

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

In the Matter of the Appeal of:

STONEWARE ENTERPRISES, INC.
1575 South State College Blvd.
Anaheim, CA 92806

Employer

Docket. 13-R3D1-3514

**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 Stoneware Enterprises, Inc. (Employer).

JURISDICTION

Commencing on September 10, 2013 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 6, 2013 the Division issued a citation 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.

On October 6, 2015, the ALJ issued a Decision (Decision) which held Employer had committed the violation alleged in the citation and imposed a civil penalty.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

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

ISSUES

Must Employer's petition for reconsideration be denied because Employer did not provide proof that it has served the petition on the Division?

Did Employer and the Anaheim Fire Department (Department) enter into an agreement under which Department was to report a workplace injury to Employer's employee to fulfill both the Department's and Employer's reporting obligation under Labor Code section 6409.1 subdivision (b) and section 342, subdivision (a)?

FINDINGS OF FACT

Employer did not provide the Board with proof of that it had served its petition on the Division.

One of Employer's employees suffered a reportable workplace injury.

Employer did not report the injury to the Division.

Employer and the Department did not enter into an agreement under which the Department was to report the injury to the Division to fulfill both the Department's own and Employer's reporting obligations.

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 that 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.

We initially point out that Employer's petition for reconsideration did not include a proof of service indicating the petition had been served on the Division. The Board informed Employer of its obligation to do so by letter dated November 17, 2015. No proof of service has been received from Employer. Labor Code section 6619 provides (in pertinent part): "A copy of the petition for reconsideration shall be served forthwith upon all parties by the person petitioning for reconsideration." Service on the other party or parties is mandatory. (Labor Code section 15 [shall is mandatory].) Failure to provide proof that the petition was served on the other party or parties requires us to deny the petition. (*Bill Nelson General Engineering Construction, Inc.*, Cal/OSHA App. 10-2399, Denial of Petition for Reconsideration (May 8, 2013).)

Even if Employer had served its petition on the Division as required, we deny it on the merits.

It is not disputed that Labor Code section 6409.1, subdivision (b), and the corresponding regulation at section 342, subdivision (a), require employers to "immediately" report serious on-the-job injuries to the Division, and that Employer knew of this obligation but did not make the required report.

Employer relies on a statement apparently made at the scene of the accident by a member of the Anaheim Fire Department that the Department "were filing the workers comp claim[.]" (Employer's petition, sic.) We construe the quoted language to mean that Employer is referring to the injury report to the Division, not a workers' compensation claim. The Department's statement would be consistent its independent obligation as a first responder to report workplace injuries to the Division. (See Labor Code section 6409.2, and section 342, subdivision (b) [first responders must immediately report serious injuries to Division]; *California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).)

Section 342, subdivision (d) provides that an employer may enter into an agreement to have a third party make the injury report to the Division on the employer's behalf. (Section 342, subd. (d); *Helpmates Staffing Services*, Cal/OSHA App. 05-2239, Decision After Reconsideration (Jan. 20, 2011).) The evidence in the record, however, does not establish that Employer and the Department entered into such an agreement. Further, the evidence shows that while the Department did make a report, it did not state in that report that it was reporting for Employer as well as itself. Therefore, even if Employer and the Department had entered into an agreement that the Department was to

report on Employer's behalf, the Department's failure to do so means Employer is in violation of the section 342, subdivision (a) reporting requirement. (*OC Turf and Putting Greens*, Cal/OSHA App. 13-1751, Denial of Petition for Reconsideration (Jun. 9, 2014).) Where an employer and third party agree that the third party is to make an injury report for the employer but fails so to report, the employer is responsible for the failure of its agent or delegee to make the report. (*Id.*)

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: DEC 21, 2015