

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

In the Matter of the Appeal of:

**TAD VAN NGUYEN
456 Urbano Drive
San Francisco, CA 94127**

Employer

**Inspection No.
1628750**

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to the authority vested in it by the California Labor Code, hereby denies the petition for reconsideration (Petition) filed in the above-entitled matter by the California Division of Occupational Safety and Health (Division).

JURISDICTION

The Division inspected a place of employment in California maintained by Tad Van Nguyen (Employer) from October 18, 2022, to March 22, 2023. On March 27, 2023, Employer was issued a total of 11 citations and items assessing total penalties of \$14,085.00 for alleged violations of the safety orders contained in title 8¹ of the California Code of Regulations.² On January 28, 2025, Employer and the Division attended a video hearing before Administrative Law Judge (ALJ) Leticia Tanner. However, although the hearing occurred, ALJ Tanner was unable to write a Decision before she left the Board.

On April 28, 2025, Presiding Judge (PJ) Kerry Lewis conducted a conference call in which she offered the parties the option of either stipulating to have a different ALJ write up a decision based upon the existing record or transferring the matter to another ALJ to conduct a hearing de novo and write up a Decision based on the second hearing. The Division indicated a willingness

¹ Unless otherwise specified, references are to title 8 of the California Code of Regulations (CCR).

² Citation 1, Item 1, alleged a Regulatory violation of section 1509(a) [Injury and Illness Prevention Program]. Citation 1, Item 2, alleged a Regulatory violation of Section 1509(b) [Injury and Illness Prevention Program]. Citation 1, Item 3, alleged a Regulatory violation of section 1512(b) [Appropriately Trained Person]. Citation 1, Item 4 alleged a General violation of Section 1640(b)(2) [Light-Duty Exterior Scaffolds]. Citation 1, Item 5, alleged a General violation of section 1675(b) [Portable Ladders]. Citation 1, Item 6, alleged a Regulatory violation of Section 3205(c) [Covid-19 Prevention]. Citation 1, Item 7, alleged a Regulatory violation of section 3395(i) [Heat Illness Prevention]. Citation 2, Item 1, alleged a Serious violation of Section 1640(b)(1) [Light-Duty Exterior Scaffolds, Uprights]. Citation 3, Item 1, alleged a Serious violation of Section 1640(b)(3) [Light-Duty Exterior Scaffold, Ties and Braces]. Citation 4, Item 1, alleged a Serious violation of Section 1640(b)(4) [Light-Duty Exterior Scaffolds]. Citation 5, Item 1, alleged a Serious violation of Section 1640(b)(5)(A) [Light-Duty Exterior Scaffolds, Platforms].

to stipulate to a decision on the existing record. Employer elected a de novo hearing. A new hearing was set for June 26, 2025, and assigned to ALJ Jennie Culjat.

At the start of the 9 a.m. Zoom hearing, Employer failed to join. ALJ Culjat emailed Employer to ask whether he planned to attend. Employer logged in at 9:30 a.m. and informed the Division and ALJ Culjat that he was not feeling well. ALJ Culjat had PJ Lewis join the video hearing. Employer's internet connection was extremely poor. Employer's audio and video froze, skipped, and broke up. When ALJ Culjat attempted to provide Employer with a phone number to call in for audio, Employer's connection was so poor it took several minutes just to convey that piece of information. It was clear that the hearing could not proceed with Employer's internet connectivity issues. Reiterating that he was not feeling well, Employer asked whether, instead of proceeding with a hearing, a decision could be made on the existing record. The Division indicated it was no longer willing to so stipulate.

ALJ Culjat and PJ Lewis announced that in light of Employer's internet connectivity problems and his not feeling well, the hearing would be continued and re-set for another date. The Division objected to the continuance for lack of good cause and was overruled at the hearing by both judges, who indicated there was good cause for the continuance based on Employer's internet connection difficulties and illness. On June 27, 2025, ALJ Culjat issued a continuance. On July 9, 2025, the Board served a Notice of Hearing re-setting the matter for an in-person hearing at the Sacramento OSHAB office on October 16, 2025. The Division filed its Petition on July 10, 2025. Employer did not file a Response to the Division's Petition.

ISSUES

- 1) Considering the Board's duty to afford appellants a fair hearing, was the Order in excess of the Board's powers?
- 2) Is a dispositive motion appropriate in these circumstances?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- a. That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- b. That the order or decision was procured by fraud.
- c. That the evidence does not justify the findings of fact.
- d. That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- e. That the findings of fact do not support the order or decision.

In its Petition requesting reconsideration of an interlocutory order, the Division asserts that the continuance was a decision made in excess of the Board’s powers, that the evidence did not support the ALJ’s finding of good cause to continue the hearing, and that the findings of fact do not support the decision. (Labor Code § 6617 (a), (c), and (e)).

Interlocutory petitions are customarily denied, because “[t]he grant of interlocutory review is extraordinary in nature and it is only exercised sparingly, and any request for such review must be supported by adequate citation to legal authority and to the record.” (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1080515, Denial of Petition for Reconsideration (March 30, 2017).) The Petition fails to persuade us that that this matter is appropriate for interlocutory review. Nonetheless, we will address the arguments the Division has raised.

1. Considering the Board’s Duty to Afford Appellants a Fair Hearing, was the Order in Excess of the Board’s Powers?

ALJ Culjat issued a continuance based upon Section 371.1, which sets forth the Board’s rules regarding motions for continuance. ALJ Culjat’s continuance referenced Section 371.1, subdivision (e), paragraphs (1), (3), (5), and (11).

The Division asserts that granting the continuance was not authorized by Section 371.1 and was in excess of the Board’s powers. However, even if ALJ Culjat erred by relying solely on Section 371.1, we see no reason to overturn the order. The order was otherwise amply supported by other Board regulations and statutes.

We begin by observing that the fundamental purpose of the Appeals Board, when an employer appeals citations issued by the Division, is to afford the employer the opportunity for a hearing. (Lab. Code, § 6602.) Moreover, there is a strong public policy favoring disposition of matters on their merits. (*Webcor Builders, Inc.*, Cal/OSHA App. 1416143, Decision After Reconsideration (May 23, 2022).) The Board generally exercises its discretion in a manner that fulfills both its purpose and public policy.

Here, Employer has not yet been afforded a viable hearing on the merits. ALJ Tanner’s departure from the Board before writing her decision resulted in the nullification of the initial hearing that Employer was provided, prepared for, and attended; that hearing was eliminated as if it never happened. This is a significant deviation from the usual Board process provided to appellants. The Board’s appeal hearings are typically assigned to one ALJ who hears the case, sees the witnesses, attorneys, and exhibits provided live on camera, and writes the decision. A completed hearing cannot be assigned to another ALJ for decision unless the originally assigned ALJ is no longer available, and the parties stipulate that the newly assigned ALJ “may proceed as if he had presided from the beginning.” (§ 384(a).)

Further, it is clear that the videoconference hearing on June 26, 2025, could not go forward. Section 376, subdivision (d), makes clear that a hearing by videoconference may only go forward “if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place, to observe the exhibits, and to observe the hearing participants

to the extent feasible.” The Employer’s internet connectivity issues prevented compliance with this standard. The Division’s Petition at pages 3-4 describes Employer’s connectivity issues at the second hearing as:

“ . . . an extremely poor internet connection, causing his video and audio feed to break up, freeze, and skip. He reported expiring (sic) the same video and audio issues, which caused him to be unable to hear and understand the Board or counsel . . . The connection issues were so bad that even the act of providing Mr. Nguyen a single piece of information (for example, a phone number to call in for audio) became an ordeal that took upwards of 10 minutes. It was clear to all parties that a hearing could not proceed under such conditions. At no point did Mr. Van Nguyen request an accommodation to proceed with the hearing via telephone, without video.”

Petition at pages 3-4.

Notwithstanding the admitted connectivity issues and the dictates of section 376, subdivision (d), the Division appears to indicate that the hearing should have still gone forward, even if only by telephone. Not so. It would have been a greater error to allow the hearing to go forward where the Employer was so disadvantaged, and where the hearing would not comply with the requirements of the Board’s videoconference regulation. Therefore, the ALJ did not err either by continuing the hearing or setting the hearing to occur in person. Because the connection problems that occurred carry grave risks regarding the denial of due process, both PJ Lewis and ALJ Culjat were correct in finding good cause to continue the second hearing.

Further, the Board may find a well-described illness to be good cause for failure to appear. (*Production Roofing and Sheet Metal*, Cal/OSHA App. 07-9544, Denial of Petition for Reconsideration (April 23, 2008), *Service Scaffold Co. Inc. dba Safety Service Scaffold*, Cal/OSHA App. 2010-1445, Denial of Petition for Reconsideration (Dec. 13, 2011).) After all, forcing an ill party to proceed can be characterized as a denial of due process, and provide ground for an Employer losing at a hearing to petition for reconsideration or later file a writ action questioning the Board’s decision after reconsideration. But unlike in the above-cited cases, where the Board was reviewing verified petitions alleging an illness, here PJ Lewis and ALJ Culjat were on a Zoom call with Employer and able to observe him.

Multiple factors favored the ALJ granting the continuance here. Taken together, the Board’s statutory obligation to afford Employer a hearing, the Board’s regulation granting the ALJs extensive authority to handle appeals and conduct hearings, and the public policy in favor of the disposition of matters on the merits, compel a conclusion that the continuance issued by ALJ Culjat was not in excess of the Board’s powers. It is not improper to find more than one reason to issue an order or decision. We also observe that ALJ Culjat’s discretion to continue this matter is not cabined by Section 371.1. For example, Section 350.1 provides ALJs with: “the full power, jurisdiction and authority to [. . .] regulate the course of a hearing, [. . .] to order a continuance,

[. . . and] to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decision as may be necessary for the full adjudication of the matter[.]” (§ 350.1).

Ultimately, the Board must be guided by “a strong public policy favoring disposition of matters on their merits.” (*Orange County Fire Authority* Cal/OSHA App. 1523238, Decision After Reconsideration (Dec. 16, 2024), quoting *Webcor Builders, Inc.*, Cal/OSHA App. 1416143, Decision After Reconsideration (May 23, 2022).) Denying Employer’s request for a continuance here, where the parties were unwilling to stipulate to allow a decision on the written record, and where internet connectivity issues prevented a compliant videoconference hearing, would violate the Board’s obligation to afford Employer a hearing of his appeal of the citation[s] issued to him, disposing of Employer’s appeal on procedural grounds, not on the merits.

2. Is a Dispositive Motion Appropriate in These Circumstances?

We also observe that the Division’s Petition may be denied on another ground; it is essentially a motion to dismiss, as it would eliminate Employer’s right to appeal the citations, despite Employer having timely filed and diligently pursued his appeal through the first hearing. However, the statutes that establish and delineate the Board’s powers do not allow for such dispositive motions.

In *Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008) the Board identified and emphasized that the statutes and regulations concerning Appeals Board proceedings direct the Appeals Board as follows: [T]o try the issues in any proceeding before it, whether of fact or law, and make and file a finding, order, or decision based thereon (Labor Code §6604(a); [t]o hold hearings and ascertain facts necessary to enable the appeals board to determine any proceeding or to make any order or decision that the appeals board is authorized to make, or necessary for the information of the appeals board (Labor Code §6604(b)). Labor Code § 6608 states that “[t]he appeals board or a hearing officer shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the appeal and file an order or decision.” (Emphasis in original.) Further, in *Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203, the Appeals Board found that granting the motion for summary disposition in that case was inappropriate because it was based upon an alleged insufficiency of evidence and would deprive the parties of the right to present all evidence and examine all witnesses, thereby contravening California Code of Regulations, title 8, section 376.1, subdivision (b).

More recently, the Appeals Board succinctly stated in *Progress Rail Services Corp.*, Cal/OSHA App. 14-1372, Denial of Petition for Reconsideration (Jan. 11, 2016): “We also note that the Board has no provision for summary judgment procedures in its rules of practice and procedure, and we decline to create a new procedure in this instance.” The same rationale supports denial of the Petition in this case.

DECISION

For the reasons stated above, Employer’s Petition is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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



FILED ON: 09/05/2025