

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

In the Matter of the Appeal of:

J & A FOOD SERVICE, INC.  
dba BURGER KING  
930 Executive Way, Suite 200  
Redding, CA 96002

Employer

Docket. 15-R2D3-0726

**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 J & A Food Service, Inc., doing business as (dba) Burger King (Employer).

**JURISDICTION**

Beginning on January 6, 2015, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 2, 2015, 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>

Employer timely appealed only Citation 2, which alleged a serious violation of section 3648, subdivision (o). Citation 1, not having been appealed, became a final order of the Board by operation of law. (Lab. Code § 6601.).

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed pre-hearing conference. At that conference the parties agreed to resolve the matter by agreement and further agreed that the terms of the agreement would be embodied in an order to be issued by the ALJ.

On May 20, 2015 the ALJ issued her Order (Order).

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

Employer timely filed a petition for reconsideration.

The Division answered the petition.

### **ISSUES**

Did Employer's petition satisfy the requirements of Labor Code section 6617?

Do the merits warrant granting Employer the relief it requests on 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. (Lab. Code § 6617; *Security Paving, Inc.*, Cal/OSHA App. 13-0771, Denial of Petition for Reconsideration (Dec. 31, 2014); *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 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.

The parties agreed to a reduction in the penalty the Division initially proposed for the alleged violation, from \$9,000 to \$5,400. Further, the parties agreed that Employer could pay the amount due in two monthly payments of \$2,700.

Employer's petition states that Employer takes full responsibility for the violation. It then asks that we further reduce or eliminate entirely the penalty.

Employer bases its request on factors already included in the negotiated settlement, such as its good faith and good history of providing safe employment. (See the "Summary Table" in the Order.) There is no basis in this record to second-guess the ALJ's acceptance of the parties' agreement, or the agreement itself. There is no claim or indication that the parties' agreement was the result of fraud or misrepresentation, a misunderstanding of material fact, or that the ALJ made an error in transcribing the terms of the agreement. In the absence of such circumstances it is not appropriate for a party to seek, through a petition for reconsideration, a better deal than the one it struck through negotiation. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).) We have previously reasoned that it is not appropriate for a cited employer to seek further penalty reduction by means of a petition for reconsideration when it has agreed to that amount in negotiation with the Division. (*Kirkland Enterprises, Inc.*, Cal/OSHA App. 08-2803, Denial of Petition for Reconsideration (Mar. 30, 2011).) Similarly, Employer cannot now implicitly challenge the merits of the citation when it has stipulated to this end result and even in its petition admits the violation. (*Akash Dirk Von Rueben dba New Dimensions*, Cal/OSHA App. 11-2958, Denial of Petition for Reconsideration (Oct. 25, 2012).)

### **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 13, 2015