

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

In the Matter of the Appeal of:

LUCKY HONG FARM, INC.  
23546 Adobe Road  
Bakersfield, CA 93307

Employer

Docket. 14-R3D1-9004

**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 Lucky Hong Farm, Inc. (Employer).

**JURISDICTION**

Commencing on May 14, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 4, 2013, 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>

On November 14, 2013 Employer timely initiated its appeals of the citations by telephoning the Board and expressing its intent to appeal.

On November 15, 2013 the Board acknowledged Employer's call by letter, which further informed Employer that it was required to provide a filled out appeal form for each citation appealed and a copy of the entire citation packet "within 10 calendar days of the date of [the Board's] letter." (Original emphasis.)

No response was received from Employer.

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

On January 10, 2014, the Executive Officer of the Board issued an Order Dismissing Appeal (Order) based on Employer's failure to send completed appeal forms and a copy of the citation packet to the Board.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

**ISSUE(S)**

Was dismissing Employer's appeals appropriate under the circumstances?

**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 responded to the Order on January 21, 2014 by submitting appeal forms and copies of the citation packet with a letter stating, in pertinent part, a "request that the above citation (sic) be appealed." In view of the Order, we construe Employer's January 21<sup>st</sup> letter to be a petition for reconsideration.<sup>2</sup>

That petition, however, 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).) Also, the

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<sup>2</sup> This is the construction of Employer's January 21<sup>st</sup> letter most favorable to Employer. Treating that letter as a second attempt to appeal the citations would result in dismissal of the appeal as late. (See Lab. Code § 6601.) There is no provision in the Labor Code or Board Regulation permitting an employer the right to file a second appeal of the same citation(s) when its first has been dismissed other than through the reconsideration process. (See Lab. Code § 6614(a).)

petition was not “verified upon oath” as required by Labor Code section 6616, which is another basis for denying it. (*Juana Gonzalez dba Los Reyes Restaurant*, Cal/OSHA App. 10-9184, Denial of Petition for Reconsideration (Oct. 19, 2010).)

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.

As pointed out above, Employer did not submit appeal forms and a copy of the citation packet within 10 calendar days of the Board’s November 15, 2013 letter confirming Employer’s telephonic appeal initiation. While Board Regulation section 359 allows appeals to be initiated by phone call, when that course is taken Board Regulation section 359.1(b) also requires a completed appeal form to be filed within ten days thereafter.

When, as here, an employer submits appeal forms and a copy of the citation packet *after* its appeal has been dismissed for failure to do so in the time required, the appeals may be dismissed. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4<sup>th</sup> 43.) In *Murray Company, supra*, the employer appealed but failed to send the Board completed appeal forms and a copy of the citation packet as required, and its appeal was dismissed. Employer then retained counsel who filed a petition for reconsideration which included completed appeal forms and a copy of the citation packet. The Board denied reconsideration, which action was upheld on appeal. We hold that *Murray Company, supra*, is applicable in the present situation, and accordingly decline to grant reconsideration.

### **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: MARCH 7, 2014