

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

KEVIN SEMIEN
3359 26th Street
San Francisco, CA 94110

Employer

Docket. 13-R1D1-1499

**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 Kevin Semien (Employer).

JURISDICTION

Commencing on January 3, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On April 5, 2013 the Division issued one citation to Employer alleging a number of “general” violations of occupational safety and health standards codified in California Code of Regulations, Title 8, and seeking civil penalties.¹ Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including two duly-noticed status conferences. Employer appeared at the earlier of the two on December 16, 2013, during which Employer stated he wished to retain an attorney to represent him at the evidentiary hearing of his appeal, which had previously been scheduled. The ALJ informed Employer of the steps he and/or his counsel needed to take regarding such representation. The second status conference was scheduled for January 6, 2014. Employer failed to participate in the second status conference.

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

The parties were notified on September 3, 2013 that the evidentiary hearing was set for January 8, 2014. Employer failed to appear at that hearing. The Division did appear.

On March 4, 2014, the ALJ issued an Amended Order Dismissing Appeal (Order). The amendment corrected various clerical errors in the original Order Dismissing Appeal issued February 27, 2014.

Employer timely filed a petition for reconsideration.

The Division did answer the petition.

ISSUE

Did Employer establish that his failure to appear at the hearing was 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 petition may be construed, in the light most favorable to Employer, to maintain that the evidence does not support the findings of fact in the Order, and the findings of fact do not support the Order.

The Board has fully reviewed the record in this case, including the arguments in favor of and in opposition of 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 circumstances involved in Employer's failure to appear at the January 8, 2014 hearing are detailed in the Order and briefly summarized above. Employer's petition iterates those circumstances. In addition the

petition adds that, as a lay person, Employer thought he had to do nothing further to change the hearing date because the Division did not object at the December status conference to a continuance. Earlier Employer had admitted in his attempt to show good cause that the ALJ told him he had to request a continuance.

The Order correctly states that Labor Code section 6611(a) provides that an employer's appeal may be dismissed for failing to appear at a hearing, and that section 6611(b) further provides the appeal may be reinstated upon a showing of good cause. It is Employer's burden to establish good cause for his failure to appear. (*Birrierias Tlaquepaque, Inc.*, Cal/OSHA App. 13-0147, Denial of Petition for Reconsideration (Jan. 21, 2014).)

Whether Employer misunderstood the Division's saying it had no objection to changing the hearing date is not helpful to him, since he was informed by the ALJ that he needed to request a continuance but failed to do so. Moreover, misunderstanding the appeal process is not good cause for failure to appear. (*AAA Auto & Body Works, Inc.*, Cal/OSHA App. 09-2270, Denial of Petition for Reconsideration (Jul. 7, 2011).)

Also, Employer did not deal with his appeal as one of his "most important legal affairs," as required. (*Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) He waited until late in the proceeding to seek counsel, failed to request a continuance despite having been told he needed to do so, failed to appear at the second status conference because of a vacation opportunity, and failed to appear at hearing. We agree with the ALJ's assessment of the circumstances and find Employer did not establish good cause for his failure to appear at the hearing.

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: May 21, 2014