

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

In the Matter of the Appeal of:

JACOV HERSCU dba JACK'S
GENERAL CONTRACTING
1833 Magellan Drive
Oakland, CA 94611

Employer

Dockets. 11-R1D4-1725 through 1729

**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 Jacov Herscu doing business as (dba) Jack's General Contracting (Employer).

JURISDICTION

Commencing on April 28, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On June 15, 2011, the Division issued 5 citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On November 30, 2012, the ALJ issued a Decision which affirmed the alleged violations and imposed a civil penalty totaling \$15,875.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

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

ISSUE(S)

Were the alleged violations proved?

Did Employer satisfy the requirements for financial hardship penalty relief?

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).) Liberally construed in the light most favorable to Employer, however, the petition may be deemed to have asserted that the evidence does not justify the findings of fact and/or that the findings of fact do not support the Decision. Also, the petition may be deemed to argue that the Decision was procured by fraud, as Employer alleges the Division staged the photographic evidence.

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 Decision was based on substantial evidence in the record as a whole and appropriate under the circumstances.

On April 28, 2011, Employer constructed a scaffold on a building in Oakland, California. The scaffold lacked required supports (section 1640(b)(2)) and guardrails (section 1637(k)(6)), planking (section 1640(b)(5)(A)), and employees were observed working on it, thus establishing employee exposure to the hazards posed by the non-complying scaffold.

Regarding Citations 2, 3, and 4, Employer's petition argues that his employees were still in the process of erecting the scaffold when the Division's inspector observed and photographed them, and had not performed any work from the scaffold. A review of the record convinces us that Employer's argument is not persuasive. The inspector's photographs were taken from some distance before she approached the scaffold, and show employees engaged in work rather than merely constructing the scaffold. (See Ex. 7.) The inspector further testified that the work in question was painting preparation activity, as the employees were using putty knives. (Decision, p. 6.) Employer also admitted at hearing that his employees were doing work other than erecting the scaffold. (Decision, p. 8, p. 13.)

At hearing Employer submitted two declarations from his employees who were observed on the scaffold. Although admission of the declarations into evidence was questionable,² for sake of analysis we assume, without deciding, they were admissible. The ALJ treated them as unreliable, and we agree with her assessment. At least one of the declarants spoke Spanish, yet Employer's wife prepared the declaration in English at Employer's direction, supposedly transcribing what the declarant said to the owner, who does not understand Spanish. (Decision, p. 13, bottom – p. 14, top.) Also, as the ALJ noted, the declaration directly contradicted Employer's own admission that his employees were engaged in preparing the building for work, not merely erecting the scaffold. (*Id.*, p. 13.)

Thus, we find that substantial evidence in the record supports the finding that Employer committed the violations alleged in Citations 2, 3, and 4.

Employer also seeks penalty reduction or elimination for Citations 1 and 5. Employer's plea in this respect admits the violations alleged and they are therefore established as a matter of law. (*Nick's Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).) Employer failed to provide evidence at hearing sufficient to meet his burden of proof on the issue, and the ALJ denied relief. (Decision, pp. 21-22; *Szemeyei Construction, Inc.*, Cal/OSHA App. 10-0008, Denial of Petition for Reconsideration (Mar. 4, 2011).) We agree with the ALJ that the evidence in support of Employer's financial hardship claim was inadequate. We also find

² Board regulation 372.4 [Evidence by Affidavit or Declaration] allows a party to have a declaration admitted into evidence, as long as it gives a minimum 10-days' notice to the opposing party. Here, Employer never gave the required 10-day notice to the Division. (Decision, p. 13.)

that Employer has not provided any additional evidence in his petition for reconsideration. Rather, Employer's petition merely iterates that he is no longer working full time and that he and his wife are receiving Social Security benefits. Employer admits he is still working part time, but does not provide any information regarding the income such work generates. Accordingly we hold he has not met the burden required to receive financial hardship relief from the assessed penalties.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman (Not Present)
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: February 13, 2013