

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

In the Matter of the Appeal of:

**SO CAL STONE FABRICATORS, INC.
310 North Cota Street, Suite N
Corona, CA 92878**

Employer

Inspection No.

1464711

**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 So Cal Stone Fabricators, Inc. (Employer).

JURISDICTION

The Division of Occupational Safety and Health (Division) issued Employer two citations on June 25, 2020, alleging violations, six General and one Serious, of occupational safety and health standards codified in California Code of Regulations, title 8,¹ pursuant to an inspection at a place of business maintained by Employer in Corona, California. Proposed penalties totaled \$2,175.00.

Employer timely appealed the citations. Employer and the Division did not reach any settlement agreement, nor did an ALJ issue a Settlement Order pursuant to an agreement of the Division and Employer to resolve and reduce the penalties to be paid by Employer, and/or to arrange an installment payment plan.

On November 30, 2020, Employer was electronically served with a Notice of Status Conference, set for 3:30 pm on February 16, 2021. On February 16, 2021, Employer failed to appear at the status conference. The ALJ subsequently issued an Order Dismissing Appeal for Failure to Appear (Order). Employer did not timely respond.

On May 9, 2021, the Division sent a collection letter to Employer, seeking payment in full of the \$2,175 penalty. Employer then, on May 19, 2021, filed the instant Petition for Reconsideration.

The Division did not answer the petition.

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

ISSUE

Does the Board have jurisdiction to take Employer's Petition under submission?

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 findings of fact do not support the order or decision (Lab. Code, § 6617, subd. (e).) Issues not raised in the petition for reconsideration are considered waived. (Lab. Code, § 6618.) 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 lack jurisdiction to grant the Petition. We also note, however, that even had we jurisdiction in this matter, we would dismiss the Petition on its merits.

The dispositive issue is whether the Petition was timely filed. The Board's record shows that the Order Dismissing Appeal was served to Employer's address as listed in Employer's appeal forms on February 16, 2021. In the absence of Employer's response within fifteen calendar days, the Order then became final. Labor Code section 6614 provides that a Petition for Reconsideration of a decision or order by an ALJ must be made within 30 days after service of the ALJ's decision or order. Employer's Petition was filed on May 19, 2021, over 90 days after the issuance and service of the ALJ's Order. We lack jurisdiction to grant reconsideration when the Petition is filed late. (See, e.g., *Quintana Construction, Inc.*, Cal/OSHA App. 1198572, Denial of Petition for Reconsideration (June 24, 2020).)

In addition, even if the Board had jurisdiction over this matter, Employer has failed to show good cause for failure to appear at the status conference. An employer's failure to appear at a duly-noticed hearing or conference is grounds to dismiss the appeal. (*Rosal Auto Recyclers*, Cal/OSHA App. 10-1050, Denial of Petition for Reconsideration (June 4, 2012); *Agri-Feed Industries, Inc.*, Cal/OSHA App. 09-4055, Denial of Petition for Reconsideration (Dec. 6, 2010).) Section 383 of the Board's regulations, however, authorizes the Board to reinstate an appeal upon a showing of good cause, including after dismissal for failure to appear. "Good cause" is defined as "sufficient facts to establish a reasonable basis for the failure to appear." (§ 383, subd. (c).)

The Board has found good cause for failure to appear, for example, in the event of “unanticipated emergencies.” (*Ameripride Uniform*, Cal/OSHA App. 04-106, Decision After Reconsideration (Apr. 3, 2008).) The Board has found such emergency circumstances to exist in cases involving genuine medical or family crises (*Alkia Ikaika Enterprises, Inc.*, Cal/OSHA App. 10-1191, Decision After Reconsideration (May 11, 2012) [finding that the attempted suicide of the employer's son constituted good cause for failure to appear.]), and natural disasters such as earthquakes (*Overland Mechanical*, Cal/OSHA App. 93-2099, Decision After Reconsideration (Mar. 28, 1995) [finding damage to employer's office during Northridge earthquake constituted good cause for failure to appear.]).

The Board has also repeatedly stated that certain circumstances do not constitute good cause. The Board's long-established precedent is clear that an employer's internal operating problems, such as failure to timely receive mail, email, or phone messages, are not good cause for failure to appear, timely file an appeal, or comply with Board orders. (See, e.g., *Fabrication Technologies Industries, Inc.*, Cal/OSHA App. 1437646, Denial of Petition for Reconsideration (Feb 22, 2021); *Rafidain, Inc., dba Genie Car Wash & Oil Change*, Cal/OSHA App. 1162918, Denial of Petition for Reconsideration (May 12, 2017).) This appears to be Employer’s argument.

Employer states that it had “no contact regarding this matter” between July 29, 2020, following a phone call between Employer’s Owner, Joel Bouman (Bouman), and a Board employee regarding Employer’s appeal, which was docketed on July 28, 2020, and Employer’s acknowledged receipt of the Division’s collection letter, on or about May 9, 2021. Employer states that only upon receiving the collection notice did it contact the Board and discover that it had not received time-sensitive emails regarding its appeal. Employer further states that its email address “did not allow any email to be received from OSHA the entire process.” Specifically, Employer claims that it did not receive emails sent through the ecourt.com system. Employer acknowledges, however, that “contact was received by mail.”

A review of the record indicates that Employer’s version of events is somewhat disingenuous. First, Bouman contacted the Board and asked for, and received, information on filing a Petition for Reconsideration on or about April 28, 2021, before receiving the Division’s collection letter, but still well outside of the statutory deadline. Employer’s suggestion that it had no contact with either the Division or the Board until it received the mailed copy of the collection letter is inconsistent with the record on this point. Second, Employer failed to appear at a Prehearing Conference on September 21, 2020 (notice served July 28, 2020), but Bouman later responded to email correspondence from the ALJ and the Division, originally dated September 17, 2020, informing him of the date of that conference.² Employer’s claim that it had received no communication from the Board regarding its appeal is therefore incorrect.

² The previous emails in the correspondence are dated September 17, 2020, and include messages from the ALJ to both Employer and the Division’s representatives, stating, in relevant part, “This matter is set for a Status Conference with the Appeals Board on Monday, September 21, 2020, at 3:30 P.M.” and, in the ALJ’s final message before Employer’s response (which Employer sent almost six months later), “I look forward to speaking with the parties on Monday.”

In addition, the record indicates that Employer was, or reasonably should have been, aware its appeal had been dismissed well within the statutory window to either respond to the Order or to petition for reconsideration. The record shows that the ALJ called Employer on the day of the hearing, February 16, 2021, to notify it that its appeal was in danger of being dismissed. Employer did not respond until March 24, 2021, when Bouman emailed the ALJ via the abovementioned group email chain, stating he was “following up” regarding “a message for me that you had called a few weeks back [...] not sure what it was pertaining to,” and noting that the “last contact we had with you [was] on 9/17/20.” The ALJ responded on March 26, 2021: “The appeal for So Cal Stone Fabricators Inc. has been dismissed due to a failure to appear at two consecutive status conferences. The Notice of Dismissal was served to the address designated in the appeal forms by So Cal Stone Fabricators.” While this may lend credence to Employer’s implied argument that it was not aware of the February 16 status conference, it undermines any claim that Employer was unaware its appeal had been dismissed, within the statutory timeframe to file a Petition for Reconsideration.

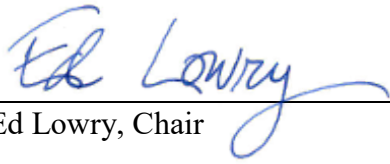
Employers are required to handle their appeals with the degree of care a reasonably prudent person would undertake in the conduct of their most important legal affairs. (See, e.g., *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) This includes ensuring that communications from the Division and the Board are properly and timely received and responded to. Employer failed to do this. The record indicates that Employer failed to handle its appeal with the requisite degree of care. Employer therefore has not shown good cause for its failure to appear, and even if the Board had jurisdiction over Employer’s petition, we would deny it on that basis.

Finally, we note that nothing in the record indicates Employer has made any effort to pay the assessed penalty. Employer, in fact, only filed its Petition when the Division pursued collection. Employer’s Petition also appears to evince a belief that Employer has arranged “to reduce fees to \$1,100.00,” and Employer requests “to settle for the original amount \$1,100.00 set up [sic] payment plan.” Employer is mistaken. No such settlement agreement or payment plan exists. Since Employer failed to appear at two duly-noticed pre-hearing conferences during which such a settlement might have been negotiated, the time to arrange any settlement agreement with the Division is past.

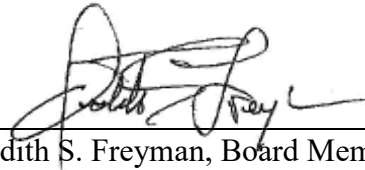
DECISION

For the reasons stated above, the Petition for Reconsideration is denied. The ALJ’s Order Dismissing Appeal for Failure to Appear and penalty of \$2,175.00 are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **06/14/2021**