BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: WEST BEACH MAINTENANCE 8226 Donovan Street Downey, CA 90242 Employer	Dockets. 14-R3D5-1333 through 1336 **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 West Beach Maintenance (Employer).

JURISDICTION

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

On March 21, 2014, the Division issued four 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 prehearing conference and a status conference. The matter was duly noticed for a contested evidentiary hearing to be held on September 9, 2014. Prior to the hearing Employer moved and was granted permission to amend its appeals to include the affirmative defense of its not being an employer as defined in Labor Code sections 6304 and 3300.

On September 9, 2014, the parties informed the ALJ that they had reached agreement to resolve the matter on stated terms. The ALJ

[1] References are to California Code of Regulations, Title 8 unless specified otherwise.

memorialized those terms in an Order (Order) issued on September 12, 2014, which was corrected by an Erratum issued on September 26, 2014 and which changes are not at issue in this Denial of Petition for Reconsideration.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUES

Did Employer satisfy the Labor Code's requirements for filing a petition for reconsideration?

Did Employer establish that its petition for reconsideration should be granted and the settlement voided?

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 that the evidence does not justify the findings of fact and the findings of fact do not support the Order

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. We have taken no new evidence. 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.

The record shows that Employer did not provide any proof that it served its petition for reconsideration on the Division as required by Labor Code section 6619. On October 7, 2014, after receiving Employer's petition, Board

staff noted the absence of a proof of service and wrote Employer explaining the requirement it serve a copy of its petition on the Division. No response or proof of service has been received from Employer. We also note that the Division has not filed an answer or other responsive pleading to the petition, which indicates, though it does not prove, that the Division has not been served with the petition.

The service requirements of Labor Code section 6619 are mandatory, as the section states that a copy of the petition "shall be served" on the other parties to a proceeding. Failure to do so may result in the denial of the petition. (*Descor Inc., dba Descor Builders*, Cal/OSHA App. 09-0930, Denial of Petition for Reconsideration (Jun. 16, 2010).) We deny Employer's petition on that basis.

We deny Employer's petition on its merits as well.

Employer raises several points in its petition, which are addressed below.

First, Employer claims it "is a small contractor with no employees[.]" Employer claims that the natural persons who were working for him were independent contractors although that detail is not raised in the petition itself and there is no evidence that such was the case. Employer did not make a *prima facie* showing that the individuals working for him were independent contractors. For example, there is no evidence or representation that they were themselves licensed contractors. If they were not, they are Employer's employees by virtue of Labor Code § 2750.5 [presumption that unlicensed individuals are employees]. Further, even under the traditional "exercise of control" analysis Employer was the employer here. (*Jesse Ramirez Drywall*, Cal/OSHA App. 93-489, Decision After Reconsideration (Mar. 23, 1999).) He supervised the work and set up and tested the fall protection method used in this instance. Nor does Employer's petition satisfy its burden of proof on the question. (*Desert Valley Date, Inc., dba Desert Valley Date*, Cal/OSHA App. 2011-2207, Denial of Petition for Reconsideration (Aug. 23, 2013) [claim of independent contractor status is affirmative defense, burden of proof on party asserting defense].) Moreover, although Employer's amended appeals raised the issue of its having no employees, its agreement to settle the matter necessarily involved waiving that and its other defenses.

Second, Employer states he "was not aware that he was withdrawing his appeal during settlement negotiations." Misunderstanding the significance of a negotiated settlement is not grounds for reconsideration. (See *Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).) Further, under the circumstances here it is likely Employer did understand what he was doing. The settlement agreed to on the day of hearing came after two other procedural steps in which resolution of the matter was not achieved. And, the agreement reached included a 36-

month payment plan, which suggests Employer knew it was abandoning his appeal.

Third, Employer argues that the Division "filed [sic; "failed"?] to comply with section 2200 regarding discovery" propounded more than 30 days before hearing. It is not known what "section 2200" Employer is referring to, as no additional information is given in the reference. Board regulations regarding discovery are not so numbered, there is no Government Code section 2200, and the Code of Civil Procedure provisions pertaining to discovery do not include a section 2200. Employer may have intended to cite Code of Civil Procedure as its discovery provisions are numbered in the 2000 range, and include a section 2020, which it may have mistyped as "2200". Be that as it may, the Code of Civil Procedure does not apply to Board proceedings (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43) and Employer waived any issues regarding discovery in settling the matter. Indeed, such issues may have been part of the Division's calculus in agreeing to the ultimate resolution.

Next, Employer challenges the serious classification of Citation 2. The agreement of the parties, as noted on the Summary Table attached to the Order, was that he withdrew his appeal, thus conceding as a matter of law the allegations of the Citation. (Board regulation § 361.3; *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) In addition, Employer argues that although there was no side rail on the scaffold, the employee in question was tied off to a secure anchorage and thus in no danger of falling. The two shortcomings of this argument are (1) an employer is not allowed to substitute its own safety measures for those required by a safety order (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008); and (2) we have only Employer's assertion that the object to which the fall protection lanyard was tied to (a steel standpipe) was adequately secure. In addition, Employer may not dispute the merits of the citations or its defenses in a petition for reconsideration after having agreed to resolve the matter on stated terms, absent fraud or misrepresentation, which are not alleged or apparent. (*Barbagelata Farms*, Cal/OSHA App. 09-2083, Denial of Petition for Reconsideration (Sep. 23, 2010).)

Lastly, Employer claims the penalty assessed was excessive. The penalty for Citation 2 was $5,400, which is 30 percent of the base penalty of $18,000 for a serious citation. Further, the penalties for the other two serious citations were reduced to $540, 10 percent of the penalty for Citation 2. Indeed total penalties for the alleged violations were, by agreement, reduced from $16,950 to $6,980, which is to be paid over a period of 36 months. Employer may now regret the bargain he made, but that is not grounds for reconsideration. (See, *Jack Barcewski, supra.*)

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
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