

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

In the Matter of the Appeal of:

KNIGHT TRANSPORTATION
PORT SERVICE, LLC
2960 E. Victoria Street
Rancho Dominguez, CA 90221

Employer

Docket. 15-R3D5-9225

**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 Knight Transportation Port Service, LLC (Employer).

JURISDICTION

Commencing on July 10, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 29, 2014, the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

The record shows that Employer received the citation on December 30, 2014.

Employer initiated its appeal of the citation by telephoning the Board on September 21, 2015. The Board acknowledged that telephone call by letter dated September 22, 2015. That letter provided information on the steps Employer needed to take to perfect its appeal. Employer submitted a completed appeal form on September 25, 2015.

After reviewing the citation and the appeal form, it was determined that Employer's appeal appeared to have been filed late. On October 19, 2015 Board staff wrote the parties concerning the apparently late appeal. Staff informed

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

Employer that its appeal appeared to be late and further that unless it made a showing that the late appeal was reasonable and for good cause, it was subject to dismissal. Employer did not respond. Staff wrote the Division requesting documentation of when the citation was served on Employer. The Division provided proof that the citation was delivered by certified mail on December 30, 2014.

On January 6, 2016 the Executive Office of the Board issued an Order Dismissing Appeal (Order) based on Employer's failure to respond to the notice that its appeal appeared to be late.

Employer timely filed a petition for reconsideration.

The Division filed an Answer to the petition.

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 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).) Construed in the light most favorable to Employer, the petition may be deemed to assert that the evidence does not justify the findings of fact.

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. Further, the record, including the information and arguments contained in the petition, does not show there was good cause for the late appeal.

Employer's attorney asserts in the petition that a response was served on the Board on October 23, 2015, and includes a copy of a certificate of service he executed that day. We assume, without deciding, for this analysis that counsel did mail the Board a response but it was not received.

Employer's petition asserts that a completed appeal form was filed with the Board. That is correct. The problem was, and is, that the appeal was late, and that unless Employer establishes good cause for the late appeal, the citation at issue becomes final and the appeal will be dismissed. (See Labor Code section 6601.) Employer's petition acknowledges as much. (Petition, p. 2, ¶ 7.)

The petition goes on to state that a showing of good cause was made in the documents sent in October 2015, which were not received by the Board. We have now considered the documents Employer has provided with its petition as replacements, and hold they do not establish good cause for the late appeal.

Employer's petition includes a declaration by one of Employer's managers dated July 8, 2015, which was apparently the document sent to the Board in response to the Board's October 19th letter. The declaration asserts that on October 24, 2014 he sent the Division a 58 page response to a request for documents. He says no further communication from the Division occurred until the citations arrived in December 2014. He then contacted the Division and spoke to a new person as the original inspector had retired. The declaration goes on to state the following:

"8. Acting under the belief that the Citation would be resolved simply by providing Ms. Ali [new inspector] with the documentation I had previously sent to Mr. Bashar, on December 30, 2014, I sent the 58 pages directly to Ms. Ali and, on the same day, she sent me an e-mail whereby she acknowledged receipt of the documents.

"9. Upon my transmittal of the documents to Ms. Ali, I believed there was no need to respond any further to the Citation unless and until I was advised by Ms. Ali that the documentation provided failed to demonstrate that the safety orders listed in the Citation were not violated. As I never heard from Ms. Ali again, I believed

this matter had been resolved and continued with that belief until I received notice that the penalties were due and payable.

“10. I now understand that I was mistaken in this belief and respectfully request leave to be granted a late appeal of the Citation.”

The statements quoted above, the date of the declaration containing them, and Board precedent indicate that good cause for the late appeal was not shown.

First, the quoted statements indicate a misunderstanding of the appeal process, which is not good cause for a late appeal. (*A.B.S. Manufacturers, Inc.*, Cal/OSHA App. 14-9075, Denial of Petition for Reconsideration (Aug. 27, 2014).) Further, it is established that the information regarding a cited employer’s appeal rights included with the citation is legally adequate to give notice of those rights and the steps necessary to exercise them. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43; *McLean Steel, Inc.*, Cal/OSHA App. 87-9002, Denial of Petition for Reconsideration (Mar, 27, 1987).) Under the circumstances, therefore, Employer was not justified in believing the citation would be resolved by its submission of documents to the Division.

Second, it is pointed out that the declaration quoted was executed on July 8, 2015, and indicates that on or before that day Employer had “received notice that the penalties were due and payable.” (Decl., ¶ 10.) Even assuming the penalty notice arrived on the day the declaration was executed; no steps to file Employer’s appeal were taken for over two months. Thus, even if the Board were to hold that, under the circumstances, Employer did not realize it had to appeal until July 8, 2015 (the date most favorable to Employer); it still failed to appeal within fifteen working days of that date. That distinguishes this matter from *Harris & Ruth Painting Contracting, Inc.*, Cal/OSHA App. 86-9024, Decision After Reconsideration (Nov. 17, 1985).

In *Harris & Ruth*, (*supra.*), employer was cited and timely sent a detailed response disputing the merits of the alleged violations to the Division, but not the Board. Employer later filed an appeal with the Board after receiving notice that its response to the Division did not effectuate an appeal. The Board ruled that under the circumstances *Harris & Ruth* showed a clear intent to appeal, had acted timely in response to the citations, but had directed its first communication to the Division and not to the Board. Late appeal was granted. The Board’s decision noted that “the content of the report” sent to the Division was “[c]onsistent with [employer’s] contention that it believed it had appealed[.]” The report “list[ed] measures or procedures demonstrating it had not violated the safety orders or had defenses to the alleged violations.” (*Id.*)

By contrast, here Employer has not provided the Board with copies of the documents the declaration states were thought sufficient to resolve the citation. Thus the Board cannot assess whether, as in *Harris & Ruth, supra*, they were sufficient to show an intent to appeal, because the Board may not consider facts not in evidence. (*Rolled Steel Products Corp.*, Cal/OSHA App. 10-4047, Decision After Reconsideration (Jun. 30, 2014), citing *Overaa Construction v. California Occupational Safety and Health Appeals Bd.* (2007) 147 Cal.App.4th 235, 244-245.) And, Employer effectively failed to timely appeal twice: once when first served with the citation and a second time (albeit a notional “second bite at the apple” advanced here only for sake of discussion and to give Employer benefit of the most favorable assumptions) when it received notice of penalties due and payable. Had Employer filed its appeal within fifteen working days of receiving the notice of penalties due and payable, rather than more than two months later, the posture of this matter may well have been different. The notice of penalties put Employer on notice that its previous belief that “simply” sending documents to the Division would resolve the citation was not correct. (See Declaration quoted above.) Given the information provided Employer with the citation initially and the further indication that all was not as it had assumed when the notice of penalty arrived, it was not reasonable for Employer to wait until September, 2015 to initiate its appeal.

DECISION

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

ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAR 21, 2016