

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

In the Matter of the Appeal of:

**WATERPROOFING AND ROOFING SOLUTIONS,
INC.**

Employer

Inspection No.

1690885

**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 (Petition) filed in the above-entitled matter by Waterproofing and Roofing Solutions, Inc. (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) began an inspection of a place of employment in California maintained by Employer on August 8, 2023. On January 4, 2024, the Division issued two citations to Employer alleging two violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Citation 1 alleged a General violation of section 1512, subdivision (b) [no person trained in first aid present at workplace]. Citation 2 alleged a Serious violation of section 1730, subdivision (a) [failure to train employees on safe work practices pertaining to roofing operations]. The citations were delivered to Employer on January 8, 2024, at its address in Los Angeles, California.

Employer, through its counsel, filed its appeal of the citations on May 3, 2024. Board staff issued a Notice of Docketed Appeal to all parties on May 6, 2024.

On June 13 and July 1, 2024, the Board wrote to the Division requesting proof of service of the citations on Employer. On July 2, 2024, the Division provided the Board with a copy of the USPS Tracking form showing the citation “was delivered to an individual at 10:26 am [sic] on January 8, 2024[.]” (USPS Tracking document.) Employer does not dispute receipt of the citations.

On July 8, 2024, Board staff sent a Notice of Untimely Appeal (Notice) to Employer’s counsel and the Division. The Notice stated that the “appeal cannot proceed because it appears untimely.” The Notice contained information and sample documents for requesting a late appeal.

Employer’s counsel timely filed a Notice of Motion and Motion for Leave to File Late Appeal (Motion) and two supporting declarations on July 26, 2024.

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

On August 5, 2024, an administrative law judge (ALJ) of the Board issued an Order Denying Late Appeal (Order) on the basis that Employer’s Motion did not establish good cause for the late appeal.

On September 4, 2024, Employer’s counsel timely filed a petition for reconsideration (Petition) and supporting declarations. The Petition was not verified as required by Labor Code section 6616. Board staff sent a letter to Employer’s counsel on September 5, 2024, informing them of the verification requirement and providing information and sample forms for doing so. The Board’s September 5 letter further informed counsel that the verification had to be served on the Board and the Division “no later than **five** days from the date of this letter. Failure to do so may result in the dismissal/denial of the petition for reconsideration.” (Sep. 5, 2024, deficiency letter, p. 2, original emphasis.)

As of this writing the Board has not received the required verification.

The Division did not answer the Petition.

ISSUES

Was there good cause for the late appeal? Was the Petition verified as required?

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 and instead quotes Board regulation (California Code of Regulations, title 8) section 390.1, which sets forth the same five grounds quoted above. (Petition, pp. 3-4.) Although it does not assert which ground(s) pertain, we shall construe the Petition in the light most favorable to Employer as advancing all five grounds.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. We have taken no new evidence.

1. Did the Petition establish good cause for the late appeal?

At the outset, we note that to their credit Employer's counsel acknowledges that the appeal was late, and contends that the circumstances establish good cause for the late appeal. We thus turn to consider those circumstances in view of the applicable law.

Labor Code section 6601 and Board regulation section 359, subdivision (d) provide that an appeal is timely if filed within 15 working days of receipt of the citation(s) being appealed. Employer received the citations on January 8, 2024, and the fifteenth working day and last day to timely appeal was January 30, 2024. Labor Code section 6601 and section 359 both authorize the Board to extend the appeal period upon a showing of good cause. Next, we examine the circumstances of this late appeal.

Employer's May 3, 2024, Motion explains that Employer's counsel intended to appeal both citations, but the "newly assigned" case manager assigned to counsel's California OSHA matters "inadvertently failed to generate appeals forms" in January when she filed abatement documents with the Division. (Motion, p. 1; see also Declaration of DonJuan ISO Motion, p. 2.) The Motion also states that Employer and counsel became aware of the failure to appeal when the Division's collections department sent Employer a notice of payment due. However, nowhere in the Motion and supporting documents (or in the entire record) does Employer state when that notice of payment was received. The ALJ, applying Board precedent, determined that "the circumstances described in the Motion amount to a mishandling of the citations by Employer's counsel . . . [and do] not constitute good cause for the late appeal." (Order, p. 2.)

Employer's Petition argues that the error of the newly assigned case manager is good cause. Board precedent is to the contrary. An employer's representative's error is attributed to the employer. (*Union Pacific Railroad*, Cal/OSHA App. 1402052 Denial of Petition for Reconsideration (Jan. 8, 2021); *Dynaelectric Company dba Wasatch Electric*, Cal OSHA App. 1083985, Denial of Petition for Reconsideration (Jan. 27, 2017); *Edco Waste and Recycling Services, Inc.*, Cal OSHA App. 12-0163, Denial of Petition for Reconsideration (Mar. 7, 2013); *Ameripride Uniform*, Cal OSHA App. 04-104, Decision After Reconsideration (Apr. 3, 2008); *Kitagawa & Sons, Inc. dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004) [paralegal mishandling appeal process not good cause]; see also *Southern California Edison*, Cal/OSHA App. 08- 9062, Denial of Petition for Reconsideration (Jan. 30, 2009) (writ denied, Jan. 2010) [manager's secretary mishandled appeal].)

The Petition also contends that the ALJ's use of the term "newly assigned" in the Order introduced unseen and unchallenged evidence into the record. That is disingenuous at best. The ALJ was merely quoting that term from counsel's Motion. Further, the evidence supporting the denial of late appeal is the record developed to date, which shows when the citations were issued and received, when the late appeal was filed, and the related pleadings filed by counsel.

Another argument raised in the Petition is that Code of Civil Procedure section 473, subdivision (b) grants relief for inadvertent errors. However, a Court of Appeal decision holds that section 473 does not apply to Board proceedings. (*Murray Company v. Occupational Safety and Health Appeals Bd.* (2009) 180 Cal. App. 4th 43, 52-53.)

Lastly, Employer’s Petition does not address the question of whether the late appeal was filed within 15 working days of receiving knowledge that the appeal had not been filed as intended. (*Club Fresh, LLC*, Cal OSHA App. 06-9241, Decision After Reconsideration (Sep. 14, 2007).) Such failure, especially given the ALJ’s pointing out that potential ground for relief, raises a strong inference that the appeal was filed later than 15 working days after the realization that the original appeal had not been filed. (See Evid. Code § 413.)

2. Failure to verify the Petition.

Labor Code section 6616 provides in part that a petition for reconsideration “shall be verified upon oath in the manner required for verified pleadings in courts of record[.]” Employer’s petition was not so verified when filed, and the verification by counsel of counsel’s declaration in support of the Petition by its terms speaks to the declaration and not Employer’s Petition. Board staff informed Employer’s counsel of the failure to satisfy the verification requirement by letter on September 5, 2024. That letter further informed counsel they had five days to provide the provide the verification. Counsel has not submitted the verification.

Labor Code setion 6616’s verification requirement is stated in mandatory terms. (Lab. Code § 15, provides shall is mandatory.) We have held several times that failure to verify a petition is grounds for denying it. (*Natural Pack, Inc.*, Cal OSHA App. 1410194, Denial of Petition for Reconsideration (Aug. 22, 2022).) The failure to verify a pleading when doing so is required is curable by amendment. (*Bd. of Trustees v. Superior Court* (2007) 149 Cal. App. 4th 1154, 1163-1164.) However, Employer’s counsel has not taken advantage of the notice of deficiency the Board provided on September 5, 2024, and thus the deficiency remains uncured. The lack of verification is another ground upon which to deny the Petition.

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: 10/11/24

