

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MELKESIAN RANCH, INC.
P. O. Box 2967
Indio, CA 92202

Employer

Docket No. 01-R6D2-3623

**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 Melkesian Ranch, Inc. (Employer).

JURISDICTION

On March 14, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an Agricultural Health and Safety Inspection Program (ASHIP) inspection at a place of employment maintained by Employer at 44th and Dillon Road, Coachella, California (the site).

On August 2, 2001, the Division cited Employer for, among other things, citations alleging general violations of section 3457(c)(2)(A) [Item 3; number of toilets] and section 3457(c)(3) [Item 4; drinking facility maintenance] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹

Employer filed a timely appeal contesting the existence of the alleged violations.

On March 6, 2003, a hearing was held before Dale A. Raymond, Administrative Law Judge (ALJ) of the Board at West Covina, California. Robert B. Melkesian, Manager, represented Employer. Phil F. Valenti, Jr., Regional Senior Engineer, represented the Division. On March 24, 2003, the ALJ issued a decision denying Employer's appeal on the two noted sections. Employer filed a timely petition for reconsideration on April 28, 2003. The Division filed an answer to the petition on June 2, 2003

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

EVIDENCE

Item 3; Section 3457(c)(2)(A)

The Division cited Employer for having an insufficient number of toilets.

Scott Walters, (Walters) Associate Cal/OSHA Engineer, testified that he saw a trailer with two toilet facilities on the road in front of the site. Francisco Rodriguez (Rodriguez) identified himself as the supervisor and accompanied Walters on his inspection. In response to Walters' question, Rodriguez told Walters that these two were the only toilets Employer had. Rodriguez said that there were 30 male and 30 female employees. Walters walked about 100 feet looking for toilets. Walters did not see any other toilets when he drove up to the site.

Based upon the above, Walters issued Item 3 for a general violation of section 3457(c)(2)(A).

Manager, Robert B. Melkesian (Melkesian) testified that the day before the inspection, he personally placed five trailers on the roads on either side of the site. Each trailer had two toilets for a total of ten toilets. The trailers could be moved easily and each foreman had a vehicle capable of moving the trailers. Melkesian drew Exhibit B to show the way trailers were placed, but not their exact locations. They would be easily visible because the trailers with toilets were big and the roads were straight and open. Melkesian could not understand how Walters could fail to see them.

Item 4; Section 3457(c)(3)

The Division cited Employer for inadequate maintenance of a drinking water facility.

Walters observed an Igloo water cooler at the site. A portion of the outside button and its ring was broken. He saw black around the button and inside the broken portion. He pointed it out to Rodriguez and took a photograph admitted as Exhibit 4. Walters believed that the black was mildew, mold, growth or some other contaminant. Based upon his experience, these contaminants could reach the internal portions of the valve, thereby contaminating the water. Walters was sure that the contaminant was black, not brown or green. Contamination might not be visible without a microscope. For example, dysentery can be spread through water contaminated due to a broken button.

Tam Smalstig, (Smalstig) Cal/OSHA Nurse Consultant III, Special Projects, testified for the Division regarding her background as an industrial

hygienist and occupational health nurse. She obtained a diagram of an Igloo spigot assembly from the manufacturer. (Exhibit 5). A seal kept the water away from the outside portion of the button and piston. Smalstig drew an arrow pointing to the seal on Exhibit 5 and initialed. Water did not ordinarily reach the broken portion of the button.

However, the spigot assembly was not watertight. It retained moisture. Anything water solvent could possibly pass through the barrier via the piston when it was pushed in, or otherwise. When the spigot was cleaned, contaminants on the spigot piston could go through the seal. Possible contaminants included mold, bacteria, viruses, dusts, and other chemicals too small to see. Due to the small, irregular spaces created by the spigot design, cleansing all the nooks was impossible. The entire spigot, not only the broken portion, must be replaced to ensure that the water inside the cooler would not become contaminated.

Based upon the above, Walters issued Item 4 for a general violation of section 3457(c)(3).

Melkesian, using a copy of Exhibit 5, testified that the water did not flow anywhere near the broken portion and there was no way that the water could get through the seal. He believed that the dark portions of the outside spigot looked like rust or a shadow. Melkesian has never personally seen the broken spigot in question.

ISSUE

Has Employer set forth sufficient grounds to grant its petition for reconsideration?

REASONS FOR DENIAL OF PETITION FOR RECONSIDERATION

Employer bases its petition for reconsideration on allegations that the Division's investigating officer's testimony was unbelievable because:

1. He had a conversation with a sub-foreman and not Francisco Rodriquez,
2. He was only at the locale 20 minutes and did not conduct a thorough examination, and
3. Employer's testimony should have been believed over the Division's investigators because his time in the field far outweighed the Division's investigators.

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.

Labor Code section 6616 provides that:

The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order or decision made and filed by the appeals board or a hearing officer to be unjust or unlawful, and every issue to be considered by the appeals board.

These requirements are mandatory. *Louis G. Beary Plastering*, Cal/OSHA App. 76-1296, Denial of Petition for Reconsideration (Nov. 14, 1977). Employer's petition plainly failed to meet these statutory requirements. The Board has consistently rejected petitions that do not contain sufficient detail. (See, e.g., *Lusardi Construction Company*, Cal/OSHA App. 86-318, Denial of Petition for Reconsideration (Oct. 29, 1986); *Paterson Pacific Parchment Co.*, Cal/OSHA App. 80-1238, Denial of Petition for Reconsideration (Apr. 22, 1981).) The Board stated the policy underlying this specificity rule in *Lusardi Construction Company*, *supra*, at pg. 2:

Without specific and detailed allegations in the petition, there is nothing of substance for the Appeals Board to review and weigh against the judge's findings and decision to determine whether or not to grant Employer's petition for reconsideration.

Employer's allegations lack the substance that the Board requires in order to grant relief. The petition contains numerous statements expressing general disagreement over both the conduct of the hearing proceeding and the ALJ's findings. A petition for reconsideration, however, requires more than asserting such disagreement. No relief can exist without specific references to evidence supporting Employer's position from the record and establishing a basis for reversing the ALJ's decision based upon principles of law.

Independent of our finding that the petition fails to comply with the above substantive requirements, we have carefully reviewed the ALJ's findings

and find that they were supported by the evidence. We give the ALJ's fact determination great weight because the ALJ specifically credited Walters' testimony over Employer's and enunciated the reasons why. The ALJ found that:

Walters' straightforward, direct, and unhesitating answers created no reason to doubt his testimony. The parties agreed that the toilet facility Walters saw was large. It is inherently improbable that Walters would not have seen similar trailers if they were on an open road and he was specifically looking for them. The most reasonable explanation is that there were no other facilities. Since Field Superintendent Rodriguez was a member of Employer's management, his statement to Walters that there were no other toilets is excepted from the hearsay rule as an authorized admission of Employer under Evidence Code section 1222. It is sufficient to support a finding.

Employer did not bring any direct evidence of the existence of more toilets although it was within Employer's power to do so. Melkesian was not present at the time of the inspection, so he did not personally observe the toilet locations at the time of the inspection. Employer did not call Rodriguez or any other percipient witness, nor did Employer bring written evidence of the existence of the toilets.

In addition, the ALJ found and we adopt that:

The evidence was undisputed that a portion of the button and the ring surrounding it was broken on Employer's water cooler and that Employer's employees drank water from the cooler. Walters' testimony that he observed a black substance on and inside the broken portion was credible and is credited over Melkesian's testimony. Walters personally observed the condition and took a photograph. Melkesian's testimony that the dark spots appearing in the photograph were from rust or shadows was speculation. He did not see the spigot in question himself.

Walters and Smalstig credibly testified that the broken portion created the possibility of contamination. Walters offered testimony based upon his experience. Smalstig's testimony, based upon her education, experience and information from the manufacturer, was supported with technical details. Although it was within his power, Melkesian did not contact the manufacturer or bring a manufacturer representative to testify at the hearing. Melkesian's testimony that nothing could get past the seal did not have any foundation.

DECISION

As noted above, we adopt these findings and Employer's petition for reconsideration is denied.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 16, 2003