

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SHIMMICK CONSTRUCTION CO.,
INC./OBAYASHI CORP. JV.
8201 Edgewater Drive, Suite 202
Oakland, CA 94621

Employer

Dockets. 11-R3D1-2562 through 2570

**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 Shimmick Construction Co., Inc./Obayashi Corp. JV (Employer).

JURISDICTION

Commencing on March 23, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 21, 2011 the Division issued 9 citations 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 held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On June 30, 2015 the ALJ issued a Decision (Decision) which upheld the violations alleged in the 9 citations.

Employer timely filed a combined petition for reconsideration and motion to file a supplemental petition for reconsideration. Employer's petition we

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

address here. The Board granted Employer's motion for leave to file a supplemental petition by Order filed on August 20, 2015.

The Division filed an answer to the petition.

ISSUE

Did the ALJ's delay in issuing the Decision deprive Employer of due process of law?

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 contends the ALJ exceeded her powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

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 Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer argues that it was denied due process of law because the Decision was not issued within 30 days of the date the matter was submitted as required by Labor Code section 6608. As Employer states in its petition, the hearing in this matter took nine days over a period of more than 11 months. Then the parties were allowed another two months to file closing briefs. The matter was submitted for decision on November 26, 2013. The ALJ then exercised her authority under Board regulation section 385, subdivision (a), to extend the submission date 17 times from December 18, 2013 until May 22, 2015. As noted, on June 30, 2015 she issued the Decision.

Employer argues the multiple extensions were an abuse of discretion and denied it due process.

It appears the controlling case authority addressing the issue of a delay in an administrative body issuing a decision is *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133. There the California Supreme Court held that unless a statute establishing a time within which a decision is to be issued also states what consequence is to result for exceeding the time limit, the limit is directory, not mandatory. (*Id.*, at p. 1145.) The Court also pointed out that a party has the remedy of seeking to have the administrative body compelled to act, i.e. decide in present context, by virtue of seeking a writ of mandate under Code of Civil Procedure section 1085. (*Id.*, p 1148.)²

Although less than ideal, there is no good alternative to allowing an ALJ the time needed to render a thorough and thoughtfully considered decision. One theoretical alternative would be to dismiss the citations at issue, but that would prejudice the Division and may do grave disservice to affected employees. Another alternative would be to require the matter to be retried, which obviously would further delay an outcome. And, we note that Employer's argument that the judge's memory must have faded over the delay period is not necessarily well-founded. The judge has a fixed record to refer to in addition to her own notes, and Employer's argument about memory implicitly assumes the judge has done no work on her decision during the period of delay, rather than reviewing the record, doing research, and drafting her decision, all activities which would keep her recollection fresh.

² The Board has denied petitions for reconsideration based on the grounds that Labor Code section 6608 has not been complied with, and two of those employers have sought judicial review of those. In both cases the writs were denied. (*CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 11, 2013) citing *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145, writ denied Kings County superior court, Jul. 2015); *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007), writ denied Imperial County Superior Court (Apr. 2008).

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: SEP 21, 2015