

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

In the Matter of the Appeal of:

T & R CONSTRUCTION GROUP
7116 Valjean Avenue
Van Nuys, CA 91406

Employer

Dockets. 14-R4D3-4120 and 4121

**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 T & R Construction Group (Employer).

JURISDICTION

Commencing on July 9, 2014 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 3, 2014 the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed two of the citations, Citation 2 and Citation 3.²

Thereafter administrative proceedings were held before Administrative Law Judges (ALJ) of the Board. A pre-hearing conference was held by one ALJ on March 30, 2015, at which it was determined a one day hearing was required. On April 8, 2015, the Board duly notified the parties that the hearing was set for July 23, 2015 at a time and place specified in the notice. A different ALJ was assigned to hear the case.

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

² Citation 2 alleged a serious violation of section 1675, subdivision (b) [portable ladder not properly on level footing]. Citation 3 alleged a serious violation of section 1670, subdivision (a) [personal fall arrest systems not worn].

On July 23, 2015 a representative of the Division appeared for the hearing, but Employer's representative did not appear.

On August 6, 2015 the Board sent the parties a "Notice of Intent to Dismiss Appeals" (Notice of Intent) which informed them that Employer's appeal would be dismissed unless Employer were to file a written motion requesting reinstatement of its appeals containing sufficient facts to establish that Employer's failure to appear at the hearing was reasonable and for good cause.

Employer replied on August 18, 2015.

On September 2, 2015 the ALJ issued an Order Dismissing Appeals (Order). The Order found that Employer had not provided proof it had served its reply on the Division, and further that Employer's reply did not demonstrate that the failure to appear was for good cause.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Did Employer establish that its failure to appear at the hearing was reasonable and for good cause?

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 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).)

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 mentioned above, on April 8, 2015, the Board sent the parties a Notice of Hearing informing them that the hearing in the subject matter was scheduled for July 23, 2015 in Van Nuys at 9:00 a.m. In addition, the hearing ALJ sent the parties an email on July 20, 2015, asking whether they had settled or were “prepared to go forward with hearing[.]” Employer replied early the next morning: “Moving forward with hearing...”, which was the complete text of its reply. On July 23rd, however, Employer did not appear for the hearing.

Employer’s reply to the Board’s Notice of Intent stated in part as the reason, “I did not received (sic) a notification via e-mail or in writing stating what time was the said Hearing.” This was not correct, as the Notice of Hearing stated both the time and place for the hearing. Also, Employer’s response to the Notice of Intent went on to say, “I was under the assumption a second notification in writing will be mailed to the office with date and time.” This is a tacit admission that a *first* notice had been received, and is also inconsistent with Employer’s email on July 21, 2015 that it was “[m]oving forward with hearing.”

The ALJ considered the above facts and dismissed the appeals.

Employer’s petition for reconsideration admits receiving the July 20th email from the ALJ. It then states, “From doing business in Las Vegas, I assumed (apparently incorrectly, in retrospect) that I would receive a follow-up email telling me the precise time I would be on the docket on that day, if you were able to fit me in.” The petition goes on to explain in more detail the apparent differences between how OSHA hearings are scheduled in Nevada and California.

Whatever California’s and Nevada’s procedures may be, Employer acted unreasonably in assuming they were the same, particularly in light of communications from the Board which belied that assumption. For example, it is was unreasonable for Employer to hold to its belief that it would be receiving a second written hearing notice after its July 21st response to the ALJ’s inquiry about going to hearing on July 23rd. A prudent person, having just sent a reply that he was going forward with a hearing, would reasonably be expected to

ascertain when and where the hearing would be held two days hence either by checking his own records or by inquiry to the Board.

Misunderstanding the appeal process is not good cause for failure to appear at a hearing. (*Chore Auto Wrecking*, Cal/OSHA App. 09-0605, Denial of Petition for Reconsideration (Jan. 14, 2010).) Employer was duly notified of the date, time and place of the hearing, was reminded of the pending hearing by the ALJ just days prior to it, acknowledged the reminder by indicating the hearing would go forward, and yet failed to appear. Under the circumstances, good cause for the failure to appear was not established.

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: NOV 20, 2015