

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

In the Matter of the Appeal of:

PAUL DAVIS RESTORATION OF  
SAN DIEGO INC.  
9767 Aspen Creek Court  
San Diego, CA 92126

Employer

Dockets. 14-R3D2-3848 and 3849

**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 Paul Davis Restoration of San Diego Inc. (Employer).

**JURISDICTION**

Commencing on June 9, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On October 23, 2014 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 some of the alleged violations, and did not appeal others.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed pre-hearing conference held on February 23, 2015. At that conference the parties informed the ALJ that they had agreed to resolve Employer's appeals on specified terms.

On April 13, 2015, the ALJ issued an Order (Order) memorializing the terms of the parties' agreement.

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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. Employer's petition was not verified and it did not include a proof of service showing it had been served on the Division.

The Division did not answer the petition.

### **ISSUES**

Did Employer fulfill the statutory requirements for filing a petition for reconsideration?

May Employer reopen its appeal at this stage of the proceeding to appeal items in Citation 1 not previously appealed?

### **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 construing the petition in Employer's favor we deem it to assert that the evidence does not justify the findings of fact implicit in the Order.

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.

1. Employer failed to comply with two mandatory requirements for filing a petition for reconsideration.

We noted above that Employer's petition was not verified and did not contain a proof of service. In processing Employer's petition Board staff noted those deficiencies and, by letter of May 21, 2015, informed Employer that it is required to provide both a verification and proof of service. No response was had.

As pertinent here, the Labor Code imposes two mandatory requirements on a party which petitions for reconsideration. The petitioning party "shall" verify its petition, and "shall" serve it on the other party or parties. (Labor Code §§ 6616 and 6619, respectively.) "Shall" is mandatory. (Labor Code § 15.) Failure to verify one's petition requires the petition be denied. (*Juana Gonzalez dba Los Reyes Restaurant*, Cal/OSHA App. 10-9184, Denial of Petition for Reconsideration (Oct. 19, 2010).) Likewise, failure to serve one's petition on the other party or parties necessitates its denial. (*Wooriman Corporation*, Cal/OSHA App. 11-9040, Denial of Petition for Reconsideration (Apr. 11, 2011).) It follows that we must deny Employer's petition for those reasons.

2. We cannot reopen Employer's appeal under the present circumstances.

Although not strictly necessary in view of Employer's failure to comply with the Labor Code's requirements for petitioning for reconsideration, we will discuss the merits of Employer's petition for Employer's future guidance and that of the regulated community since similar circumstances are likely to arise in the future. (*Juana Gonzalez, supra*, Cal/OSHA App. 10-9184, citing *Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation* (2006) 136 Cal.App.4<sup>th</sup> 1049, 1069.)

The petition asks the Board "to make a judgment on [Citation 1] items 1, 3, 4, and 7." Employer's appeal of Citation 1 specified it was appealing only items 2, 5, 6, 8, 9, and 10. The record does not indicate that Employer sought to amend its appeal of Citation 1 to include the items it had not appealed at or prior to the pre-hearing conference where the parties' informed the ALJ of their agreement to settle the appeals.

In simple fact, Employer did not appeal items 1, 3, 4, and 7, and its attempt to do so in its petition for reconsideration is a late appeal. (See Labor Code § 6601 [citation must be appealed within 15 working days of receipt and if not appealed, final; Board may extend period for good cause shown].) The

information sent to Employer with the citations was legally adequate to inform Employer of its rights and obligations regarding an appeal. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4<sup>th</sup> 43; *A L S Fashion, Inc.* Cal/OSHA App. 14-9046, Denial of Petition for Reconsideration (Jul. 8, 2014).)

Employer's petition also states: "We were told by the OSHA people [names omitted] to appeal all items. This did not happen because we did not understand the process and did not complete the paperwork the right way." Misunderstanding the appeal process is not good cause for a late appeal. (*A.B.S. Manufacturers, Inc.*, Cal/OSHA App. 14-9075, Denial of Petition for Reconsideration (Aug. 27, 2014); *19<sup>th</sup> Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).) And, employers are required to pursue their appeals with the diligence one expects of a reasonably prudent person would devote to his most important legal affairs. (*Golden State Framers, Inc.*, Cal/OSHA App. 07-9526, Denial of Petition for Reconsideration (Apr. 10, 2008).) We decline to reopen Employer's appeal and allow a late appeal of items 1, 3, 4, and 7 at this stage of the proceeding under the existing circumstances.

It may be that Employer has come to regret the bargain it struck with the Division. That is not grounds for granting reconsideration as to the four items not appealed. (See *Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).)

### **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: JUN 29, 2015