**BEFORE THE**
**STATE OF CALIFORNIA**
**OCCUPATIONAL SAFETY AND HEALTH**
**APPEALS BOARD**

| | |
|---|---|
| In the Matter of the Appeal of:<br><br>**WEBCOR BUILDERS, INC.**<br>1751 Harbor Bay Parkway, Suite 200<br>Alameda, CA 94502<br><br>**Employer** | **Inspection No. 1416143**<br><br>**DECISION AFTER RECONSIDERATION AND REMAND TO HEARING OPERATIONS** |

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following decision after reconsideration.

## Jurisdiction:

On December 16, 2019, the Division of Occupational Safety and Health (Division) issued a single citation to Webcor Construction LP (Employer) alleging a General violation of section 3395, subdivision (i)[1] [failure to establish, implement, and maintain a heat illness prevention plan]. Employer timely appealed.

The Appeals Board scheduled the hearing for September 15, 2021, to occur via Zoom. Prior to the hearing, the Administrative Law Judge (ALJ) held a prehearing conference and issued a prehearing conference order. The order stated,

> The parties shall submit all exhibits that may be introduced at the video hearing to the Appeals Board and to any other party representative no later than September 3, 2021. Parties will upload exhibits to OASIS and provide a copy to opposing counsel via a preferred file sharing method.

The Division filed a motion to continue the initial hearing date, which the Board granted.

The Appeals Board re-scheduled the hearing to occur on February 10, 2022 via Zoom. Again, the ALJ held a prehearing conference and issued a prehearing conference order. That order was largely identical to the aforementioned order, except that it required the submission and exchange of all exhibits "no later than February 2, 2022." The Division failed to comply with this order in a timely manner.

On February 10, 2022, the parties appeared for the hearing remotely via Zoom. The Division was represented by Victor Copelan, District Manager. Employer was represented by

[1] Unless otherwise specified all references are to title 8 of the California Code of Regulations.

Perry Poff, attorney at Donnell, Melgoza & Scates LLP. The hearing was held before ALJ Jacqueline Jones.

At the hearing, Employer moved to prohibit the introduction of any Division exhibits, under the authority of section 381. Employer argued the Division failed to comply with either of the ALJ's aforementioned prehearing conference orders to the extent they set forth timeframes concerning uploading and exchange of proposed exhibits. After argument on the motion, the ALJ granted the Employer's motion and excluded the Division's exhibits. The ALJ issued an Order, which stated, "Good cause having been found, Employer's motion to grant the appeal of Citation 1, Item 1, is granted and Citation 1, Item 1, is vacated." (Order, p. 2.)

The Division filed a timely petition for reconsideration challenging the ALJ's order granting the appeal. The Board took the petition for reconsideration under submission. Employer filed an Answer.

In making this decision, the Board engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

**Issue:**

1) Was exclusion of the Division's exhibits and grant of Employer's appeal an appropriate remedy for the Division's failure to timely upload and exchange all exhibits that may be introduced at the video hearing, pursuant to the timeframes set forth in the ALJ's prehearing conference order?

**Discussion:**

**1) Was exclusion of the Division's exhibits and grant of Employer's appeal an appropriate remedy for the Division's failure to timely upload and exchange all exhibits that may be introduced at the video hearing, pursuant to the timeframes set forth in the ALJ's prehearing conference order?**

The Division has filed a petition for reconsideration seeking to overturn the ALJ's Decision, which had granted Employer's appeal and excluded the Division's exhibits. Although the petition for reconsideration acknowledges the Division failed to timely upload its documents as required by the prehearing conference order, the Division's petition surprisingly does not take a particularly contrite approach to this failure. Rather, the Division simply seeks to cast the ALJ's orders (both the prehearing conference order and the order dismissing appeal) as unlawful, asserting various arguments to that effect. The petition's arguments, save one, are not well-taken.

***Division Arguments Concerning Contempt***:

The Division first argues that section 381 "is…only applicable to the commission of acts that would constitute direct contempt." (Petition for Reconsideration, p. 2.) In other words, the Division essentially contends the ALJ cannot take any action under section 381 unless the alleged contemptuous conduct occurs in the presence of the ALJ. (*Id.* at p. 3.) The Division seeks to evade

culpability for its conduct by arguing any such conduct occurred outside the ALJ's presence. (*Id.* at pp. 3.) The Division's argument finds no support in the plain text of the regulation.

Section 381 is not solely a contempt provision. Section 381 offers the Board six different alternatives to address a parties' failure to obey a lawful order, and only one of those concerns initiation of contempt proceedings. Section 381, states,

> (a) If any person in proceedings before the Appeals Board disobeys or resists any lawful order or refuses, without substantial justification, to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceedings, the Administrative Law Judge or the Appeals Board may, on its own motion or the motion of a party:
> (1) Certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code Section 11455.20;
> (2) Exclude the person from the hearing room;
> (3) Prohibit the person from testifying or introducing designated matters in evidence;
> (4) Establish designated facts, claims, or defenses if the person is a party;
> (5) Grant the appeal without further proceedings if the person is a representative of the Division; or
> (6) Dismiss the appeal without further proceedings if the person is the Employer or a representative of the Employer.

The aforementioned six options are written in the disjunctive. Following well-established rules of construction, the use of the word "or" indicates an intention to designate separate disjunctive categories. (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.)

Although the Division argues that laws pertaining to contempt proceedings preclude the actions taken by ALJ, the Division's contempt related arguments are inapposite. Contempt proceedings have neither been sought by Employer, nor initiated by the Board. It appears the ALJ's order proceeded under section 381, subdivisions (a)(3) and (a)(5), not subdivision (a)(1). There is nothing in the plain text of section 381, subdivisions (a)(3) or (a)(5) suggesting that those options—exclusion of evidence or granting the appeal—may only be utilized by the ALJ when the alleged conduct occurs in the direct view of the ALJ.

***The Division's Arguments Concerning the Exclusive Record Principle***:

The Division next argues that requiring prehearing upload or lodging of proposed exhibits violates the exclusive record principle. The cited principle merely states that administrative tribunals exercising quasi-judicial authority cannot act on their own information outside of any

hearing record. (See *Pinheiro v. Civil Service Com. for County of Fresno* (2016) 245 Cal.App.4th 1458, 1467-1469; See also Gov. Code, § 11425.50, subd. (c).) In other words, nothing may be treated as evidence which has not been introduced as such. (*Ibid*.) The Division suggests that proposed exhibits produced prior to the hearing may be reviewed or relied upon by the ALJ even if they are not ultimately admitted into the record. (Petition for Reconsideration, pp. 6-7.) We are not persuaded by this argument as it is grossly speculative. There is nothing to suggest that the Board's ALJs are acting or relying on any proposed exhibits unless properly introduced and addressed at hearing, and we decline to entertain unfounded speculation. There is no evidence that any documents are relied upon or considered by the ALJs unless they are introduced at hearing, the parties have an opportunity to refute, test, and explain them, and they are moved and admitted into the record.

The Division's argument also seems disingenuous, since the Division still uploaded documents two days before the hearing and, as discussed below, the Division's delay was explicitly *not* due to a concern with the ALJ's prehearing review of exhibits. In short, this *post hoc* rationalization for the Division's failure is not persuasive.

Further, the Board's ALJs are required to summarize the evidence received and relied upon. (§ 385; See also Lab. Code., § 6608.) The Division suggestion that the Board's ALJs are abandoning this duty, without a shred of evidence, is not particularly well-taken. It is neither unusual, nor a violation of the exclusive record principle, for a judicial body to require submission of proposed exhibits prior to trial. The Board's ALJs have done nothing that does not commonly occur for trials in state, federal courts, and, most importantly, other administrative matters. For example, although this statute does not explicitly apply to the Board,[2] Government Code section 11511, subdivision (b)(9), located within Chapter 5 of the Administrative Procedure Act, states that at prehearing conferences parties should be prepared to deal with production and exchange of exhibits and documents to be offered at hearing.

***The Division's Underground Regulation Arguments***:

The Division next argues that it should not be punished for the failure to abide by the ALJ's prehearing conference order, which required prehearing upload of potential exhibits, because the order contravened an existing regulation, and was consequently a void underground regulation. (Petition for Reconsideration, p. 4.) The Division argues that section 355.4, subdivision (f) contains an exclusive list of documents that may be filed directly into OASIS, which does not include hearing exhibits. (*Ibid*.) Of all the arguments advanced within the petition for reconsideration, this argument merits the most attention. However, the Division's underground rulemaking argument fails for two reasons.

First, we do not believe the documents were "filed." Although the prehearing conference order is somewhat vague on this point in that it requires the upload of these documents, we interpret the order, particularly given the context, as requiring *lodging* of the documents, not filing. (See, e.g., *Mao's Kitchen, Inc. v. Mundy* (2012) 209 Cal.App.4th 132, 150 [discussing difference between filing and lodging].) Although both lodged exhibits and filed documents may be uploaded

[2] See Labor Code section 6603.

to OASIS, there is a critical distinction between filing and lodging. Most filed documents become part of the administrative record or hearing record. (§ 347, subds. (b), (s).) To the contrary, the potential exhibits lodged with the Appeals Board might never be admitted into evidence, might never become part of the administrative or hearing record, and may never be relied upon or considered by the ALJ. Again, a hearing exhibit will not be relied upon unless it is introduced, the parties have an opportunity to refute, test, and explain it, and the document is moved and admitted into the record. Here, many of these proposed exhibits lodged prior to hearing may never be introduced, much less admitted into the record. Also, unlike filings, these lodged exhibits are not accessible to anyone other than parties to the appeal.

There is nothing in section 355.4 that prevents, prohibits, or even mentions lodging of documents. On the other hand, there are other regulations that broadly permit the ALJs to require lodging of documents. The ALJs have authority to require lodging of documents under, without limitation, section 350.1, which provides ALJs considerable authority to regulate the course of proceedings. The ALJ, without limitation, is entitled to "issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter, or take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, status conference, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act." (§ 350.1; see also § 374, subd. (b).) ALJs have broad authority to issue orders regulating the proceedings before them, permitting the actions taken here.

Second, the Board, and the ALJ, did not engage in underground rulemaking by requiring prehearing lodging of exhibits. The ALJ's prehearing conference order cannot be defined as a regulation, much less an underground regulation. The Administrative Procedure Act (APA) defines a "regulation" broadly to include "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) As discussed in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, a regulation has two principal characteristics:

> First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. ( *Roth v. Department of Veterans Affairs* (1980) 110 Cal. App. 3d 622, 630 [167 Cal. Rptr. 552].) Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (Gov. Code, § 11342, subd. (g).)
>
> (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)

Here, the first characteristic is not met. The prehearing conference order issued by ALJ Jones solely governed the immediate case, not a group of cases. It did not constitute a rule of

general application. In sum, when the ALJ ordered pre-hearing upload of exhibits, this constituted an exercise of case-specific discretion under section 350.1. (See also § 374, subd. (b).) Interpretations that arise in the course of case-specific adjudication are not regulations. (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal.4th at 571.) Within the immediate matter, the ALJ's order was fundamentally adjudicatory and case-specific in nature.

Of course, we do recognize that other ALJs have issued similar orders requiring upload of exhibits prior to hearing, but that does not necessarily mean a general rule exists. Rather, in this specific context, the existence of such similarities simply means that a good idea in one case is often a good idea in another. There are really only two dominant options to deal with exhibits. The ALJ can order the proposed exhibits lodged prior to the hearing or have the parties bring the exhibits to the hearing. It stands to reason that multiple ALJs (like many federal and state court judges) will reach the conclusion to require prehearing lodging of proposed exhibits, particularly in hearings scheduled by videoconference. Videoconference hearings might be unnecessarily delayed if parties attempt to contemporaneously upload exhibits during the proceeding, rather than prior to its commencement. Further, the ALJs might decide to require submission via OASIS, as it is a convenient tool for both parties and the ALJ. That reasonable minds reach similar conclusions, does not necessarily mean that reasoned, case-specific discretion has not occurred.

Ultimately, we find no underground regulation.[3] However, as we previously stated, of all the Division's argument, this argument merited the most the attention. Therefore, the parties, and the ALJs themselves, are reminded that prehearing conference orders are, and should be, tailored to the needs of the specific case. Although many cases will benefit from prehearing upload of exhibits, it is also axiomatic that not every case will have need for prehearing upload of proposed exhibits in OASIS, provided appropriate arrangements are made. The Board has no general rule in this regard, nor any required template. The ALJs must exercise case specific discretion. Further, even where it is determined that parties should provide their exhibits prior to hearing, the time and method for lodging may necessarily vary depending on the specific needs of the case.

***Further Considerations***:

Despite the failure of many of the Division's arguments, after review of the record, we are compelled to conclude that the Division's conduct in this particular instance, was not sufficient to result in the exclusion of the Division's exhibits and grant of Employer's appeal.

We have reviewed the hearing record. Victor Copelan, the District Manager responsible for trying this case, noted the Division had only intended to rely on two exhibits. The first exhibit was a heat illness prevention plan, allegedly provided by Employer during the investigation. Mr. Copelan said he had not timely uploaded the document because Employer had already uploaded the same exhibit. He said he was not sure if he needed to upload the same document.[4] The second

[3] Even assuming arguendo that the order after prehearing conference order could constitute an underground regulation, it would be a harmless error in this case. We find no prejudice to the Division since the Board reverses the order granting appeal for reasons stated below.

[4] We are mindful that the ALJ's prehearing conference says that representatives will meet and confer, where possible, to establish which party will upload duplicate exhibit. There is no indication that this was done by either side, nor did the ALJ inquire about this portion of the Order.

exhibit contained the jurisdictional documents. Mr. Copelan had no particular excuse for the failure to timely upload the jurisdictional documents, nor did he indicate he had requested an extension of the time periods set forth in the ALJ's order. He simply did not comply in a timely manner. As to those documents, he said it has been his practice to upload those at the hearing. He sincerely apologized and indicated there was no intent to disrespect the ALJ or the process.

After reviewing Mr. Copelan's response, which explained but did not justify the Division's failures here, we conclude that the sanction of excluding the Division's exhibits and granting of the Employer's appeal was too severe. Ultimately, we believe that termination of the action should only occur in extreme situations. (See, e.g., *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799.) The Division's untimely uploading of proposed exhibits does not rise to that level; the ALJ's admonishment would have been sufficient.

In reaching the conclusion that the ALJs order was too severe, we are also mindful that no prejudice had been demonstrated based on the Division's non-compliance with the ALJ's order. Although section 381 does not explicitly discuss or require prejudice, it is nonetheless a factor that may be discretionarily considered when deciding an appropriate remedy. No prejudice exists here. The two Division exhibits were fully available to Employer; Employer had already uploaded one of the proposed exhibits itself. Further, had any prejudice occurred, it could have been remedied via a continuance. The public policy favoring disposition on the merits outweighs competing policies favoring judicial efficiency. (See, e.g., *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.) As a further point on the issue of prejudice, where the ALJ orders prehearing upload of exhibits, the ALJ should be cautious and mindful that hearings are dynamic proceedings. Parties cannot necessarily anticipate each exhibit that will be necessary in advance of the hearing, and should not be unreasonably denied the opportunity to supplement proposed exhibits during the hearing, particularly where no prejudice would occur, or prejudice may be cured by a continuance.

We would have reversed the order for a separate reason. Prior to granting an appeal under section 381, as a matter of due process, the parties should have adequate time to respond to and address the issue. Adequate notice prior to imposition of sanctions is mandated by the due process clauses of both the state and federal Constitutions. (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208 [other citations omitted].) Due to the severity of the remedy requested and ultimately imposed, the Division should have been provided additional notice and time to research and address the motion, even if it meant a continuance of the hearing, rather than merely addressing the issue during oral argument.

For the reasons stated herein, the order of the Administrative Law Judge is reversed and this matter is remanded to hearing operations for further proceedings.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member

FILED ON: 05/23/2022