

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

In the Matter of the Appeal of:

GARY BOTHUN dba
BOTHUN TURKEY FARM
P.O. Box 456
Snelling, CA 95369

Employer

Docket. 15-R4D2-0137

**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 Gary Bothun doing business as (dba) Bothun Turkey Farm (Employer).

JURISDICTION

Commencing on September 10, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 2, 2014 the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were commenced before an administrative law judge (ALJ) of the Board. The parties were duly notified that a pre-hearing conference was set for November 12, 2015. A representative of the Division attended and Employer failed to appear.

On November 13, 2015 the ALJ issued to Employer a "Notice of Intent to Dismiss Appeals." That Notice informed Employer that unless it were to file a written motion containing sufficient facts to show that Employer's failure to appear at the pre-hearing conference was reasonable and for good cause its appeal would be dismissed. Employer did not submit a reply.

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

On December 30, 2015 the ALJ issued an Order Dismissing Appeal (Order).

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

ISSUE

Was there good cause for Employer's failure to appear?

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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) For purposes of a full discussion, we nonetheless may construe the petition to assert the evidence does not justify the findings of fact.

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.

Employer has not shown that the failure to appear was reasonable and for good cause, and it is Employer's burden to do so. (*Ameripride Uniform*, Cal/OSHA App. 04-106, Decision After Reconsideration (Apr. 3, 2008).) Employer's petition addresses the failure to appear only by way of apologizing for it. Under such circumstances dismissing the appeal was appropriate (*Spreckles Sugar Co.*, Cal/OSHA App. 13-0945, Denial of Petition for Reconsideration (Jun. 25, 2014).)

Employer's petition seeks relief in the form of a penalty reduction or elimination. In view of the failure to show good cause for the failure to appear, relief based on the merits of the underlying citation is not warranted. (*Metro Sheet Metal, Inc.*, Cal/OSHA App. 11-0784, Denial of Petition for Reconsideration (Apr. 26, 2012), fn. 2.)

Even if it were appropriate to address them, the individual points Employer raises do not warrant relief. The petition states Employer has closed the turkey ranch, declared bankruptcy, and sought other employment. We note that bankruptcy does not discharge debts due to penalties payable to a governmental unit. (See 11 USC § 523, subd. (a)(7).) And, we have held that closing a business is not a basis for penalty elimination. (*Delta Transportation, Inc.*, Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012).) Also, Employer's petition contends that the individual involved in one of the cited violations was not an employee but rather an independent contractor. While the latter point is, in theory, potentially grounds for relief, we could not decide on facts not in evidence, even if we were able to reach the merits advanced in the petition. (*Estenson Logistics*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011) [Board may not assume dispositive facts not in evidence]; and see *Service Scaffold Co., Inc. dba Safety Service Scaffold*, Cal/OSHA App. 10-1445, Denial of Petition for Reconsideration (Dec. 13, 2011) [Labor Code § 6616 requires petition to set forth in detail facts supporting petition].)

We mention, however, that Employer did not challenge the abatement requirements and that the citation appears to indicate that all items have been abated. As such, Employer may be entitled to abatement credit, and we suggest the Division's Accounting Unit check to see whether such an adjustment has been made, and, if not, whether it should be.

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: MAR 15, 2016