

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

In the Matter of the Appeal of:

**SINCLAIR CONCRETE, INC.
7205 Church Street
Penryn, CA 95663**

Employer

Inspection No.

1123110

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), having taken the petition for reconsideration filed by Adela Magana (Magana) under submission, renders the following Decision After Reconsideration.

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued two citations to Sinclair Concrete, Inc. (Employer) alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Employer timely appealed. Administrative proceedings followed. On April 30, 2019, an administrative law judge (ALJ) of the Board issued a Settlement Order (Order) which memorialized the terms agreed to by the Division and Employer to resolve the appeals.

Magana timely filed a petition for reconsideration.

The Division and Employer filed answers to the petition.

ISSUES

Did Magana timely file a motion to intervene or for party status in this matter? If not, does Magana have standing to petition for reconsideration?

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

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

- (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.

Magana's petition asserts that the ALJ's Order was issued in excess of her authority.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration, Magana's contemporaneous Motion to Participate, the answers to the petition, and the information provided by the parties in response to the Board's October 24, 2019, Order for Supplemental Information. Based on our independent review of the record, we find that the Settlement Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

To better understand our decision to deny Magana's Motion to Participate, we summarize the circumstances giving rise to this matter.

Employer, along with others, was a subcontractor on a construction project in Modesto, California. Magana's husband worked for Employer, and was killed while working on that Modesto project when employees of another subcontractor caused a roof joist to fall. The joist struck and fatally injured Mr. Magana.

The Division investigated the accident, and based on that investigation cited all three employers involved, namely Employer here, the subcontractor which caused the accident, and the project's general contractor. Employer was cited on June 28, 2016, and timely appealed.

Magana's workers' compensation attorneys and Employer's OSHA defense counsel commenced a series of communications regarding the accident, the Division's citations, and aspects of Magana's workers' compensation action against Employer. Those communications, which were furnished in response to our Order for Supplemental Information, appear to have been conducted with courtesy and cooperation. Magana herself received copies of the citations issued to Employer on August 26, 2016, and gave them to her attorneys on or about September 4, 2016.

After the Division cited Employer, the Division's Bureau of Investigations (BOI) commenced its own investigation into the accident to determine if it would be appropriate to refer the matter to authorities for criminal prosecution. The Board stayed Employer's appeal proceedings pending completion of BOI's review. Magana's attorneys were informed of the BOI process and that the OSHA appeals was stayed until it was completed. BOI concluded its review on March 19, 2019 (no charges were recommended), and the Board issued a notice to the parties that the hearing on Employer's appeal was set for June 4, 2019. Magana, through her attorneys, was informed of the hearing date on March 27, 2019. Earlier, on March 4, 2019, Employer's counsel had informed Magana's counsel of the terms of a proposed settlement agreement between Employer and the Division, noting that the Division had as of that date not yet agreed to

those terms. Employer's counsel later, on March 13, 2019, informed Magana's counsel that the Division had agreed to the tentative settlement terms. Those terms were accepted and memorialized in the ALJ's Order of April 30, 2019.

The foregoing demonstrates that Magana was well informed of the initiation and progress of Employer's OSHA citation appeal proceedings over time. Given those circumstances, in this matter there was no lack of notice to her. Therefore, we evaluate her Motion to Participate under our rules of procedure. (8 Cal. Code Regs., tit. 8, § 345 and following.)

Board regulation section 354, subdivision (c) authorizes a surviving spouse to seek party status in an appeal proceeding "in accordance with Section 371" of our rules. In turn, section 371, subdivision (c) provides that a prehearing motion must be filed at least 20 days before the hearing date. Magana knew both that the Division and Employer had agreed to settlement and that a hearing on Employer's appeals was scheduled for June 4, 2019, no later than March 27, 2019. The last day for her to file a motion to participate (we construe it as a motion for party status) was May 14, 2019. Her Motion, filed on May 29, 2019, was untimely.

Board regulation section 371, subdivision (d), allows a late filed motion to be accepted if a showing of good cause for the late filing is made. Under the circumstances established here, however, we do not find good cause for the late filing of the motion to participate. Magana was well informed of the appeal proceedings in this forum, knew that a settlement was reached and the terms of that settlement, and that a hearing was set for a specified date. Yet her attorneys took no timely action to ask to participate in the negotiations, provide her views on the settlement to the parties, or request party status in the Board proceeding, until May 29, 2019. Accordingly, there being no good cause for its late filing, the Motion to Participate is denied.

Since Magana is a not party to this proceeding, she lacks standing to petition for reconsideration. (Lab. Code § 6614, subd. (a) [any "party" aggrieved by Board order or decision may petition for reconsideration].) Further, we do disagree with the contention in her petition that there was no good cause for the settlement. The Division had ample opportunity to investigate the tragic accident here, both through its role as the agency which enforces workplace safety and through its additional function in investigating accidents for possible referral to criminal enforcement authorities. The ALJ's Order states that Employer accepted responsibility for one of the alleged violations, and that the Division withdrew the other citation based on additional information provided by Employer. It is within the Division's prosecutorial discretion to do so. (*K H S & S of Concord, Inc.*, Cal/OSHA App. 11-0374, Decision After Reconsideration (Sep. 4, 2014).) Thus, while we are sympathetic to Magana's plight due to the tragic loss of her young husband, we find no grounds for granting her petition to reconsider the ALJ's Order.

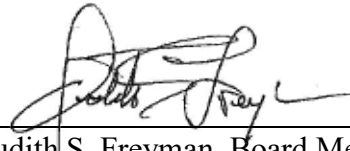
DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **02/25/2020**