

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

In the Matter of the Appeal of:

ESPRESSO BAR @ SUNRISE
6121 Sunrise Mall
Citrus Heights, CA 95610

Employer

Docket No. 2013-R2D1-9102

**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 Espresso Bar @ Sunrise (Employer).

JURISDICTION

Commencing on February 8, 2013 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On April 22, 2013, the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely initiated its appeal of the citations by telephone call to the Board on May 6, 2013, which call the Board acknowledged by letter of May 8, 2013.

The Board's letter informed Employer that it had to provide the Board with a completed appeal form, which by definition means a filled out appeal form with a copy of the citation or citations being appealed attached. (Board Regulation § 347(e).)

The Board did not receive a response from Employer.

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

On July 12, 2013, the Board's Executive Officer issued an Order Dismissing Appeal (Order) in view of Employer's failure to submit a completed appeal form.²

Employer untimely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Whether the Board has jurisdiction to grant reconsideration.

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 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], 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).) Construed in the manner most favorable to Employer, however, the petition may be deemed to assert that the evidence does not justify the findings of fact.

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

² The Order incorrectly states that Employer telephoned the Board on May 16, 2013. That was a typographical error; the call was on May 6, 2013, as stated in the Board's acknowledgement. May 16, 2013 was the date by which Employer was to submit its completed appeal form to the Board.

preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Labor Code section 6614(a) provides that a petition for reconsideration must be filed within 30 days of the date the final order or decision at issue was served on the petitioning party. The Order was served on Employer and the Division on July 12, 2013. Allowing 5 days for service by mail to an address in California (Code Civ. Pro. § 1013), the last day for filing Employer's petition was August 16, 2013. It was mailed and thus deemed filed on August 19, 2013. (Board Regulation § 390 [petition deemed filed on date mailed to Board].) We are without jurisdiction to grant a late-filed petition. (*National Metal Fabrication, Inc.*, Cal/OSHA App. 10-3342, Denial of Petition for Reconsideration (Dec. 8, 2011) citing *Nestle Ice Cream Co., LLC v. Workers' Compensation Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1108.)

Although we are without jurisdiction to grant Employer's petition, we make note of the following points pertaining to the two alleged violations. Were we able to consider the merits of the proceeding, it appears Employer qualifies for the exception in § 3203(a)(3) allowing small employers to have a verbal Injury and Illness Prevention Program. Second, regarding the alleged hazard communication violation, Employer also may qualify for the consumer products exception in § 5194(b)(5)(G). In light of the equities of the foregoing, we suggest that the Division may be wise to exercise its discretion with respect to the penalties in this matter.

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: October 9, 2013