

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

In the Matter of the Appeal of:

EDCO WASTE & RECYCLING  
SERVICES, INC.  
224 Las Posas Road  
San Marcos, CA 92969

Employer

Dockets 12-R3D2-0163 and 0164

**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 EDCO Waste & Recycling Services, Inc. (Employer).

**JURISDICTION**

Commencing on July 18, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 9, 2011, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup> Citation 1 alleged a total of eleven Regulatory and General violations. Citation 2 alleged a Serious, Accident-Related violation of section 3314(c) [failure to comply with lockout/tagout requirements].<sup>2</sup>

Employer timely appealed through outside counsel.

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

<sup>2</sup> The Division also cited Employer at two of its other sites, and Employer timely appealed. The Board has assigned docket numbers 12-R3D2-0605 and 0606; and 12-R3D2-2043 through 2047 to them. Those proceedings are not at issue here, but are relevant to the issues raised in Employer's petition for reconsideration. For brevity, in the remainder of this Denial of Petition for Reconsideration the docket number will omit the "R3D2" portion.

Thereafter administrative proceedings were commenced, including scheduling of duly-noticed prehearing conferences before an Administrative Law Judge (ALJ) of the Board.

Employer, through its counsel, failed to appear or be available for duly-scheduled prehearing conferences on June 18, 2012 (dockets 12-0605 and 0606), October 15, 2012 (dockets 12-0163 and 0164), and November 5, 2012 (all three proceedings). The Division was available for all three prehearing conferences. Orders to Show Cause were issued, providing Employer with the opportunity to show its failure to appear was reasonable and for good cause.

On December 28, 2012, the ALJ issued an Order re Sanctions Dismissing Appeal (Order) in the instant dockets, 12-0163 and 0164. The Order provided that Employer's appeals in dockets 12-0163 and 0164 were dismissed and the proposed penalties, totaling \$22,670.

Employer retained new counsel and timely filed a petition for reconsideration.

The Division filed an answer to the petition.

### **ISSUE**

Did the ALJ abuse her discretion by imposing the sanctions of dismissing Employer's appeals?

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

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 states as grounds for its petition that the Order was issued in excess of the ALJ's powers and that it has discovered new evidence which it could not, in the exercise of reasonable diligence, have discovered and produced earlier.

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.

We review an ALJ's procedural rulings and penalty determinations using an abuse of discretion standard. (*MCM Construction, Inc.*, Cal/OSHA App. 09-9230, Denial of Petition for Reconsideration (Nov. 5, 2009) [procedure]; *Kang's Painting*, Cal/OSHA App. 09-2668, Denial of Petition for Reconsideration (Jan. 11, 2010) [dismissal of appeal for failure to appear affirmed as within ALJ's discretion]; *Shiho Seki dba Magical Adventure Balloon Rides*, Cal/OSHA App. 11-0477, Denial of Petition for Reconsideration (Aug. 31, 2011) [penalties].)

The ALJ's Order discussed in detail the history of Employer's retained counsel's multiple failures to appear as well as the reasons he gave for them. She found that in the instant docket, 12-0163 and 0164, he did not establish good cause for failing to participate in the duly-noticed prehearing conferences. Board Regulation section 374(c) provides in pertinent part that "The failure of a party or its representative to . . . participate in the prehearing conference shall be grounds for the imposition of sanctions . . . as the Appeals Board may deem appropriate." Further, the ALJ's Order to Show Cause in this matter, issued November 29, 2012, informed Employer's attorney that sanctions "including dismissal of Employer's appeal" could be imposed if good cause for the failure to appear were not shown.

Employer's former outside counsel, whom it retained to represent it in the instant matter and its appeals of the two other dockets we have referred to, failed to appear at duly-noticed pre-hearing conferences over a period of months with respect to each of the three cases. On each occasion the Division's representative appeared and the ALJ made unsuccessful attempts to contact Employer's counsel. The ALJ issued an Order to Show Cause which gave Employer's counsel the opportunity to show his failures to appear were reasonable and for good cause. In the Order the ALJ gave Employer's counsel benefit of the doubt in two of the three pending proceedings, but also found that various inconsistencies in his explanations combined with his repeated failures to appear warranted imposing the sanction of dismissing Employer's appeal of the instant appeals.

After the dismissal of its instant appeals, Employer retained different outside counsel to advocate for reconsideration of the Order and reinstatement of its appeals. It appears to have terminated the services of its initial counsel.

The basis for Employer's Labor Code § 6617(d) assertion is that it knew nothing of the failure of its original counsel to represent it properly until after its subject appeals were dismissed. Prior to then, it believed all to be well and moving along in the normal course of events. Employer asserts that it did not know of its initial counsel's failure to properly represent it, and that rather, when it made occasional contact with him to obtain an update on the cases he made assurances that all was well and that settlement attempts were under way.

On the other hand, Employer acknowledges that it was having the same difficulties in contacting original counsel by phone that the ALJ experienced when attempting to place calls to him for the pre-hearing conferences. Employer does not say it sought an explanation for initial counsel's behavior or independently checked on the status and progress of the proceedings. It seems to have relied on the representations of counsel despite his behavior.

Applying appellate case precedent to its own proceedings,<sup>3</sup> Board precedent holds that an employer's representative's mishandling of employer's appeal is attributable to the employer, even when the mishandling is the error of an attorney or the attorney's staff. (*Wesley Burnett dba Environ*, Cal/OSHA App. 01-491, Denial of Petition for Reconsideration (Sep. 23, 2002) [miscommunication between two of Division's attorneys not good cause for its failure to appear at hearing]; *Kitagawa & Sons, Inc., dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004) [paralegal working for employer's counsel mishandling appeal documents not good cause for late appeal].) The Board has also held miscommunication between employer and its attorney is not good cause for a late appeal, and by the same reasoning would not be good cause for a failure to appear. (*Chore Auto Wrecking*, Cal/OSHA App. 09-0605, Denial of Petition for Reconsideration (Jan. 14, 2010) citing *Oltmans Construction Co.*, Cal/OSHA App. 08-9435, Denial of Petition for Reconsideration (Feb. 2, 2009); *Ameripride Uniform*, Cal/OSHA App. 04-106, Decision After Reconsideration (Apr. 3, 2008); *Anita's Mexican Foods Corp.*, Cal/OSHA App. 08-9257, Denial of Petition for Reconsideration (Sep. 2, 2008).) The Board has also successfully challenged a writ when the attorney involved made a dispositive error. (*Bragg Crane*.)

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<sup>3</sup> For example, *Martin v. Cook* (1977) 68 Cal.App.3d 799, 809; *Orange Empire National Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353 [client charged with inexcusable neglect of attorney and gives redress against the attorney].)

Here, we find that Employer's initial counsel's failures do not rise – perhaps we should say fall – to the level of abandonment, which is a narrow concept. (See *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898-899.) And, Employer had warning signs, which it ignored, that its initial counsel was not managing his practice effectively. It experienced the same difficulties in communicating with initial counsel as the ALJ did.

In addition, the case law on excusable and inexcusable neglect rests in large measure on Code of Civil Procedure section 473(b), which does not apply to Board proceedings. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4<sup>th</sup> 43, 53.)

Employer argues its prompt action in retaining new counsel and seeking relief from the dismissal when it learned of it falls within Board precedent finding good cause for a late appeal. (*Club Fresh, LLC*, Cal/OSHA App. 06-9241, Decision After Reconsideration (Sep. 14, 2007) [good cause for late appeal when ER showed lack of notice of citations and acted timely after learning of them].)

The *Club Fresh, supra*, is distinguished on its facts. First, it involved the apparent filing of a late appeal, not attorney malpractice. Further the employer filed a “late” appeal based on the issuance date of citation, but the Division could not furnish proof of when the citation was served. In addition, the employer stated in its verified petition that it did not receive the citations and knew nothing of them until a bill for the penalty arrived in the mail. Employer contacted the Board within 15 days of receiving that indication of having been cited. The Board found the employer had acted diligently and timely upon receiving actual notice of the citations, and granted late appeal.

Although not raised by Employer, we also note that dismissal of its appeal and imposition of \$22,670 in penalties was a nuanced decision by the ALJ. Employer's other two pending cases, which were also subject to sanctions for initial counsel's failures to appear, involve (dockets 12-0605 and 0606) two citations, alleging 3 General and 1 Serious violation and penalties of about \$19,500; and (dockets 12-2043 through 2047) five citations, alleging 3 General, 1 Willful Serious, and 3 Serious violations with total proposed penalties of \$111,935. Further, the ALJ sanctioned Employer for its initial counsel's conduct in this specific case given his behavior in it, and not generally or overall. We hold that doing so was not an abuse of discretion.

## **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: March 7, 2013