

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

In the Matter of the Appeal of:

CHER XUECHUAN MA dba
PARADISE ISLAND SPA
8068 N. Cedar Ave.
Fresno, CA 93720

Employer

Docket: 15-R6D5-9160

**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 Cher Xuechuan Ma dba Paradise Island Spa (Employer).

JURISDICTION

The Division of Occupational Safety and Health (Division) issued citations to Employer bearing an issuance date of April 27, 2015. On July 28, 2015 Employer telephoned the Board indicating its intent to appeal the citation(s). Appeal forms lacking an attached citation were received at the Board on August 10, 2015.

On August 11, 2015, the Board sent Employer a letter explaining that its appeal appeared to be late, and that it had not submitted the citations with the appeal forms. The letter also advised Employer how to request extension of the filing period. Employer was informed that the documents must be received within 10 calendar days. Employer submitted copies of the citations to the Board on August 14, 2015.

On September 15, 2015 the Board received a letter from Employer signed under penalty of perjury, requesting extension of the filing period for good cause. A Presiding Administrative Law Judge (PALJ) of the Board denied the request to file late appeals on September 21, 2015, finding that good cause did not exist.

Employer subsequently submitted a timely petition for reconsideration to the Board on October 22, 2015.

ISSUE

Did Employer establish good cause for its late appeal?

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 fails to state any of the bases set forth in Labor Code section 6617. Alone, this failure to state one or more grounds upon which reconsideration may be granted is grounds for denial of the petition for reconsideration. (*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).)

Even assuming Employer's petition set forth a basis for reconsideration that was compliant with Labor Code section 6617, the petition still suffers from a fatal flaw. Employer does not explain how or why the PALJ's Order Denying Late Appeals is in error. Under Labor Code 6601, the Board may grant an extension of the time period for filing an appeal only where good cause is demonstrated. Reviewing the record and Employer's petition, the Board cannot find that the PALJ erred or that Employer has shown good cause for the untimely filing in its petition.

Employer's petition addresses the merits of the Division's citations, rather than the issue of good cause for lateness of the appeal. Employer questions regarding whether the citations were addressed to the appropriate entity. This is an issue to be contested at hearing, as the PALJ explained in her Order Denying Late Appeals. Despite the existence of this possible defense, Employer still has an obligation to file its appeal timely, or provide a good cause reason for the failure. (*C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (Apr. 13, 2001) [Division has burden of demonstrating it has cited the correct entity.]) The Board stated in a similar Denial of Petition for Reconsideration, where appellant argued that the ALJ

erroneously assigned it the status of "employer" and responsibility for acts of a company the appellant did not own, that "the existence of a potential defense cannot be considered by the Appeals Board unless an appeal is timely filed, or good cause for the failure to do so is established." (*Williams Janitorial*, Cal/OSHA App. 12-9047, Denial of Petition for Reconsideration (Jun. 8, 2012).)
Employer has not shown good cause for the late appeal.

DECISION

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

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: DEC 08, 2015