

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

In the Matter of the Appeal of:

GARDNER TRUCKING, INC.
P.O. Box 747
Chino, CA 91708

Employer

Docket. 2012-R3D2-0782

**DENIAL OF PETITION
FOR RECONSIDERATION**

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

JURISDICTION

Commencing on January 19, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 13, 2012 the Division issued a citation to Employer alleging five violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed hearing on August 7, 2013. Although the Division appeared as required, Employer failed to do so.

On August 26, 2013, the ALJ issued Notice of Intent to Dismiss Appeal, which gave Employer the opportunity to provide a statement containing sufficient facts to show its failure to appear was reasonable and for good cause. Employer responded on September 10, 2013.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

On September 23, 2013 the ALJ issued an Order Reinstating Appeal (Order), which found that Employer had stated good cause for its failure to appear.

The Division timely filed a petition for reconsideration.

Employer did not answer the petition.

ISSUE

May the Division seek reconsideration of an interlocutory order?

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.

The Division's petition is founded on the claim that the ALJ acted in excess of her power in reinstating Employer's appeal.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Order is interlocutory in nature. An interlocutory order is one issued by a tribunal before a final determination of the rights of the parties to the action has occurred. "In determining whether a judgment is final or merely interlocutory, the rule is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only[.]" (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.)

Similarly, Board precedent holds that reconsideration will not be granted concerning interlocutory rulings, reasoning that they are not “final” orders within the meaning of Labor Code section 6614. (*Inglewood Parks & Recreation*, Cal/OSHA App. 08-4182, Denial of Petition for Reconsideration (Mar. 4, 2010).) Labor Code section 6614(a) states, in pertinent part, “At any time within 30 days after the service of any final order or decision made and filed by the appeals board or a hearing officer, any party aggrieved . . . by any final order []” may petition for reconsideration. Since the Order at issue does not resolve the underlying dispute but instead reinstates the appeal for further proceedings including, potentially, a hearing on the merits, it is not “final” and the Board lacks jurisdiction to grant the Division’s petition for reconsideration.

We recognize there are exceptions to the general rule which do allow appeals of interlocutory orders, such as those involving questions of law, orders which are effectively final regarding issues independent of a case’s merits, or matters which are final as to a particular person. The situation here, however, does not fall within those exceptions. The Order is in essence a ruling on the evidence provided by Employer and disputed by the Division. As such it is a matter within the discretion of the ALJ, which we do not believe was abused. Further, Code of Civil Procedure section 904.1 provides that evidentiary rulings may not be appealed separately; although those rules do not apply in Board proceedings, we are guided by them when they address issues we must decide. (See *Central Chevrolet*, Cal/OSHA App. 05-2615, Decision After Reconsideration and Order of Remand (Sep. 12, 2008).)

Lastly, since the policy of the law is to decide matters on the merits where possible, we are disinclined to reverse an order which serves that goal. (*Galligan v. City of San Bruno* (1982) 132 Cal.App.3d 869, 876.)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 9, 2013