

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

In the Matter of the Appeal of:

**EMPIRE REMODELING, INC.
1490 Camden Avenue
Campbell, CA 95008**

Employer

Inspection No.
1541484

**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 Empire Remodeling, Inc. (Employer).

JURISDICTION

Beginning July 13, 2021, the Division of Occupational Safety and Health (the Division), conducted an inspection of a worksite maintained by Empire Remodeling, Inc. (Employer).

On December 3, 2021, the Division issued four citations to Employer, alleging nine violations of California Code of Regulations, title 8.

Employer failed to initiate an appeal the of Citations within the 15 working day time frame provided by section 359, subdivision (d), and Labor Code section 6601.

Employer appealed the citations on January 5, 2022, through its representative, Mindy Brereton of GotSafety.

The Board subsequently sent the Division a request for proof of service or delivery receipt, so that the Board could determine whether Employer's appeal was timely. The Division responded to this request on March 18, 2022. The Division uploaded an undated Certified Mail Receipt. The tracking number associated with the receipt stated the package had been delivered on December 6, 2021.

On March 24, 2022, the Appeals Board issued to Employer a Notice of Untimely Appeal (Notice). The Notice stated,

The Appeals Board cannot process your appeal unless you show good cause for initiating your appeal late. If you believe you do have good cause for initiating your appeal late, a Declaration explaining the facts you rely upon to show good cause why a late appeal should be accepted must be sent to the Appeals Board.

[...]

Your Declaration and Proof of Service must be postmarked within 20 days of the date of service of this Notice of Untimely Appeal located on the attached Declaration of Service by Mail or Email and delivered to 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833 by USPS mail, delivery service or in person.

Employer failed to provide any response to the Notice of Untimely Appeal. Thereafter, on May 24, 2022, the Appeals Board issued an Administrative Order Dismissing Appeal (Order).

On December 8, 2022, Employer through its representative, filed a Petition for Reconsideration (Petition), requesting reconsideration of the Administrative Order Dismissing Appeal. The Petition states that Employer received its citation on January 5, 2022 and sent it to their representative, who filed an appeal the same day. The Petition also attacked the Certified Mail Receipt sent by the Division, noting it had no delivery date. Employer also argued it had not been signed by any employee of Employer.

ISSUE

Does the Board have jurisdiction to grant reconsideration in this matter?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case. 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 Board has taken no new evidence.

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 none of the statutory grounds upon which we may grant reconsideration, which is reason to deny the petition. (*Arodz Motorsports, LLC, dba A1 Tune & Lube*, Cal/OSHA App. #1087194, Denial of Petition for Reconsideration (Nov. 22, 2017).) However, even if we were to construe the petition to assert one or more of the statutory grounds in Labor Code section 6617, we could not grant reconsideration.

The dispositive issue is whether the petition was timely filed. The Board's record in this matter shows that the Order was served on May 24, 2022. Both the Order and Labor Code section 6614, subdivision (a) gave Employer notice that a party may petition the Board for reconsideration within 30 days after service of the decision or order at issue. Employer's petition was filed on December 8, 2022, several months late.

We lack jurisdiction to grant reconsideration when the petition is filed late. (*Amerisk Engineering Corp.*, Cal/OSHA App. 1129146, Denial of Petition for Reconsideration (Dec. 21, 2018), citing Labor Code sections 5900 and 5903; *Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1108; citing *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984.)

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member



FILED ON: 01/20/2023