

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

In the Matter of the Appeal of:

A.B.S. MANUFACTURERS, INC.  
519 Horning Street  
San Jose, CA 95112

Employer

Docket 14-R6D7-9075

**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 A.B.S. Manufacturers, Inc. (Employer).

**JURISDICTION**

Commencing on February 21, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On April 11, 2013, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer telephoned the Board on April 4, 2014 to initiate its appeals.

On May 12, 2014 the Board wrote both Employer and the Division. The Board's letter to Employer informed it that its appeals appeared to be late, and that if Employer wished to seek an extension of the appeal period it had to submit a statement and declaration demonstrating good cause for the extension. The Board's contemporaneous letter to the Division requested it to provide the Board with documentation showing when the citations were delivered to Employer.

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer's timely reply indicated that it believed the matter had been resolved when Employer corrected the items noted in the citations, based on previous experience with city and county inspections.

The Division provided copies of certified mail receipts and other USPS documentation showing the citations had been delivered to and signed for by Employer on April 12, 2013.

On June 17, 2014, an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave to File Late Appeal (Order)]. The Order considered the circumstances summarized above and held that Employer had not established good cause for its late appeal under applicable provisions of the Labor Code, the Board's regulations and the Board's reasoning in previous matters presenting the same or similar circumstances.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

### **ISSUES**

Did Employer's petition for reconsideration satisfy the Labor Code's requirements for such petitions?

Did Employer establish good cause for its late appeal?

### **REASON FOR DENIAL OF PETITION FOR RECONSIDERATION**

Labor Code section 6617 states that a petition for reconsideration "may be based upon one or more of the following grounds and no other:

- (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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (See also Board regulation § 390.1) Further, Labor Code section 6616 requires a petition to "set forth specifically and in full detail" the grounds upon which the petitioner believes the Order to be unjust or unlawful, and failure to do so is also reason to deny the petition. (*UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).)

The Board has fully reviewed the record in this case, including 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.

Employer's petition stresses the financial hardship the proposed penalties would inflict on the business, and addresses the merits of the citations themselves. Raising those issues and arguments is not appropriate under the present circumstances. (*Ham Supreme Shop*, Cal/OSHA App. 11-9065, Denial of Petition for Reconsideration (Jun. 6, 2011) [Board declined to consider issues re financial hardship and merits where no good cause for late appeal].) It does not dispute the correctness of the Order or seek to add any additional information which may tend to establish good cause for the late appeals.

Employer filed its appeals almost a year after the citations were received. Employer explained that it believed from past experience with other government entities such as city inspectors that the matter was resolved upon its correction of the cited violations. The ALJ denied leave to file a late appeal, correctly ruling that misunderstanding the appeal process is not good cause for late appeal. (*19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).) The Order also correctly stated that the information included with the citations is legally adequate to put cited employers on notice of their rights and obligations should they elect to appeal. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4<sup>th</sup> 43; *McLean Steel, Inc.*, Cal/OSHA App. 87-9002, Denial of Petition for Reconsideration (Mar. 27, 1987).)

Employer's petition states that the penalties imposed by the citations (\$3,675) would put it out of business. Even construing the petition as asserting one or more authorized bases for reconsideration, a claim of financial hardship unsupported by evidence thereof is not a basis for granting reconsideration. (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 09-0399, Denial of Petition for Reconsideration (Jul. 19, 2012) [Board does not assume facts not in evidence]; *Paige Cleaners*, Cal/OSHA App. 96-1144,

Decision After Reconsideration (Oct. 15, 1997) [employer has burden to prove financial hardship].)

Although we hereby deny Employer's petition for reconsideration, our doing so does not act to bar the Division from agreeing to allow Employer to pay the penalty over a period of time, for example twelve months at \$306.25 per month. We leave it to Employer and the Division to discuss whether such an accommodation would be appropriate.

**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: August 27, 2014