

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

In the Matter of the Appeal of:

**VICTOR C. GARCIA, an Individual
dba FLORES AUTO SERVICE
1801 5th Street
Santa Ana, CA 92703**

Employer

Inspection No.
1359495

**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 Victor C. Garcia, dba Flores Auto Service (Employer).

JURISDICTION

On February 6, 2019, pursuant to an inspection commenced on November 8, 2018, at a place of employment maintained by Employer in Santa Ana, California, the Division of Occupational Safety and Health (Division) issued citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer was served with a Notice of Incomplete Appeal on March 5, 2019. An Order Dismissing Appeal was issued on May 17, 2019, for failure to submit a completed appeal. Victor C. Garcia (Garcia, or Petitioner) timely filed a Petition for Reconsideration on May 24, 2019. The Board took this petition under submission on July 19, 2019, and remanded the matter to Hearing Operations on August 23, 2019, for further proceedings to determine whether Mr. Garcia was the Employer at the time the Division issued the citations.

Again, the appeal was dismissed for failure to submit a complete appeal. Petitioner was served with a Notice of Incomplete Appeal on September 4, 2019, and an Order Dismissing Appeal subsequently issued on November 4, 2019. The Board never had the opportunity to consider the question of employer status raised in Petitioner's first petition.

On August 18, 2021, Petitioner untimely filed the instant Petition for Reconsideration, again arguing that Petitioner was not the Employer in this matter and requesting that the appeal be reinstated.

The Division did not answer the petition.

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

ISSUE

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

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 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 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 lack jurisdiction to grant the Petition. We also note, however, that even had we jurisdiction in this matter, we would dismiss the Petition on its merits.

A. Petitioner failed to act with reasonable diligence in pursuing its reinstated appeal.

At no point has Petitioner provided a completed appeal, including an appeal form for each citation appealed and a copy of the complete citation package, despite being provided on several occasions with instructions on filing and completing its appeal, warnings that its appeal was in danger of being dismissed, and multiple opportunities to correct its incomplete appeals.

Petitioner's first Petition for Reconsideration was timely filed on May 24, 2019, following an Order Dismissing Appeal, issued on May 17, 2019, for failure to submit a completed appeal. In the first petition, handwritten by Mr. Garcia, Petitioner stated that he had "transferred the business" to his cousin, Jaime Navarro, as of March 31, 2018, but, unbeknownst to Petitioner, Mr. Navarro never "changed everything over to himself." As a result, Petitioner argued, he was "never made aware of any circumstances that would lead to so many violations and citations."

The Board took Petitioner's first petition under submission on July 19, 2019, and remanded the matter to Hearing Operations on August 23, 2019, for further proceedings to determine whether Petitioner Victor Garcia was the Employer. Again, however, the appeal was dismissed for failure to submit a complete appeal. The second Order Dismissing Appeal was served on November 4, 2019. The Board never had the opportunity to consider the question of employer status raised in Petitioner's first petition.

Petitioner now, almost two years later, presents a second Petition for Reconsideration, again asserting that he was not the Employer, again offering no explanation for his prior failure to submit a completed appeal, and again requesting that the appeal be reinstated. The second Petition, however, asserts different facts than the first. Whereas the first petition stated that Mr. Garcia "transferred the business" to Mr. Navarro on March 31, 2018, the most recent Petition claims that Petitioner, Mr. Garcia, "never acquired an ownership in" Flores Auto Services, and that his only involvement in the business was "periodically try[ing] to help Mr. Navarro succeed." Provided in support of Petitioner's new claims are declarations from the former wife and sister of Jaime Navarro, who is now deceased, stating that Mr. Navarro, not Mr. Garcia, was always the business's owner.

It is well-established that, in pursuing an appeal, an employer must "act with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs." (*Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) Petitioner here has not acted with the requisite degree of care. On two previous occasions, Petitioner's appeal in this matter has been dismissed because Petitioner failed to provide a completed appeal form for each citation being appealed, and a copy of the complete citation package. Petitioner has never submitted a completed appeal.

Petitioner, in short, has previously raised the same issue, requesting the same relief, and failed to act with reasonable diligence in pursuing its reinstated appeal when it was granted a remand on that question, as well failing to act with reasonable diligence in untimely filing the instant Petition for Reconsideration.

B. The Petition for Reconsideration was filed late, and the Board therefore lacks jurisdiction to grant reconsideration.

The Board's record in this matter shows that the second Order Dismissing Appeal was served on November 4, 2019. In the absence of Employer's response within fifteen calendar days, the Order Dismissing Appeal then became final. 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. Petitioner's instant Petition was filed in August, 2021, almost two years 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.)

There is one potential complicating factor here in that the Petition asserts that Petitioner, Victor Garcia, was not an owner of Flores Auto Service at the time of the Division’s investigation and thus not a citable Employer in this matter. Another matter currently pending before the Board, *Andrew Harrison Barnes*, Inspection No. 1272378, presents the question of whether a petitioner’s status as an employer is a matter of fundamental jurisdiction, meaning the citations were void *ab initio* (“from the start”) and thus could be challenged at any time; or, alternatively, whether employer status is not a matter of fundamental jurisdiction, meaning the Board now lacks jurisdiction to take the petition under consideration because the petitioner failed to challenge the Order and raise the question of employer status within the statutory timeline.

If this were Petitioner’s first Petition for Recommendation in this matter, and raised the question of Mr. Garcia’s status as Employer for the first time, even two years after the filing deadline, the Board would be thus inclined to be to take the Petition under submission until we have had the opportunity to issue a Decision After Reconsideration in the matter of *Andrew Harrison Barnes*. Even assuming, however, that employer status is a matter of fundamental jurisdiction which may be raised at any time, Petitioner here has previously raised the same issue, requesting the same relief, and failed to act with reasonable diligence in pursuing its reinstated appeal when it was granted a remand on that question. No grounds now exist upon which the Board may re-open this matter for a third time, almost two years later.

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **09/16/2021**