BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **PORTER & SONS PAINTING & CONSTRUCTION, INC.** **3516 I Street** **Eureka, CA 95503** **Employer**	Inspection No. **1713315** **DENIAL OF PETITION FOR RECONSIDERATION**

The California 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 Porter & Sons Painting & Construction, Inc. (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) inspected a worksite in California maintained by Employer from November 28, 2023, through January 9, 2024. On January 9, 2024, the Division issued one citation to Employer alleging two violations of occupational safety and health standards codified in California Code of Regulations, title 8.[1] Employer timely initiated appeals of the citations.

After Employer's appeal was filed, administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a Status Conference among the parties and the ALJ on September 9, 2024. The parties also held one or more "informal conferences" to resolve the issues. As a result of those discussions, on or about September 10, 2024, the Division proposed settlement terms to Employer by email. On September 13, 2024, Employer accepted the proposed settlement by email.

The settlement terms were communicated to the ALJ on September 17, 2024, and acknowledged by her that day. The ALJ issued a Settlement Order (Order) embodying the agreed upon terms on September 24, 2024.

On October 16, 2024, Employer timely filed a petition for reconsideration (Petition).

The Division did not answer the petition.

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

ISSUE

Did Employer set forth sufficient facts in its Petition to warrant setting aside 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 asserts that the Order was procured by fraud, and that it has discovered new material evidence which could not, with reasonable diligence, have been discovered earlier. (Lab. Code § 6617, subds. (b) and (d).)

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.

The Citation alleged two violations. Citation 1, Item 1, alleged a General violation of section 1509, subdivision (c), for failure to post a code of safe practices at the worksite. Citation 1, Item 2, alleged a General violation of section 3395, subdivision (i), for failure to establish a heat illness prevention plan (HIPP).

The settlement terms agreed to by the Division and Employer were to reclassify Item 1 as a Notice in Lieu of Citation with no penalty, and Item 2 stayed unchanged as cited with a penalty of $175.00.

One of Employer's grounds for reconsideration is that he had newly discovered evidence which could not have been discovered even with reasonable diligence. The record indicates that was not the case. First, Employer's email of September 17, 2024, agreeing to the settlement terms stated, "53 years as a contractor with past Osha [sic] inspectors worked with us its [sic] unfortunate this one did not." Employer apparently knew at that time the inspector had not made a second visit to the worksite. Second, Jacoby Porter, whose unverified statement is attached to the Petition, is more likely than not to have told Employer that the inspector did not make a follow-up inspection before the Petition was filed. The Citation was issued in January, the settlement reached in September, and the Petition filed in October 2024. Knowledge of the inspector's failure to return was not new or newly discovered.

Employer also contends that the settlement was procured by fraud because the Division's inspector did not return to the worksite the day after the inspection to determine if the violations noted during the inspection were corrected or abated, although the inspector said he would do so.

Board precedent has defined fraud. "Fraud consists of a false representation of material fact, made recklessly or without reasonable ground for believing its truth, with intent to induce reliance thereon, and on which the injured party justifiably relies." (*Concrete Wall Sawing Co., Inc.*, Cal/OSHA App. 97-1777, Decision After Reconsideration (June 5, 2001); *The Daily Californian/Calgraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991) both citing *Hale v. George A. Hormel & Co*. (1975) 48 Cal.App.3d 73.) The circumstances Employer raises do not fall within the quoted definition.

The alleged failure of the inspector to keep his "word" (Petition) by returning to the worksite the next day is not fraudulent behavior, though perhaps bad manners. The inspector was not legally obligated to return. Further, Employer cannot be said to have justifiably relied on a statement made in January when he agreed to settle in October. He was necessarily aware that a return visit had not occurred. Lastly, Employer's previous experience with OSHA inspections appears to have been that the inspectors would note violations and give him time to correct them before citing them. (Petition.) Be that as it may, that is not required procedure.

For the above reasons, the two bases for reconsideration advanced in the Petition are found not to exist, and none of the other statutory grounds are applicable given this record. Accordingly, we deny the Petition. (Lab. Code §§ 6616, 6617; see *Fiberine GVMR, Inc.*, Cal/OSHA App. 06-9154, Denial of Petition for Reconsideration (Jan. 29, 2007).)

We further see no reason to negate the settlement agreed to by the parties. In agreeing to resolve their dispute, each party accepted the advantages and disadvantages inherent in such an agreement. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).)

We note that the Petition states incorrectly that the heat illness plan violation was dropped but it was in fact affirmed. (Order.) Regarding that violation the Petition seems to contend that because the worksite was in Humboldt County, "the coldest and wettest in the State, [which] never gets above 80 [degrees]," no heat illness plan was required. (Petition.) But Section 3395 does not include an exception for Humboldt County or any other location regardless of its ambient temperatures. Thus, were we to reach the merits, it appears they would be decided against Employer.

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's Order and penalties are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED: 12/10/2024