

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

In the Matter of the Appeal of:

PAN-PACIFIC PLUMBING CO. dba  
PAN-PACIFIC MECHANICAL  
17911 Mitchell South  
Irvine, CA 92614

Employer

Dockets. 14-R3D3-1020 through 1022

**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 Pan-Pacific Plumbing Co., also referred to as Pan-Pacific Mechanical, (Employer).

**JURISDICTION**

Commencing on October 17, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On March 4 2014, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board. The matter was duly noticed for a contested evidentiary hearing, and both parties appeared. At the hearing the parties informed the ALJ they had agreed to resolve the matter by stipulation, and the ALJ issued an Order (Order) memorializing that agreement on April 20, 2015. On May 13, 2015 the ALJ issued an Erratum, which related back to April 20, 2015, to correct a clerical error in the summary table attached to the Order.

On April 12, 2016 Employer filed a petition for reconsideration.

The Division did not answer the petition.

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

## **ISSUES**

Was the petition filed timely? Is a Board decision “evidence” within the meaning of Labor Code section 6617, subdivision (d)? Should the Board’s recent decision in *McCarthy Building Co., Inc.* (Cal/OSHA App. 12-3458, Decision After Reconsideration (Feb. 8, 2016) be applied retroactively to Employer’s proceeding?

## **FINDINGS OF FACT**

Employer and the Division resolved the subject citations by agreement, the terms of which are summarized in the Order.

The parties’ agreement was accepted and memorialized in the Order issued by an ALJ on April 20, 2015. To correct a clerical error in the Summary Table attached to the Order, the ALJ issued an Erratum and a corrected Summary Table on May 13, 2015.

Among the citations resolved by the parties’ agreement was a violation of section 1629, subdivision (a)(4).

Neither party objected to the Order or its correction.

Neither of the parties petitioned for reconsideration of the Order within the time permitted by Labor Code section 6614, subdivision (a).

The Board did not take the Order under reconsideration on its own motion within the time permitted by Labor Code section 6614, subdivision (b).

## **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 as grounds for its petition for reconsideration that it has discovered new evidence which, in the exercise of reasonable diligence it could not have discovered and produced at hearing.

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. We hold that Employer's petition for reconsideration was not timely, that our decision in *McCarthy Building Co., Inc., supra, (McCarthy)* is not "evidence" within the meaning of Labor Code section 6617, subdivision (d), or Evidence Code section 140, and that the *McCarthy* decision does not apply retroactively to Employer's proceeding.

In 2014 Employer was cited for, among other citations not at issue, a serious violation of section 1629, subdivision (a)(4), which requires there be two means of access to the top floor of a building under construction. Employer and the Division agreed to resolve the alleged section 1629 violation. Under that agreement the Division amended the classification of the alleged violation to "general" instead of "serious" and reduced the penalty. For its part Employer agreed to accept the violation as amended and pay the associated penalties without admitting wrongdoing.

In February of this year the Board issued its *McCarthy* decision, which held that the roof of a building is not a floor, and that section 1629, subdivision (a)(4) did not require there be two stairways to the roof. Employer contends that the *McCarthy* decision is new evidence, and that the holding in *McCarthy* should apply retroactively to Employer's matter. The result of Employer's argument and petition, if granted, would be to grant retroactively Employer's appeal of the already-settled section 1629 violation.

1. Timeliness. The *McCarthy* decision was issued on February 8, 2016, and took effect on the date it was filed. Even assuming, *for discussion only*, that a petition for reconsideration can be filed with respect to a matter which had become final nine months earlier, Labor Code section 6614, subdivision (a) would require a party to file its petition for reconsideration within 30 days of the date the Board decision or action in question is served. Accordingly, under this assumption, the last day for Employer to have filed its petition for reconsideration was March 14, 2016. Thus, even under this most favorable (and theoretical) assumption, Employer's petition, having been filed on April 14, 2016, was late. It is well established that the Board has no jurisdiction to grant a late-filed petition. (Lab. Code sect. 6614, subd.(a); *Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1108; [4] citing *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984); *A & M Ornamental Iron, Cal/OSHA App. 15-9132, Denial of Petition for Reconsideration* (Nov. 24, 2015).)

2. Evidence. Employer's petition asserts that it has discovered new evidence which it could not, in the exercise of reasonable diligence, have presented at the hearing. (See Labor Code section 6617, subd. (d).) The language of Labor Code section 6617, subdivision (d) speaks to evidence for production "at the hearing." The California Evidence Code defines "evidence" to mean "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or non-existence of a fact." (Evid. Code sect. 140.) A Board decision a "writing[.]" but not one which tends "to prove the existence or non-existence of a fact." Rather it is a quasi-judicial action which resolves disputed issues of facts and/or law. The newly discovered evidence provision of Labor Code section 6617, subdivision (d), does not apply here.<sup>2</sup>

Further, Evidence Code section 145 states, "The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing." Although the Evidence Code and Labor Code are distinct enactments, the definition of "the hearing" in Evidence Code section 145 supports our holding that Labor Code section 6617, subdivision (d), is also referring to the hearing at which the parties announced their agreement, or at which they could have litigated the issues presented by the citations.

Employer's petition may be read to imply that its petition was timely since the petition was filed within 30 days of the time Employer states it learned of our *McCarthy* decision. Since the *McCarthy* decision is a matter of public record and because Employer was not a party to that proceeding, the Board had no obligation to inform Employer of the *McCarthy* decision. (Compare *Jones v. Flowers* (2006) 547 U. S. 220 [government may not deprive individual of property without fair notice of intent to do so].) Therefore, even if *McCarthy* were to be "evidence" within the meaning of Labor Code section 6617, subdivision (d), and even if issuing a subsequent decision in an entirely different proceeding were a ground for reconsideration, Employer's petition was not timely.<sup>3</sup>

3. Retroactivity. California case law holds that, with very few exceptions, appellate court decisions in civil cases have retroactive effect. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973.) United States Supreme Court decisions are in accord. (*Teague v. Lane*, 489 U.S. 288; *Griffith v. Kentucky*, 479 U.S. 314.) The Board follows the rule of retroactivity. (*Realtime Staffing Services Inc. dba Select Staffing*, Cal/OSHA App. 12-3687, Denial of Petition for Reconsideration (Nov. 19, 2015); *BLF, Inc. dba Larrabure Framing*, Cal/OSHA App. 02-4675, Decision After Reconsideration (Jan. 7, 2010).) Decisions are held

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<sup>2</sup> We have found no published court decision stating that the same language in section Labor Code 5903, subd. (d) of the Worker's Compensation Act (Labor Code section 3200 and following) means that a judicial or quasi-judicial decision of a court or the Workers' Compensation Appeals Board is "evidence" in the sense of a writing tending to prove or disprove the existence of a fact. And, as we understand the Workers' Compensation Appeals Board's application of section 5903, subdivision (d), the types of "decisions" which it considers evidence are those of medical reviewers, not judicial or quasi-judicial decisions. (See, *Stacey Saunders v. Loma Linda University Medical Group, PSI*, 2014 Wrk. Comp. PD Lexis 659.)

<sup>3</sup> We note that Labor Code section 6617 does not state that a *subsequent* decision in a *different* case is grounds for reconsideration. Section 6617 does state, "The petition for reconsideration may be based upon one or more of the following grounds and no other[.]"

to apply retroactively to “cases on direct review or [which are] not yet final.” (*Newman, supra*, 48 Cal.3d, pp. 976, 993, and 980, last quoting *Griffith, supra*, 479 U.S. p. 328.) We have applied the concept of retroactivity to matters not yet final. (See, for example, *Realtime* and *BLF, Inc., supra*.)

If decision retroactivity applies only to cases not yet final, then *McCarthy* does not apply here. Employer resolved its appeals by stipulation with the Division before *McCarthy* was decided, the parties did not seek reconsideration, and the Board saw no reason to take the matter under reconsideration on its own motion. Once the time for reconsideration in this proceeding expired, the time to file a petition for writ of mandate also expired (see Labor Code section 6627)<sup>4</sup>, the matter was final and the Board lost jurisdiction. To reopen this matter now would violate the rule of finality. (See *Merritt-Chapman & Scott Corp. v. Industrial Accident Comm.* (1936) 6 Cal.2d 314; *Robinson v. Robinson* (1961) 198 Cal.App.2d 193, 196, citing *Pico v. Cohn* 91. Cal. 129 [there must be an end to litigation].) Finally, it is against common sense to allow a party which had agreed to resolve a matter in litigation by settlement to later reopen the matter, after it became final, because of subsequent developments in the law. An agreement resolving litigation allocates risks among the parties in return for benefits, such as the risk (shared by both parties) that a subsequent ruling on an issue would alter the outcome of the case being settled. One takes the good with the bad in making any bargain, including an agreement resolving a legal dispute. Absent fraud or other circumstances which would void it, the bargain is binding. (*Pico v. Cohn, supra*; *Jack Barcewski dba Sunshine Construction, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration* (Apr. 16, 2007).)

## DECISION

For the reasons stated above, the petition for reconsideration is denied.

ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MAY 27, 2016

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<sup>4</sup> We note that a petition for writ of mandate may be filed only *after* a petition for reconsideration is filed or reconsideration is ordered by the Board. It follows that no writ of mandate could be filed in this proceeding in 2015 because the jurisdictional prerequisite of a petition for reconsideration or a Board order of reconsideration had not been made.