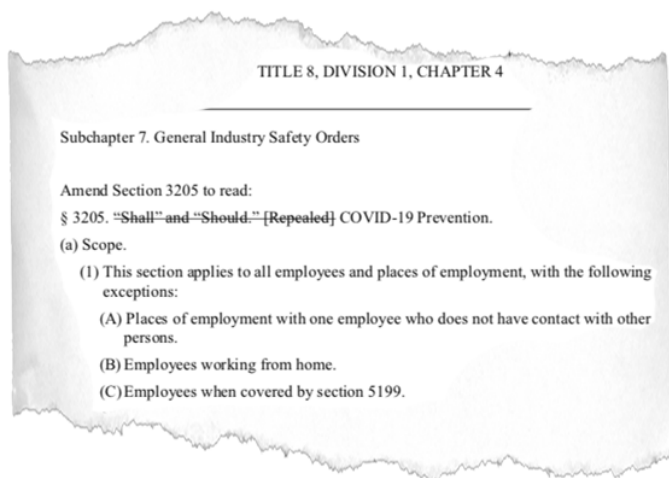




Employers Ponder Compliance With New COVID Rules

Cal/OSHA's Division of Occupational Safety and Health has published the first of what it says will be an evolving set of "frequently asked questions" about the temporary emergency standard on COVID-19. It was approved by the Office of Administrative Law earlier this week.



The Division also says it intends to hold a stakeholder committee meeting this month, with the exact date to be determined. An advisory committee will follow it, DOSH adds. Stakeholders will have plenty of questions and comments on the controversial regulation. It will expire on October 2nd. Emergency standards typically last for six months, but this one is extended an extra four months due to Governor Gavin Newsom's COVID executive orders extending various deadlines. The ETS also could be extended twice.

"Our members had fared well when visited by DOSH under the IIPP standard for COVID compliance."
— Lupe Sandoval

DOSH Chief Doug Parker calls the regulation "strong but achievable standards to protect workers" that also clarify what employers must do to prevent workplace exposures and stop outbreaks. But employer representatives have questions that the FAQ isn't likely to answer ([click here](#) to see the document).

"Our members ... will have many concerns as to how to comply with this onerous, complex and confusing regulation," says Guadalupe "Lupe" Sandoval, founder and executive di-

rector of the California Farm Labor Contractor Association. In addition to guidance, Sandoval urges DOSH to provide sample programs, such as the Injury and Illness Prevention Program and heat illness prevention models the Division has developed.

"I think it's going to be challenging for a lot of people to try to figure out how to do this."
— Bryan Little

"I think it's going to be challenging for a lot of people to try to figure out how to do this," says Bryan Little, director of **COVID Rules** *continued on page 12866*

Two COVID Updates

Guidelines

The Center for Disease Control lowered its guidelines – from 14 days to 10 – for how long an exposed person must quarantine to ensure they are not sick with the virus. The quarantine decreases to 7 days with no symptoms and a negative test.

The new emergency standard for coronavirus is in conflict with the new CDC scientific results in that it requires 14 paid days off work.

Vaccines

Moderna has applied for emergency use authorization. If granted distribution can begin during December, older Americans and first responders will be among the first to get the vaccine.

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- John Locher Harvesting, Inc.
- MWL Solutions, Inc.

It is 7,187 days since our last lost-time accident.

Cal/OSHA's Doug Parker Working on Biden Transition

Joe Biden has named Cal/OSHA Chief Doug Parker to his transition team.

Parker is advising regarding the Department of Labor. He does have prior ties to Washington, D.C., having served on the staff of former Senator Paul Wellstone (D-Minn), who was killed in a plane crash in 2002. Wellstone was one of the farthest left members of the Senate.



Doug Parker

Cal/OSHA Reporter asked the Department of Industrial Relations for details on Parker's activities on the transition, whether he is currently in Washington D.C., who is running DOSH in his absence, and if he is in the running for an appointment to the new administration. DIR spokesman Frank Polizzi would only refer the Biden transition team.

Before being appointed DOSH chief, Parker was executive director of Worksafe, was formerly a senior policy advisor and special assistant at the Mine Safety and Health Administration (MSHA), and served briefly as assistant secretary of labor for MSHA. He previously had worked as a staff attorney for the United Mine Workers of America. He also has worked for the Democratic National Committee.

Su in Running for Labor Post

Julie Su, who is currently Secretary of California's Labor and Workforce Development Agency, is one of several candidates on the list as possible U.S. Secretary of Labor, according to published news reports.

Several national publications have included Su among a list

of candidates, although one political publication opined she probably is a better candidate for the Labor Department's Wage and Hour Division, since she is seen as a problem solver instead of a political pick.

Su, who became LWDA Secretary under the Newsom administration, formerly was state Labor Commissioner.



Julie Su

Other candidates are said to include Rep. Abby Finkenauer (D-Iowa), Rep. Andy Levin (D-Mich), and Boston mayor Marty Walsh, the former president of the Laborer's Union.

Fatality Case Settlements

Cal/OSHA's Division of Occupational Safety and Health and employers have settled several cases involving fatalities and serious injuries. Here are the results of those cases.

Saxco International, dba Square Peg Packaging: This Concord-based employer will pay \$28,720 (42%) of a proposed \$68,940 in the July 2017 death of an employee in a fall from a stepladder at its San Diego facility.

Two employees were unloading a truck with pallets of wine, then labeling and stacking them in the warehouse. The pallets are more than seven feet tall, weighing 1,800 pounds, and one of them tipped over, leaning against an adjacent wall.

The employees summoned a third employee to help right the pallet. He choose to use a step ladder, not fully opened but leaned against the wall. Standing near the top step, he pushed the pallet from the wall, lost his balance, and fell headfirst to the floor. He died from a head injury.

DOSH cited his employer Saxco for four serious, 



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News items or corrections are welcome and may be submitted by phone or fax, or by mail.

seven general, and three regulatory violations after investigating. “The accident was caused by a lack of ladder safety training, using a stepladder incorrectly, over-reaching from the ladder, not using a safe means to access the high pile, not ensuring that forklift loads were secured from tipping, and not stacking material so it doesn’t create a hazard,” the Division says.



Saxco International's San Diego facility.

The most serious allegation, under General Industry Safety Orders §3276(e)(15)(A), for overreaching on the stepladder, is affirmed in the settlement, but the \$22,500 penalty was reduced to \$18,000 after applying adjustment factors. A violation under §3276(e)(16)(C) for using the stepladder as a single ladder was reclassified from serious, accident-related to serious, and had adjustment factors applied. It was reduced from \$18,000 to \$6,750. Another separate violation for failure to keep the load safe (GISO §3650(l)) was reduced from serious, accident-related to general and had adjustment factors applied, reducing the \$18,000 penalty to \$600. The fourth violation, for failure to provide safe access to high piles under GISO §3339(b), was reduced from serious to general, and the penalty reduced from \$6,750 to \$600.

The other general and regulatory violations were all affirmed in the settlement, but with reduced penalties.



PakLab in Chino.

Universal Packaging Systems, dba PakLab: This Chino employer will pay \$31,500, some 74% of a proposed \$41,875 in the January 2017 death of Adolfo Aguirre, 37. He fell through a skylight above the company’s production department while attempting to fix a leak. The firm’s production manager had tasked Aguirre and a fellow employee with investigating the leak and directed them to cover the skylight with a tarp if needed. While attempting to remove a nut on the skylight, Aguirre fell through the opening, about 35 feet to the production floor.

“The employer did not provide training to its employees regarding skylight safety when working around skylight openings,” DOSH says in citing PakLab for two serious violations. Both are affirmed in the settlement, but a serious, accident-related violation of GISO §3212(e)(1) for not protecting the opening was reduced from \$25,000 to \$18,000 after DOSH adjusted the extent and likelihood factors of the violation. The other serious violation was under the Injury and Illness Prevention Program standard was affirmed, but the penalty reduced from \$16,875 to \$13,500 for the same reasons.

ABC Supply Co.: DOSH proposed \$38,750 in the July 2018 death of 24-year-old Ricardo Ramos, who fell about 20 feet from the second floor of a Carlsbad construction site while attempting to get to the third floor. He was using a collapsible ladder. The Beloit, Wisconsin-based employer will pay \$8,250 (21%) after providing additional information.



ABC Supply, was cited after a fatal accident at this residential construction project.

DOSH cited the company for two serious violations: lack of effective site assessment and lack of effective training on proper ladder selection. The site assessment violation, under Construction Safety Orders §1509(a), was reduced by 90%, from \$20,250 to \$2,250. The training violation was reduced from \$13,500 to \$2,250. A violation of the fatality and serious injury reporting standard was upheld because the employer reported the fatality beyond the eight-hour deadline. But the penalty was reduced from \$5,000 to \$3,750.



Guadalajara Grill: DOSH withdrew three citations and \$25,8765 in penalties after this Salinas employer proved it was blameless in the January 2018 death of a 40-year-old employee. The employer had paid the occasional employee to clean the restaurant's vents, light fixtures, and ceiling fans. He was working from his personal ladder, chose to stand on the top step to remove a cover from the air conditioning system, when the ladder gave way, and he fell onto a wooden bench, then the concrete below, sustaining fatal blunt force trauma.



DOSH had cited the grill for three violations, two serious and one general, of the portable ladder standard.

COVID Rules

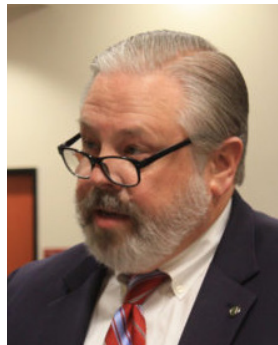
continued from page 12863

labor affairs for the California Farm Bureau Federation. "I really don't feel like I can give them very good guidance as to what to do, because the regulation is so vague. It's vague and specific at the same time, which is a pretty neat trick."

A Question of Feasibility

The standard requires employers to establish, implement, and maintain a written COVID Prevention Program that includes:

- Identification, evaluation, and correction of COVID health hazards
- Providing face coverings for employees and ensuring they wear them to prevent exposure;
- Training employees on COVID hazards, infection prevention techniques and various benefits that might be available to them;
- Testing employees with potential COVID exposure in the workplace and notifying the employer's local health department if there are three or more COVID cases, as well as return-to-work provisions for infected employees;
- Increased requirements when there are multiple infec-



Bryan Little,
Farm Bureau

tions and outbreaks in the workplace; and

- prevention procedures for employer-provided housing and transportation.

"The bigger concerns relate to feasibility," says Rob Moutrie, policy advocate for the California Chamber of Commerce. "The scale of testing required by the regulation is staggering. Larger workplaces will be in perpetual 'outbreak' status simply because it is impossible to prevent occasional cases of social spread. Employers will be forced to acquire weekly testing for large swaths of their workforces."

Little says the testing requirement is a prime example of the vagueness of the standard. "It's not at all clear. If I have to get people tested, can I rely on the local health department? Does 'provide' mean I must procure and then provide to [employees]? Does it mean that I can simply give you some time off with pay and let you go to the local health department and get your test done that way?" He adds that the standard implies that Cal/OSHA sees employers as being directly responsible for testing. And tests can cost hundreds of dollars each. "I wonder if you're going to get to the point where you have to revert to 'capital conservation' mode when you just can't afford to keep bleeding," he comments.

The FAQ document so far doesn't address the question of what satisfies the testing requirement. Little adds that the employee-positive removal and wage and benefits provisions are also going to be problematic "just largely as a cost issue." The standard requires that employers exclude employees with COVID-19 exposure for 14 days after the last known exposure, with pay, seniority, and all other rights and benefits.

Adds Holly Harper, vice president of strategic communications for Associated General Contractors of California, "We do feel the pay provisions were an overreach. AB 685 was [approved] by the state legislature and with it going into place and already established pay protocols, OSHA should not be going into how compensation is going to be handled on the back end. Its job is to keep workers safe and the workplace safe."

"The differences between the regulation and AB 685's text are leading to concerns for businesses who were rushing to get ready for AB 685 by January 1st, only to see different



Lupe Sandoval,
*Farm Labor
Contractors*



Holly Harper, AGC

AGC photo

terms come out in this regulations – and go into effect first,” Moutrie tells *Cal-OSHA Reporter*.

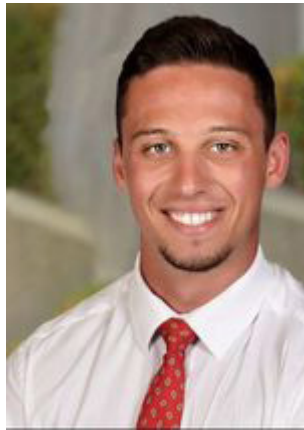
Implement and Document

Little has this suggestion for anxious employers: “If you haven’t already implemented the Cal/OSHA guidance, do it now, document everything and start taking a look at the regulation. At least read and familiarize yourselves with the exclusion and testing requirements, and start trying to do that. We’ve been suggesting to people to be generous with paid sick leave, because it might be in your interest. It doesn’t do you any good to have someone who has good reason to think they’ve been exposed in the workplace, and make everybody else who works for you sick. Review the outbreak and testing requirements and do your best under the circumstances.”

DOSH Chief Parker has said that Cal/OSHA inspectors “will take their good faith efforts to implement the emergency standards into consideration.” He adds, though, that DOSH’s will be paying close attention to eliminating hazards and implementing testing requirements.

“I hope he meant it,” Little remarks. “We’ll see what happens when they start citing people.”

AGC’s Harper notes that the association and the construction industry were proactive as the pandemic emerged and established protocols that have served worksites well. “We set out everything from job site checklists,” to encouraging employees to report symptoms and conducting contact tracing. Brian Mello, AGC’s new safety director, notes,



Brian Mello, AGC

AGC photo

“The documents and resources we have provided, consistent with the new emergency regulation, and once implemented,” will provide a foundation for compliance. “We’re pushing for employers to follow best practices,” he says. “The master plan that we came up with is consistent with the language around the new regulation.”


CFLC’s Sandoval calls the ETS a “gotcha kind of regulation,” something employers will find challenging to summarize in a simple written program. “We are hoping DOSH [provides] easy-to-use sample programs, such as the sample IIPP and Heat Illness Prevention programs they make available to employers. Our members had fared well when visited by DOSH under the IIPP standard for COVID prevention. This new regulation makes it much, much more difficult to be in compliance.”

“OSHA should not be going into how compensation is going to be handled on the back end. Its job is to keep workers safe.”
– Holly Harper


And Moutrie says, “At this point, businesses are still discovering new issues in the text as it is digested. As we are preparing for compliance, we are simultaneously trying to take note of those [issues] to share them and push for fixes.”

Job Postings

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LION FARMS, LLC, MCV075788 (1070258)	
ATKINSON CONSTRUCTION, LP, 34-2017-80002611, C091705 (317386084)	
UNITED PARCEL SERVICE, B308218, 18STCP03195 (1158285)	
UNITED PARCEL SERVICE, B308218, 18STCP03195 (1158285)	
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- Cal/OSHA inspector job openings: <http://www.cal-oshareporter.com/documents/recruiting-inspectors.pdf>

If you have questions, contact a Cal/OSHA recruiter at CalOSHAJobs@dir.ca.gov

Workplace Fatality Update

Cal/OSHA Division of Occupational Safety and Health reports 25 new workplace fatalities, including 16 new COVID deaths.

In Redondo Beach, a property manager for South Bay Mortgage was killed after falling from the roof of a three-story building.

In Los Angeles, a roofer for Roof Repair Specialists fell 10 feet from a flat roof and died in a hospital about five days later.

In Redlands, an employee of Match Corp. was struck and run over by an asphalt haulage vehicle as it was backing up at a construction site.

In Spring Valley, an employee of Granite Construction was raking asphalt along the shoulder of Highway 94 when a vehicle drove into the closed-off area and struck the employee.

In Universal City, an employee of Calex Engineering was disconnecting trailer hydraulic lines when the truck operator ran him over.

In Los Angeles, the owner of Mario Antonio L Estrada Roadside Assistance was crushed when the truck he was repairing fell off a jack stand, causing fatal injuries.

In Fountain Valley, an employee of Pacific Conveyor Systems was discovered unconscious in a bathroom from an apparent heart attack, later passing away in a hospital. DOSH is investigating this incident to rule out work-relatedness.

In Menlo Park, an individual who was hired by a homeowner to clean skylights at a residence died of as-yet unknown causes

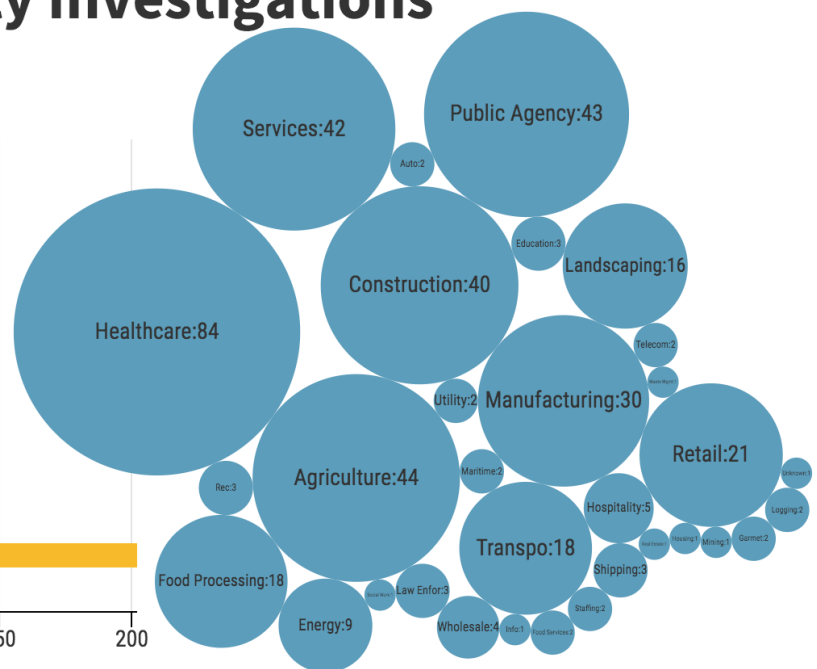
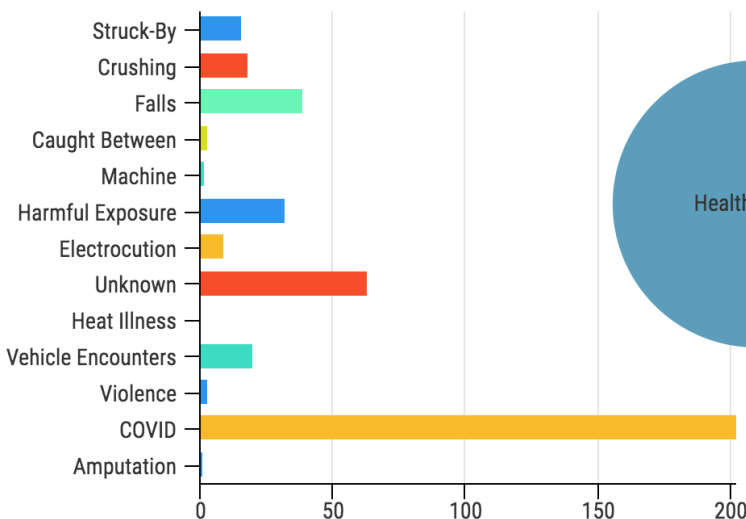
at the site.

The COVID fatalities include:

- An employee of Healthright 360 in Vallejo;
- An administrative coordinator for Alameda Health Services-Highland Hospital in Oakland;
- A nurse assistant for Eskaton Health-Greenhaven Care Center in Sacramento;
- A traffic sign maintenance employee for Sacramento County Department of Transportation;
- A janitor for Van Law Food Products in Fullerton;
- An employee of Neilmed Pharmaceuticals in Santa Rosa;
- An employee of Norberts Athletic Products in Gardena;
- An employee of Rocket Farms in Prunedale;
- An employee of Health Trust Supply Chain in San Jose;
- A seasonal almond production line employee for Andersen and Sons Shelling;
- An employee of Schaffner Dairy in El Centro;
- An employee of Bentley Mills in Ontario;
- A machinist for BDR Industries, dba RND Enterprises in Lancaster;
- An employee of Imperfect Foods in Monrovia; and
- A front-door greeter for Ralph's Grocery Co. in Los Angeles.

2020 Cal/OSHA Fatality Investigations

as of 12/02/2020



SUMMARIES OF RECENT CAL/OSH APPEALS BOARD DECISIONS

Cal-OSHA Reporter is pleased to provide, for our valued subscribers, graphs indicating cited employers' experience modification rating (X-Mods) over the designated years.

JURISDICTION – PETITION FOR RECONSIDERATION

Labor Code § 6614(a) (2020) – The Appeals Board lacked jurisdiction to grant reconsideration over Employer's untimely petition for reconsideration.

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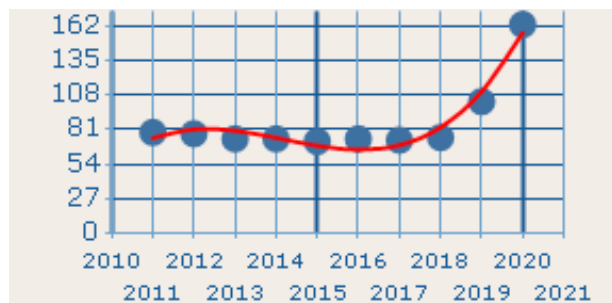
JOHN LOCHER HARVESTING INC.
47 COR 40-8345 [¶23,074R]

Digest of COSHAB's Denial of Petition for Reconsideration dated November 24, 2020, Inspection No. 1321676.

Ed Lowry, Chair.

Judith S. Freyman, Board Member.

Marvin P. Kropke, Board Member.



X-MOD GRAPH FROM COMPLINE

Background. The Division issued three citations to Employer, which notified the Board of its intent to appeal them. The following day, the Appeals Board notified Employer its appeal was incomplete, and that it could complete its appeal within 20 days of service of the notice. Employer did not respond. The Board subsequently issued an order dismissing Employer's appeal as incomplete and/or untimely, and notified Employer of the deadline to petition for reconsideration. Employer's petition was filed more than two months after that date.

Denial of petition for reconsideration. Employer's petition failed to assert any of the grounds for reconsideration provided by Labor Code §6617, which is reason to deny a petition (**Arodz Motorsports, LLC dba A1 Tune & Lube**, Cal/OSHA App. 1087194, DDAR (Nov. 22, 2017) [**Digest J** 22,786R]). However, the Board construed the petition to assert the evidence did not justify the findings of fact, and the findings of fact did not support the decision.

Labor Code §6614(a) provides that a party may petition the Board for reconsideration within 30 days after service of the decision or order at issue. Employer's petition was filed almost 15 months late. The Appeals Board lacks jurisdiction to grant reconsideration when the petition is filed late (**Amerisk Engineering Corp.**, Cal/OSHA App. 1129146, DDAR (Dec. 21, 2018) [**Digest J** 22,891R]; Labor Code §§5900, 5903). The Board, thus, denied Employer's petition.

JURISDICTION – PETITION FOR RECONSIDERATION, INTERLOCUTORY

Labor Code §§ 6614, 6616 (2020) – Employer's petition for reconsideration was interlocutory, and the Appeals Board denied it for that reason.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD – TIME AND PLACE OF HEARING, VIDEO HEARINGS

Board reg. § 376(d) (2020) – The Appeals Board has authority to hold video hearings. To the extent its rules required a physical location, the governor's executive order related to the COVID-19 pandemic suspended that requirement.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD – TIME AND PLACE OF HEARING, DUE PROCESS

Board reg. § 376.1 (2020) – The Appeals Board rejected Employer's contention that it had a constitutional right to an in-person administrative hearing. The Board concluded a video/electronic hearing provided the parties sufficient due process in the administrative context.

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MWL SOLUTIONS, INC.
47 COR 40-8345 [¶23,075R]

Digest of COSHAB's Denial of Petition for Reconsideration dated November 24, 2020, Inspection No. 1436014.

Ed Lowry, Chair.

Judith S. Freyman, Board Member.

Marvin P. Kropke, Board Member.

Background. The Division issued two citations to Employer, which timely appealed. The Appeals Board subsequently sent the parties a notice of expedited proceedings. The Board is required to expedite matters in which one or more appealed citations have been classified as serious, repeat serious, willful serious, willful, willful repeat or failure to abate and the alleged violations are not abated or the issue of abatement has been appealed (Board reg. §373(b)).

Here, one citation alleged a serious violation of §1509(a) and remained unabated; accordingly, the proceedings were expedited. The Board issued to the parties a notice of expedited conferences and hearing that a video prehearing conference would be conducted on a specific date, followed by a video hearing approximately one month later. The use of video technology to conduct proceedings was the result of the COVID-19 pandemic and the governor's executive order suspending in-person hearings during the resulting public health emergency.

Employer filed a motion to change venue, which the Division opposed. The ALJ issued an order denying motion for change of venue and overruling objection to video hearing. Employer then filed a petition for reconsideration that rendered its motion moot.

Denial of petition for reconsideration. Employer's petition contended the order was issued in excess of the ALJ's powers, the evidence did not justify the findings of fact, and the findings of fact did not support the order (Labor Code §§6617(a), (c), and (e)).

Employer's petition for reconsideration was interlocutory in nature, as a hearing on the merits of the citations had not begun and there had been no final decision on the merits of the citations (**Siboney Contracting Co.**, Cal/OSHA App. 1280908, DDAR (May 11, 2020)

NOTE: According to the Appeals Board, ALJ decisions are not citable precedent on appeal, i.e., they cannot be quoted when one is appealing a citation. There is nothing in the California Code of Regulations about this: it is by Board precedent. "(U)nreviewed administrative law judge decisions are not binding on the Appeals Board." (*Pacific Ready Mix*, Decision After Reconsideration of 4-23-82, and *Western Plastering, Inc.*, Decision After Reconsideration, 12-28-93.) Decisions After Reconsideration (DARs) are precedential and may be quoted in an appeal.

[**Digest ¶ 23,048R**]). Reconsideration is not granted concerning interlocutory rulings because they are not final orders within the meaning of Labor Code §6614 (**Gardner Trucking, Inc.**, Cal/OSHA App. 12-0782, DAR (Dec. 9, 2013) [**Digest ¶ 22,294R**]). The grant of interlocutory review is “extraordinary” and only exercised sparingly (**Shimmick Construction Company, Inc.**, Cal/OSHA App. 1080515, DDAR (March 30, 2017) [**Digest ¶ 22,687R**]).

Employer argued its due process rights would be violated if the hearing were to be conducted virtually rather than in-person. This argument was speculative, and could not be answered until the hearing was concluded, the Board found, noting the only way to know whether the hearing was adequate to satisfy due process was to hold the hearing.

The Appeals Board has recognized exceptions to the rule against reconsideration of interlocutory orders. They include: questions of law; orders that are effectively final regarding issues independent of a case’s merits; and matters that are final as to a particular person (**Siboney Contracting**, supra). In deciding whether to grant an interlocutory order, the Board may consider general principles followed by courts that allow interlocutory review (citation omitted).

Here, a decision to hold a video hearing would not be final independent of the merits of the appealed citations. The hearing would examine and decide the merits and the ALJ’s ruling would not be immediate and irreparable, the Appeals Board stated. The hearing was required; its outcome was unknown; and even if Employer were to lose its appeal of one or both citations, it then would be entitled to petition for reconsideration. (See Labor Code §6614.)

Employer’s due process arguments also were speculative because the video hearing process needed to be completed first. If, after the hearing, Employer believed it did not receive due process, it would have to petition for reconsideration with specific references to the alleged deficiencies. (See Labor Code §6616.)

The Appeals Board next rejected Employer’s contention that the Board lacked authority to order video hearings and establish procedures for such hearings. The Board first addressed the issue of “underground rulemaking.” With regard to the prohibition on underground rulemaking, the Government Code prohibits state agencies from relying on uncodified rules or regulations, where the agency has failed to adopt and file it per the Administrative Procedure Act (APA).

Board reg. §376(d) is intended to take convenience of the parties and witnesses into consideration when a hearing venue is set. The Appeals Board stated that a video hearing is likely the least burdensome on parties and witnesses, because they can attend from any location with internet access, thus minimizing or eliminating logistical problems associated with travel to a physical venue. To the extent Employer argued the Appeals Board adopted an “underground regulation” in establishing its video hearing procedures, the governor’s executive order suspended any regulation or statute that would require in-person hearings during the state of emergency and any statute or regulation that would allow an objection to remote hearings.

The executive order suspended any statute or regulation that would permit a party to appear in person, or to object to an electronic/video hearing. To the extent the Board’s rules would require a physical location, the executive order suspended that requirement, the Appeals Board held. The Board noted that, in issuing the executive order, it appeared the governor acted within his authority under the state’s Emergency Services Act of the Government Code.

Given that statutes and regulations requiring in-person hearings were suspended, even if Board reg. §376 were deemed to require a venue for in-person hearings, that requirement was not in effect during pendency of the executive order, the Board noted. Further, the Government Code provides explicit authority for video/electronic hearings.

The Board stated that it has explicit statutory authority, absent any objection, to conduct a hearing by telephone, television, or other electronic means. The only statutory limitation on the Board’s authority to conduct video/electronic hearings occurs if a party objects to the

hearing being conducted in such a remote manner or if a member of the public wishes to be physically present, under the Government Code. In this matter, however, the governor’s executive order curtailed the ability of a party or member of the public to object on those grounds. Consequently, based on the executive order and the APA, the Appeals Board determined that it had sufficient authority to require video/electronic hearings without it constituting underground rulemaking during the state of emergency.

Finally, the Board rejected Employer’s contention that the Appeals Board lacked authority to create video hearing regulations. The Board did not promulgate regulations; it has authority to set the venue for hearings (Board reg. §376(d)) and exercised that authority to set hearings during the COVID-19 crisis at virtual locations, allowing participation by video technology. The information the Board published about how to access video hearings were not regulations, but rather explanatory material about how the technology platform worked and how to access the hearings remotely. They were intended to make it easy for all participants to utilize the technology and have confidence they could participate fully. The Board reiterated its belief that it acted similarly to state superior and appellate courts that had adopted technology platforms to enable participation in virtual court hearings.

Employer additionally argued the video hearing scheduled by the Board violated due process; specifically, that it had a constitutional right to in-person or face-to-face confrontation in the administrative context that a video hearing would infringe improperly. The Board noted that, with respect to civil proceedings, the Fifth and Fourteenth Amendments to the United States Constitution, and the state constitution, guarantee only due process of law, and an administrative hearing is essentially a civil proceeding to which no constitutional right of confrontation attaches. Moreover, it is well-established that due process does not confer upon a party to civil proceedings an absolute right to be personally present at the proceedings (citation omitted). While a party may have an interest in being physically present, a claim that a person must be personally present is unsupported in either the state or federal constitution, the Board noted.

The Appeals Board further noted that a video electronic/hearing provides parties sufficient due process in the administrative context. Federal courts long have permitted telephonic or video testimony, and there was little reason to believe the Board’s average administrative hearings require greater due process protections than those of federal civil trials. The Board stated that, while there may be instances in which due process requires in-person hearings, such was not the case during the pandemic.

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