BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: VISTA CONSTRUCTION 3035 Doris Lane Bakersfield, CA 93304 Employer	Docket. 14-R6D7-9015 **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 Vista Construction (Employer).

JURISDICTION

Commencing on October 17, 2013 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 20, 2013, the Division issued citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.[1] Employer timely contacted the Board by telephone on January 9, 2014 to indicate its intention to appeal one or more of the citations. Board Regulation section 359 authorizes Employer's telephone call as a means of initiating the appeal.

The Board acknowledged Employer's telephone call by letter of January 10, 2014. The Board's letter informed Employer that it was required to send the Board a filled out appeal form and a copy of the entire citation packet within 10 calendar days of January 10, 2014, and that failure to do so constituted grounds for dismissal of Employer's appeal. No response was received from Employer.

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

On February 21, 2014, the Board's Executive Officer issued an Order Dismissing Appeal (Order), stating that Employer's appeal was dismissed because it had failed to provide the required documents.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Does the record support the Order?

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 maintains 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 a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

As we noted above, although Employer initiated its appeal within the fifteen working day period established by Labor Code section 6601 and Board Regulation section 359, it failed to perfect its appeal at any time before the Order was issued, as required by Board Regulation 359.1(b). Employer was informed that its appeal was subject to dismissal if it failed to send the Board a completed appeal form and a copy of the entire citation packet within 10 calendar days of the Board's January 10, 2014 letter. Failure to perfect one's appeal as required is grounds for dismissal. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43.)

Although Employer submitted a completed appeal form with its petition for reconsideration, that too has been held not grounds to reinstate the appeal. (*Id.*)

Employer's petition also argues the merits of the citation at issue. It is inappropriate to argue the merits given that Employer has failed to perfect its appeal as required. (*Excelline Food Products, Inc.*, Cal/OSHA App. 07-9491, Denial of Petition for Reconsideration (Feb. 22, 2008); see *Smurfit Stone Container*, Cal/OSHA App. 2010-9245, Denial of Petition for Reconsideration (Jan. 24, 2011).)

Even if we were to reach the merits we would deny reconsideration. Employer's petition admits it was working as a subcontractor at a construction site and that its employees were exposed to unprotected steel rods or projections in violation of section 1712(c) [employees shall be protected from impalement hazards presented by reinforcing rods or similar projections]. Although Employer argues it did not create the hazardous condition and was not responsible for it, Employer does not acknowledge that it was citable for the violation under the so-called multi-employer workplace doctrine found in Labor Code section 6400(b). Under the terms of the statute, Employer was citable as an "exposing" employer.

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 13, 2014