BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. 1443556
ECO-BAY SERVICES **1501 Minnesota Street** **San Francisco, CA 94107** **Employer**	**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 Eco-Bay Services, Inc. (Employer).

JURISDICTION

The Division of Occupational Safety and Health (the Division) cited Employer for two general violations of California Code of Regulations, title 8[1] section 1509 (failure to maintain an effective Illness and Injury and Illness Prevention Program), and one regulatory violation of section 342(a) (failure to report work connected fatalities or serious injuries). Employer timely appealed.

On February 22, 2022, Employer, through its representative, accepted the Division's settlement offer. The Settlement Order issued on February 24, 2022

Employer filed a "Motion to Rescind Settlement Order," which the Board construes as a Petition for Reconsideration, on March 9, 2022. The Division filed a reply on March 24, 2022.

ISSUE

Is a mistake by an employer's representative, in accepting the Division's settlement offer, a sufficient basis for the Board to rescind the Settlement Order?

REASON FOR DENIAL OF PETITION FOR 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 find that the Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances. We have taken no new evidence.

[1] Unless otherwise specified, all section references are to California Code of Regulations, title 8.

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.

The proper procedure for an employer's representative to seek a revocation of a Settlement Order is for the employer to petition the Board for reconsideration in compliance with Labor Code Sections 6614 through 6619. In addition, section 364.2 governs Board procedure regarding settlement orders. Section 364.2, subdivision (f) provides the following grounds for reconsideration of a settlement order:

> Within 30 days of the date of the Notice of Acceptance of Settlement Order, any party, intervenor, or obligor aggrieved may file a petition for reconsideration of the Settlement Order on the basis of fraud, misrepresentation, mutual mistake of fact, or undue influence in the formation of the Settlement Order.

Here, Employer alleges none of these grounds. Employer does not allege fraud, misrepresentation, or undue influence. Employer argues only that its representative made a mistake of fact in accepting the settlement terms. This was not a mutual mistake by both the Division and the Employer, but a unilateral mistake by Employer.

Employer's primary argument is that its representative accepted the Division's settlement offer in error. The petition explains that, at the time, the representative was engaged in handling two appeals for Employer. Employer argues its representative mistakenly accepted a settlement offer for Inspection 1443556, when Employer believed it had directed its representative to accept a settlement offer for Inspection 1474119.

According to Employer's representative, this confusion on Employer's part seems to have arisen because a status conference for Inspection 1443556 took place on December 13, 2021, shortly after Employer accepted the Division's settlement offer for Inspection 1474119; the settlement order in that matter had issued on December 9, 2021. During a February 22, 2022, status conference with the Division, however, both Employer's representative and the Division knew that Inspection 1443556 was the appeal under discussion. Employer's representative states, in the petition:

> "During the conversation it was my understanding that they [Employer] were willing to accept the offer for #1443556 but Eco Bay Services was under the impression they accepted the other offer [sic] citation # 1474119 and that we were still in discussion with the Division regarding citation #1443556. When we discussed them

> over the phone, he [Employer] stated to accept the offer and it was my understanding that it was for #1443556."

(Petition, p. 1.)

Even if there had been any confusion on Employer's part regarding which matter was discussed at the December 13 status conference, there certainly should have been none at the status conference in February. Division District Manager Dennis McComb sent the original settlement offer for Inspection 1443556 to employer's representative via email on July 27, 2020 and followed up again via email on February 17, 2021, April 19, 2021, and February 22, 2022, well after the other matter was settled.

On February 22, 2022 employer's representative accepted, on behalf of Employer, the terms of the settlement offer that the Division had created for Inspection 1443556. McComb sent the email chain with offer and acceptance to the Board's Administrative Law Judge (ALJ), who issued the Settlement Order. This was a unilateral mistake of communication between Employer and its representative, not Employer and the Division; it was not, therefore, a mutual mistake, and not grounds for rescinding the Settlement Order.

In addition, the Board has long held that employers must handle their appeals with the degree of care a reasonably prudent person would undertake in the conduct of its most important legal affairs. (*Timothy J. Kock*, Cal/OSHA App. 01-9135. Denial of Petition for Reconsideration (Nov. 20, 2001); *Chamlian Enterprises, Inc.*, Cal/OSHA App. 08-1322, Consolidated Denials of Petitions for Reconsideration (Aug. 13, 2009).) Board precedent further holds that errors made by an employer's representative or attorney in handling an employer's appeal are attributable to the employer. (*Kitagawa & Sons, Inc., dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004); *EDCO Waste and Recycling Services, Inc.,* Cal/OSHA App. 12-0163, Denial of Petition for Reconsideration (Mar. 7, 2013).) The error of Employer's representative here is thus attributed to Employer.

Here, Employer's representative did not act with reasonable care and diligence in communicating important information to the employer. As the Division summarized in its Answer, these two appeals were distinctly numbered, processed by different Division district offices, represented by different staff, and dealt with distinct subject matter.

The settlement for Inspection 1443556 – the subject of Employer's instant petition – was accepted on February 22, 2022, more than two months after Employer accepted the settlement for Inspection 1474119. Employer's appeal of Inspection 1443556 was handled by the San Francisco Office, by District Manager McComb. There was no attorney assigned to represent the Division on the appeal. It related to two General and one Regulatory violation(s).

Inspection 1474119, on the other hand, was handled by the Foster City district office, by attorney Rachel Brill and safety inspector Barbara Kim. It related to two Serious violations, and, as noted, was settled on December 9, 2021. There should have been no cause for confusion, given the multiple factors distinguishing these two matters. A reasonably diligent representative should have made sure that the employer knew which appeal was being discussed before accepting the settlement offer on the employer's behalf. (See *De Soto Gardens Apartment G & K Management Co., Inc.*, Cal OSHA App. 96-2418, Denial of Petition for Reconsideration (July 16, 1997)

[Division sought to withdraw from settlement after its District Manager erred in entering into settlement].)

Finally, the petition also states, "The Employer does have more evidence to provide for both the Citation 1-2 and 1-3." However, Employer offers no explanation as to why this evidence could not have been discovered and produced prior to the settlement. A reasonably diligent representative should have discovered and produced all relevant evidence related to the employer's appeal at a time prior to accepting the settlement offer. (*Owl Crane & Rigging Co*., Cal/OSHA App. 94-1018, Denial of Petition for Reconsideration (June 29, 1995).)

Because the petition fails to state adequate grounds to rescind the Settlement Order, and because Employer failed to act with reasonable diligence in pursuing its appeal, Employer's petition for reconsideration must be denied.

DECISION

For the reasons stated above, the petition for reconsideration is denied. The Settlement 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: 04/11/2022