

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

In the Matter of the Appeal of:

BOBBY GILBERT
dba B & J Tree Service
17602 17th Street, Suite 102 #157
Tustin, CA 92780

Inspection No.
1631420

**DENIAL OF PETITION FOR
RECONSIDERATION**

Employer

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 Bobby Gilbert dba B & J Tree Service (Employer).

JURISDICTION

Beginning October 13, 2022, the Division of Occupational Safety and Health (the Division), conducted an inspection of a worksite maintained by Employer. On March 3, 2023, the Division issued Employer four citations alleging five violations of safety orders.¹ Citation 1, Item 1, alleged a General violation of section 1509, subdivision (c) [failure to post code of safe practices in a conspicuous place], Citation 1, Item 2, alleged a General violation of section 3421, subdivision (c)(2) [failure to ensure proper and safe use of all equipment], Citation 2, Item 1, alleged a Repeat-General violation of section 3203, subdivision (a)(4) and (a)(6) [failure to establish, implement, and maintain an Injury and Illness Prevention Plan that includes procedures for identifying, evaluating, and correcting workplace hazards], Citation 3, Item 1, alleged a Repeat-Serious violation of section 3381 [head protection], and Citation 4, Item 1, alleged a Repeat-General violation of section 3395, subdivision (i) [failure to have its Heat Illness Prevention Plan available at the worksite]. Total proposed penalties were assessed at \$33,610.

Employer initiated an untimely appeal of the citations, but later requested and received leave to file a late appeal from the assigned Administrative Law Judge (ALJ).

Section 355.2, subdivision (a), requires the Employer to elect the method it will receive service of documents from the Board, whether via postal mail or email. Employer's appeal forms specifically designated email as the preferred method of service for documents from the Appeals Board. The listed email was bandjtreesevice@hotmail.com.

¹ Unless otherwise specified reference are to title 8 of the California Code of Regulations.

The Board noticed a status conference for February 5, 2024. The notice was served on Employer at the aforementioned email address. Employer failed to appear. Therefore, the assigned ALJ issued an Order Dismissing Appeal for Failure to Appear (Order) on February 14, 2024, giving the Employer 15 calendar days to respond (and under section 348, subdivision (c), an additional five days are added). Employer did not file a timely response and the Order became final.

Under Labor Code section 6614, subdivision (a), Employer had 30 days from the date the Order became final to petition the Board for reconsideration, again extended by five days under section 348, subdivision (c). Employer filed an untimely petition on May 23, 2024.

Employer's petition for reconsideration argues that he never received notice of the status conference. The petition states, "[u]nfortunately, I did not receive any notice about this hearing. Please note that I do not use computers or emails. If the notification was sent to me via email, I regret to inform you that I or my secretary did not receive it." Employer thereafter restates its intention to "contest the violation citation as serious as well as penalties[.]" Notably, both Employer's declaration filed in support of the motion for late appeal, and Employer's May 23, 2024, petition for reconsideration letter were on Employer's letterhead stationery, which lists Employer's email address as the same one provided as Employer's preferred method of service.

ISSUE

Does the Board have jurisdiction to grant reconsideration in this matter?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case. The Board has taken no new evidence.

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.

Employer's petition asserts none of the statutory grounds upon which we may grant reconsideration, which is reason alone to deny the petition. (*Arodz Motorsports, LLC, dba Al Tune & Lube*, Cal/OSHA App. #1087194, Denial of Petition for Reconsideration (Nov. 22, 2017).) However, even if we were to construe the petition to assert one or more of the statutory grounds

in Labor Code section 6617, we could not grant reconsideration.

The dispositive issue is whether the petition was timely filed. The Board's record in this matter shows that the Order became final on March 5, 2024. Both the Order and Labor Code section 6614, subdivision (a), gave Employer notice that a party may petition the Board for reconsideration within 30 days after the order served on Employer became final. Employer's petition was filed late. We lack jurisdiction to grant reconsideration when the petition is filed late. (*Amerisk Engineering Corp.*, Cal/OSHA App. 1129146, Denial of Petition for Reconsideration (Dec. 21, 2018), citing Labor Code sections 5900 and 5903; *Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1108, citing *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984.)

However, even assuming, *arguendo*, that the Board could somehow overlook the jurisdictional defect, Employer's petition does not state any grounds that would warrant reinstatement of the appeal. Although Employer's petition states that he does not use email or computers, Employer's appeal forms selected email as the preferred method of service and provided the email address listed on Employer's letterhead stationery. Having done so, Employer had an obligation to put procedures in place to ensure its email was routinely and properly monitored. An employer must "act with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs." (*Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) Further, we observe that both Employer's declaration filed in support of the motion for late appeal, and Employer's May 23, 2024, petition for reconsideration were on Employer's letterhead stationery, which prominently lists Employer's email address as a communication method, indicating that Employer does indeed use email, despite contrary assertions.

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 07/22/2024

