

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

In the Matter of the Appeal of:

ROCHE EXCAVATING INC.
1051 East 6th Street
Santa Ana, CA 92701

Employer

Docket 13-R3D1-9036

**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 Roche Excavating Inc. (Employer).

JURISDICTION

Commencing on October 24, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 29, 2012 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 initiated its appeal by telephone call on December 13, 2012.

The Board acknowledged Employer's telephone call by letter dated December 14, 2012. That letter informed Employer that it was required to file a completed appeal form for each citation being appealed and include a copy of the citation(s) with the form(s). The Board's letter also informed Employer that it had 10 days to send or deliver the completed appeal form(s) and citation(s) to the Board, and that failure to do so could result in dismissal of the appeal(s).

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

No response was received from Employer.

On March 27, 2013 the Executive Officer of the Board issued an Order Dismissing Appeal (Order). The Order noted that Employer had not provided a completed appeal form as of its date.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Did Employer establish that its failure to file a completed appeal form was 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 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 said to claim that the evidence does not justify the findings of fact and/or the facts do not support 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 substantial evidence in the record as a whole and appropriate under the circumstances.

Board Regulation section 347(e) defines “completed appeal form” to mean all blanks filled in, boxes checked, signed, and with a copy of the citation being appealed attached. Board Regulation section 359.1 requires a completed appeal form to be filed with the Board within ten days of the Board’s acknowledgement of an appeal which is initiated by means such as a telephone call to the Board, and also provides that failure to do so is grounds for dismissal.

As noted above, after Employer initiated its appeal by telephone call to the Board and the Board acknowledged same, it failed to file a completed appeal forms not only within 10 days of the acknowledgement, but on or before March 27, 2013, more than 3 months after it was due.

Employer’s petition for reconsideration explains that its late filing was “due to inadequate office personnel[.]” This could mean that Employer was insufficiently staffed, or it could mean that its personnel were not performing as required. It appears that the latter meaning was intended, as Employer states that a staff member did not perform her duties as directed, despite claiming she had done so. (Petition, p.1.)

Such circumstances fall within the ambit of what we have termed “internal operating problems,” and which we have often held in a variety of situations do not constitute good cause for late appeals, failure to appear, and other shortcomings. (*Ludivina Lopez-Hernandez dba Olivias Tires & Wheels*, Cal/OSHA App. 11-1965, Denial of Petition for Reconsideration (Dec. 10, 2012).) We have held that when a secretary or administrative assistant falsely tells her supervisor that she has filed an appeal with the Board as directed, it is not good cause for the late filing. (*Southern California Edison*, Cal/OSHA App. 08-9062, Denial of Petition for Reconsideration (Jan. 30, 2009).) Here as in *Southern California Edison*, *supra*, Employer’s staff member misrepresented her compliance with instructions to file documents with the Board. Here, as well, there is no indication that Employer took any steps to verify the assigned task had been performed or completed. (*Id.*)

Therefore, we hold that Employer has not established good cause for its failure to file a completed appeal form within the time required, and affirm the Executive Officer’s dismissal of the appeal.

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 31, 2013