

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BIRRIERIAS TLAQUEPAQUE, INC.
10904 Rush Street
South El Monte, CA 91733

Employer

Dockets. 13-R6D5-0147
through 0149

**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 Birrierias Tlaquepaque, Inc. (Employer).

JURISDICTION

Commencing on October 16, 2012 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 4, 2012 the Division issued four citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed Citation 1, Item 2, Citation 3 and Citation 4.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board. On September 12, 2013 the parties were duly notified that the proceeding was set for hearing on October 31, 2013. A representative of the Division appeared at the appointed place, date and time; Employer, however, failed to appear.

On October 31, 2013, the ALJ issued a Notice of Intent to Dismiss Appeal which informed Employer of its failure to appeal and further that Employer had 10 days to file a written motion to have its appeal reinstated supported by a declaration showing that the failure to appear was reasonable and for good cause.

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

Employer filed a motion to have its appeal reinstated.

The ALJ considered the motion and denied it in an Order Dismissing Appeal dated November 15, 2013 (Order).

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Did Employer show good cause for its failure to appear at the hearing?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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.

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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], and 6617; *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).)

In addition, Employer did not verify its petition under oath and failed to provide proof that it served its petition on the Division. Both are required by the Labor Code. (Lab. Code §§ 6616 and 6619, respectively.) Failure to satisfy both those requirements requires denial of the petition. (*RMJ Construction*,

Cal/OSHA App. 12-9013, Denial of Petition for Reconsideration (May 11, 2012).)

As to the merits of this matter, Labor Code section 6611(a) states in pertinent part the Board “may dismiss the appeal” if the employer fails to appear. Labor Code section 6611(b) further provides the Board may reinstate the appeal “upon a showing of good cause by the employer for his failure to appear.” It is Employer’s burden to establish good cause. (*Ameripride Uniform*, Cal/OSHA App. 04-106, Decision After Reconsideration (Apr. 3, 2008).) We hold that Employer has not established good cause for its failure to appear.

Employer’s stated reason is that he operates a small food service business having two part time employees, and that to appear at the hearing would have required him to shut down the business for a day, and so lose revenue and be unable to meet his payroll for the week. Notice of the October 31, 2013 hearing was mailed to the parties on September 12, 2013. Employer had approximately six weeks advance notice of the hearing, which was adequate time to make arrangements to keep his business open on that day or to seek a continuance in order to have the hearing on a later date when such alternative arrangements could be made. (Board Regulation § 371.1; *Valley Crest Landscape, Inc.*, Cal/OSHA App. 84-451, Denial of Petition for Reconsideration (Mar. 28, 1986); *Steve Woodlief Plastering*, Cal/OSHA App. 07-2909 (Denial of Petition for Reconsideration (Sep. 19, 2008).)

Employers are expected to deal with their appeals as they would their most important legal affairs. (*National Diversified Sales*, Cal/OSHA App. 06-9243, Denial of Petition for Reconsideration (Feb. 5, 2007).)

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: JANUARY 21, 2014