

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

In the Matter of the Appeal of:

KDTD INC., dba
KD DEVELOPMENT, INC.
4641 Ingraham Street
San Diego, CA 92109

Employer

Dockets 14-R3D2-1935 and 1936

**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 KDTD, Inc. doing business as KD Development, Inc. (Employer).

JURISDICTION

Commencing on December 9, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On May 20, 2014, the Division issued two 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, Items 2, 7, 8, 9, and 10; and Citation 2.

After Employer's appeals were filed and docketed the matter was assigned to an Administrative Law Judge (ALJ) of the Board to conduct pre-hearing and hearing proceedings. Accordingly, the matter was duly noticed for a pre-hearing conference to be held by telephone on September 22, 2014. At the designated time the Division's representative appeared by telephone. Employer's representative did not participate.

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

On September 23, 2014, the ALJ issued a Notice of Intent to Dismiss Appeals (Notice). The Notice recited the facts summarized above and informed Employer, through its representative of record, that its appeals were subject to dismissal unless Employer or its representative filed, within ten days, a written motion establishing that the failure to appear was reasonable and for good cause. The Notice was sent certified mail to Employer's representative at his address of record.

No response was received from Employer or its representative, and on October 22, 2014 the ALJ issued an Order Dismissing Appeals (Order).

Employer timely filed a petition for reconsideration.

The Division answered the petition and Employer filed a reply.

ISSUE

Was the failure to appear at the pre-hearing conference reasonable and for good cause?

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 "verified petition for reconsideration" (Petition) contends the Order was issued in excess of powers and the evidence does not justify the findings of fact in the Order.

The Board has fully reviewed the record in this case, including the arguments presented in the Petition. 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.

It is well established in Board jurisprudence that failure to attend a prehearing or hearing without good cause is grounds for dismissal of the appeal. (*Brownstone Upholstery Corporation, Inc.*, Cal/OSHA App. 13-1090, Denial of Petition for Reconsideration (Mar. 28, 2014).) We follow our reasoning in that matter and others raising the issue here.

The record shows that Employer responded to the Notice of Intent by sending a Declaration to the Division but not the Board. The Declaration was dated September 25, 2014. The Petition admits, on page 2, that “After careful review of the firm’s records, we are unable to locate any documents that would establish that the Response to Notice of Intent to Dismiss Appeals was actually served on the Appeals Board.” The Notice of Intent states, in pertinent part, that any response “shall be filed with the Appeals Board at [its office in West Covina].” Failure to file required documents with the Board has been held grounds to deny relief. (See *Bear Label Machine, Inc.*, Cal/OSHA App. 11-9219, Denial of Petition for Reconsideration (Mar. 13, 2012) [appeals must be filed with Board]; *Smurfit Stone Container*, Cal/OSHA App. 10-9245, Denial of Petition for Reconsideration (Jan. 24, 2011) [petitions for reconsideration must be filed with Board].) Employer responded to the Order by letter dated October 27, 2014 to the Board and others, but that was after the Order had been issued.

Two declarations were included with the verified petition. One was from a legal assistant who works for Employer’s attorney. She stated that she inadvertently failed to send the response to the Notice of Intent to the Board though she sent it to other parties. Her error is attributed to Employer. (*Kitagawa & Sons, Inc., dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004) [paralegal’s error attributed to employer].)

The paralegal’s declaration may also be construed implicitly to raise the argument that the failure to file the notice with the Board should be forgiven under the “inadvertence and excusable neglect” doctrine of Code of Civil Procedure § 473(b). The Code of Civil Procedure has been held not to apply to Board proceedings. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43.)

We therefore conclude that Employer’s petition should be denied on the grounds that Employer, through its attorney, failed to timely respond to the Notice.

We turn next, if unnecessarily, to the merits of Petition.

As we noted above, two declarations were filed with the Petition. One was from a paralegal, as already discussed. The other was from Employer's attorney, who therein explains the circumstances which gave rise to his failure to attend the pre-hearing.

The attorney states the prehearing was on his calendar, that he had every intention of attending, and, "However, on the morning of the appearance I was at the VCA Emergency Pet Hospital in Mission Valley, San Diego, California." The family pet "was in the emergency room being treated for a very serious illness."

While illness or death of a direct family member has in some cases been considered good cause for failure to attend a Board proceeding, the doctrine has yet to be extended to encompass family pets, and we decline to do so here.² (See *Metro Sheet Metal, Inc.*, Cal/OSHA App. 11-0784, Denial of Petition for Reconsideration (Apr. 26, 2012).) One reason for not doing so here is that no detail concerning the emergency was stated in the attorney's declaration. "While death and illness [of humans] can be good cause for a failure to appear, bald claims of such events are not sufficient to establish good cause." (*Id.*)

Nor did the attorney contact the Board to report the claimed inability to attend, or the emergency, or to request a continuance before the pre-hearing or even later that day. Moreover, since the pre-hearing was to be conducted by telephone, we think it reasonably likely that Employer's attorney could have participated from the veterinary hospital.³ While it would be speculation to say here how such a call may have been responded to by our staff, it is nonetheless the case that had the attorney contacted the Board about the situation, either a continuance may have been granted or, at a minimum, we could in the context of the Petition be viewing the circumstances differently than under the present facts; i.e. some allowance may have been made for the situation and the attorney's reporting of the "emergency" to the Board. (See, *Southern California Edison*, Cal/OSHA App. 08-9062, Denial of Petition for Reconsideration (Jan. 30, 2009).) And, where an employer's representative is responsible for a procedural failure, that error is attributed to the employer. (*Kitagawa & Sons, Inc.*, *supra.*)

The Petition also argues that the Notice of Pre-Hearing Conference does not make clear that one sanction the Board may impose is dismissal of the appeal. Although the Notice and the underlying Board regulation, section 374(c), do not explicitly state that the appeal may be dismissed, the regulation's wording encompasses that option: "[failure to attend] shall be

² We are not insensitive to the importance of pets to their owners; we are chary of extending the concept of "good cause" to encompass pet emergencies.

³ The attorney's declaration makes no assertion that he had no cell phone or access to one or another type of phone, and we think it unlikely that a facility in San Diego was outside cell phone coverage.

grounds for the imposition of such sanctions, inferences, or other orders as the Board may deem appropriate.”

Another argument the Petition makes is that if Employer is not allowed to present its case at a hearing it will have been denied due process. That argument is not valid. Employer, by virtue of its attorney’s failing to attend the pre-hearing conference, failed to avail itself of Board procedures without good cause. One is not denied due process when without good cause he fails to participate in the process available to him. (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828. [“Because plaintiffs did not take advantage of opportunities to avoid in the trial court the problem about which they now complain on appeal, they have waived any claim of a due process violation.”]; *Robbins v. Regents of University of California* (2005) 127 Cal.App.4th 653, 659-660, citing *Bartold*.) In short, a party’s failure to take advantage of available due process does not constitute a denial of due process.

Lastly, the petition states, without making a claim of harm or prejudice, that the Order was not received at the attorney’s offices. The Board’s proof of service shows the Order was mailed to the correct person at the correct address, and it appears from the record that other correspondence sent to that address was received without problem or delay. Further, since Employer timely filed its Petition, no prejudice resulted even if the Order did not arrive in the normal course of mail delivery.

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: December 31, 2014