

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

In the Matter of the Appeal of:

**BDS Construction, Inc.
23615 Welby Way
West Hills, CA 91307**

Employer

**Inspection No.
1493190**

**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 BDS Construction, Inc. (Employer).

JURISDICTION

On or about March 12, 2021, the Division of Occupational Safety and Health (Division) issued citations to Employer, alleging the following violations of occupational safety and health standards codified in California Code of Regulations, title 8,¹ with penalties totaling \$6,750:

Citation 1, Item 1, alleged a violation of section 341, subdivision (d)(5)(A) [failure to obtain a project permit for the construction of trenches or excavations 5 feet or deeper].

Citation 1, Item 2, alleged a General violation of section 1509 and section 3203, subdivision (a)(8) [failure to include procedures for allowing employee access to Injury and Illness Prevention Program].

Citation 1, Item 3, alleged another General violation of section 1509 (b) [failure to have a written Code of Safe practices relating to employer's operations available at the job site].

Citation 1, Item 4, alleged a General violation of section 1512, subdivision (b) [failure to have an appropriately trained person available to render first aid at the job site].

Citation 1, Item 5, alleged a General violation of section 3220, subdivision (a) [failure to have a written emergency action plan].

Citation 1, Item 6, alleged a General violation of section 3395, subdivision (i) [failure to establish, implement, and maintain a written Heat Illness Prevention Plan].

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Citation 2, Item 1, alleged a Serious violation of section 1541.1, subdivision (a) [employees exposed to cave-in hazards at construction site while working inside an excavation over five feet high without an adequate protective system in place].

The record indicates that the Division issued the above citation package on March 12, 2021. However, it is unclear whether Employer actually received the citation package at that time. The Division attempted to transmit the citation package via certified mail the same day. However, the tracking information on the certified mail receipt shows that the package did not reach Employer, and has remained “in transit” since April 12, 2021. The Division also provided evidence that it sent the citation package to Employer’s designated email address on March 12, 2021.

Nevertheless, on October 27, 2021, Employer initiated an appeal by telephone. (The Board infers that Employer did in fact receive the citation package at some point prior to that date.) Employer also submitted an Appeal Form, indicating Employer’s preference for service via email.

On November 1, 2021, the Board issued Employer a Notice of Docketed Appeal, and served it on Employer, at Employer’s indicated email address.

On June 3, 2022, the Board asked the Division to provide its proof of service to determine whether Employer’s appeal was timely initiated. On June 16, 2022, the Division provided the certified mail receipt and email to the Board.

On June 27, 2022, the Board issued a Notice of Untimely Appeal (Notice), and served it on Employer via email. In that Notice, the Board explained that Employer’s appeal “cannot proceed because it appears untimely.” Further, the Board advised Employer that it could submit a declaration with facts to show good cause for filing a late appeal, or its appeal would be dismissed. Employer did not respond to the Notice.

On October 7, 2022, the Board issued an Administrative Order Dismissing Appeal (Order) on the grounds that Employer’s appeal was untimely. The Board also served the Order on Employer via email.

On February 14, 2023, Employer responded to the Order, which the Board construes as a Petition for Reconsideration (Petition). In its Petition, Employer states that it “received notice of appeal determined incomplete on February 14, 2023 via email Marlene Harris was kind to send it.” However, Employer’s Petition does not indicate whether Employer also received the Order when it was first sent on October 7, 2022.

ISSUE

Does the Board have jurisdiction to grant reconsideration in this matter?

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

The Board has fully reviewed the record in this case. 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.

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 none of the statutory grounds upon which we may grant reconsideration, which is reason to deny the petition. (*Arodz Motorsports, LLC, dba A1 Tune & Lube*, Cal/OSHA App. #1087194, Denial of Petition for Reconsideration (Nov. 22, 2017); see also Lab. Code § 6618.) However, even if were we to interpret the petition as asserting one or more of the statutory grounds in Labor Code section 6617, we still could not grant reconsideration.

As noted above, the record is unclear as to whether Employer initiated its appeal within 15 working days of receipt, as required. (See Lab. Code, § 6601; § 359, subd. (d).) However, even if we assume that Employer's initial appeal was timely, the Board still lacks jurisdiction, because Employer failed to file its Petition within 30 days of the Order.

The Board's record in this matter shows that the Order was served on October 7, 2022. Absent evidence to the contrary, the Board must assume that Employer received the Order on October 7, 2022, when it was properly served via email, to Employer's preferred email address. Employer's Petition does not argue that it never actually received the Order at the time it was sent, thereby waiving that issue. (Lab. Code, § 6618.) Thus, under Labor Code section 6614, subdivision (a), Employer was required to petition the Board for reconsideration within 30 days of service of the Order. That 30-day period expired on November 14, 2022.² Employer did not respond to the Order until February 14, 2023.

² To explain how this deadline is calculated, the Board first notes that 30 calendar days after October 7, 2022 is November 7, 2022. However, under Board regulations, that deadline is extended by five days for service via email. (§ 348, subd. (c).) Adding five days to November 7, 2022 brings us to Saturday, November 12, 2022. Where a deadline falls on a Saturday, it is extended to the next "working" day. (§ 348, subd. (a) [If the last day is not a working day, time shall be extended to the next working day"]; § 347, subd. (ee) ["Working Day" means any day that is not a Saturday, Sunday or State-recognized holiday...].) Here, the next "working day" was Monday, November 14, 2022.

In short, Employer was required to petition for reconsideration within 30 days, i.e., by November 14, 2022, but it took no action in response to the Order for approximately three months. Accordingly, the Board lacks jurisdiction to grant Employer's petition for reconsideration, because it is untimely. (*Cecilio Murrieta dba El Toro Bravo Tortilleria*, Cal/OSHA App. 1232113, Denial of Petition for Reconsideration (May 29, 2018) (citations omitted).)

DECISION

For the reasons stated above, the petition for reconsideration is denied. The Administrative Order Dismissing Appeal is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 04/14/2023

