

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

In the Matter of the Appeal of:

**GOLDEN STATE CONSTRUCTION
& FRAMING, INC.
1240 N. 9th Street
Modesto, CA 95350**

Employer

Inspection No.

1532874

**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 Golden State Construction & Framing, Inc. (Employer).

JURISDICTION

On November 23, 2021, pursuant to an inspection at a place of employment maintained by Employer in Pleasanton, California, the Division of Occupational Safety and Health (Division) issued two citations to Employer alleging Serious violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer, through its safety consultant, filed its appeal on January 7, 2022, approximately three weeks after the fifteen working day filing deadline. (§ 359; Lab. Code, §§ 6600, 6602.)

On May 31, 2022, the ALJ issued an Order Denying Late Appeal (Order).

On August 22, 2022, Employer untimely filed the instant Petition for Reconsideration. Employer's Petition was unverified and lacked proof of service. (Lab. Code, §§ 6616, 6619.) On August 22, 2022, the Board served Employer with a Deficiency Letter providing Employer with notice and instructions for verification and proof of service. Employer failed to respond.

The Division did not answer the petition.

ISSUE

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

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

**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 conclude the petition must be denied for any of one of three separate reasons, each of which independently support denial of the petition.

First, 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 in itself is reason to deny the petition. (*Arodz Motorsports, LLC, dba Al Tune & Lube*, Cal/OSHA App. 1087194, Denial of Petition for Reconsideration (Nov. 22, 2017).)

Second, even if we were to construe the petition asserting one or more of the statutory grounds in Labor Code section 6617, we could not grant reconsideration, as the petition was untimely. (Lab. Code, § 6614.) The ALJ issued the Order on May 31, 2022, finding that Employer failed to demonstrate good cause for filing a late appeal, and stating that Employer's appeal would not be processed. Both the Order itself 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 – which merely repeats the assertions in the declaration filed by Employer's safety consultant, as discussed below – was filed on August 22, 2022, almost two months late. The Board lacks 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.) In addition, Employer failed to provide verification, pursuant to Labor Code section 6616, and proof of service, pursuant to Labor Code section 6619, for its Petition.

Finally, even if we had jurisdiction to reach the merits of Employer's petition, the Board would still deny the petition.

The Division served the citations on Employer via certified mail on November 23, 2021. The citations were received at Employer's office on November 26, 2021. The notification requirements of the Labor Code are satisfied if the Division serves a citation by certified mail which has been signed for by an agent or employee of the employer, as was the case here. (*Pyramid Telecommunications, Inc.*, Cal/OSHA App. 04-9063, Denial of Petition for Reconsideration (Jul. 11, 2005).) Pursuant to section 359, and Labor Code sections 6600 and 6602, an employer must file an appeal of the citation within 15 working days of receipt of the citation. Accordingly, Employer was required to file its appeal no later than December 17, 2021. Employer's safety consultant filed Employer's appeal on January 7, 2022.

The Board served Employer with a Notice of Late Appeal on May 2, 2022. Section 359 and Labor Code section 6601 allow an employer to submit a written statement of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing.

On May 23, 2022, Cassie Simons (Simons), a representative of Employer's safety consultant, Safety Compliance Institute (SCI), submitted a declaration asserting that the appeal should not be deemed late because the Division served only Employer, not SCI, with the citation. The declaration states that Employer had hired SCI to be its "active consultant" on the case and, when Employer received the citations at its office, the owner "assumed" that Simons and SCI had received a copy. Rather than confirming that SCI had received a copy of the citations, Employer took no further action until Simons followed up with Employer "a couple weeks later." The declaration attributes the late filing to "a miss communication [sic] on who had the citations."

The ALJ found that Employer failed to demonstrate good cause for its late appeal. We concur with the ALJ and conclude that even if Employer's petition had been timely filed, the Board would deny reconsideration due to lack of good cause for the late filing of the appeal.

First, Labor Code section 6600 provides that the appeal period commences when *the cited employer* receives the citation. The Board has held that the Division is not required to serve a representative with the citation in order to satisfy service requirements; the Division's statutory obligation for proper service is to ensure that the employer receives the citation, not any particular individual or representative. (*United Parcel Service, Inc., dba UPS*, Cal/OSHA App. 1273411, Denial of Petition for Reconsideration (Oct. 31, 2018).)

Additionally, the Board has held that miscommunication between a party and its representative is not good cause for permitting a late appeal. (*RH Tech and Construction Inc.*, Cal/OSHA App. 09-9326 Denial of Petition for Reconsideration (Feb. 26, 2010).) If an employer does not receive confirmation or communication from its representative regarding a citation the employer has received, it is the employer's obligation to follow up with its representative. (*Oltmans Construction Co.*, Cal/OSHA App. 08-9435 Denial of Petition for Reconsideration (Feb. 2, 2009).)

It is well-established that "employers must treat 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).) Here, the reasonably prudent course of action would have been for Employer to contact

SCI in order to confirm its receipt of the citations and ensure that Employer's appeal was timely filed. Employer neglected to do so.

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's 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: 09/16/2022

