

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

AC FRAMERS
4588 Caterpillar Road
Redding, CA 96003

Employer

Docket No. 03-R2D3-3475

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken Employer's petition for Reconsideration under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning June 11, 2003, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by AC Framers (hereinafter Employer) at 4588 Caterpillar Road, Redding, CA.

On September 3, 2003, the Division issued one citation to Employer, alleging a single violation of Title 8 Cal. Code Reg section 1632(b) [failure to cover roof opening], which was classified as Serious. Further, the Citation stated abatement must be completed by September 16, 2003, and it contained a proposed penalty of \$14,400.00. Employer filed a timely appeal contesting only the existence of the citations.

This matter came on for hearing before an Administrative Law Judge (ALJ) for the Board on March 28, 2006, and the matter was submitted that day.

The ALJ rendered a decision on April 18, 2006, denying Employer's appeal. The Decision concluded the Division established a violation of section 1632(b). It further held that since the Employer's appeal form did not contest the classification, abatement and penalty portions of the Citation, and that

Employer did not raise any affirmative defenses before or on the day of the hearing, that those items were established by operation of law.¹

On May 26, 2006, the Appeals Board received a letter from Employer, dated May 22, 2006, but arriving in an envelope post marked May 24, 2006, essentially requesting reconsideration of the ALJ's decision.

At the Board meeting convened on June 14, 2006, the Board minutes reflect the Petition for Reconsideration was granted provided it was timely.

ISSUE

Was the petition for reconsideration timely?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Labor Code defines the jurisdiction of the Appeals Board. Labor Code section 6614(a) states, “[a]t any time within 30 days after the service of any final order or decision” of the Board a petition for reconsideration may be filed, and further that it “shall be made only within the time and in the manner specified in this chapter.” Thus Employer's petition had to be filed within 30 days of service of the Order. Because Labor Code section 6614(a) uses the phrase “after service of any final order [etc.],” the time for filing a petition for reconsideration is extended by 5 days by the provisions of Code of Civil Procedure section 1013 and Board Regulation section 348(c).

Since the Order was filed and served on April 18, 2006, Employer had 35 days (30 plus 5) within which to file its petition for reconsideration. Board Regulation section 390(a) provides that a petition “shall be deemed filed on the date it is delivered or mailed to the Appeals Board.” Applying these rules to this proceeding, Employer had 35 days after April 18, 2006, within which to file its petition for reconsideration. The first day of that period was April 19, 2006, and the last was May 23, 2006. Employer's petition was postmarked May 24, 2006, and was thus late.

Board precedent holds that Labor Code section 6614(a)'s filing period is jurisdictional. (*Ultimate Construction*, Cal/OSHA App. 05-378, Denial of Petition for Reconsideration (Apr. 30, 2008).) Once

¹ The Decision cited Board Regulation 362.3 as authority for this rule. Later, on April 28th, the ALJ issued an Amended Decision correcting this typographical error. The correct citation is to Board Regulation 361.3. No substantive changes were made by this amendment.

the time for filing a petition for reconsideration has expired, the Board is without power to grant relief. (*Id.*)

(*Daniel Santos Estrada*, Cal/OSHA App. 09-9251 Denial of Petition for Reconsideration (Jan. 21, 2010).) Furthermore, the circumstance of mailing or filing a petition for reconsideration one day beyond the statutory deadline has been considered by the Board. “The deadline for filing a petition for reconsideration is jurisdictional and even a petition filed one day beyond the deadline must be denied. (See *Beutler Heating & Air Conditioning, Inc.*, Cal/OSHA App. 93-2220, Denial of Petition for Reconsideration (Mar. 16, 1995) and *Edwin D. Chapman*, Cal/OSHA App. 81-331, Denial of Petition for Reconsideration (Oct. 1, 1981).)” (*Arb, Inc.*, Cal/OSHA App. 02-1574, Denial of Petition for Reconsideration (Nov. 10, 2005).)

In addition, the existence of the “Amended Decision” dated April 28, 2006, does not have the effect of resetting the 35 days allowed (30 days plus 5 days mailing) to mail or submit a petition for reconsideration. (*Arb. Inc. supra.*) In *Arb, Inc.*, the ALJ had similarly issued a non-substantive “Amended Decision” which was more correctly characterized as an errata since it corrected the name of the testifying OSHA compliance officer, and included the omitted Summary Table. (*Id.*)

Since section 390(a) limits the time to file a petition for reconsideration from an order or decision to within 30 days of such order or decision “with respect to *any matters determined or covered by the order on decision*” (emphasis added), the Board holds that the [initial] decision (which remained substantively unchanged by the [later] corrections) enunciated all the matters determined or covered which could have been reviewed by the Board and is the operative disposition of the case. The non-substantive changes in the (later) order relate back to the original decision. (*Yancey Roofing Corporation*, Cal/OSHA App. 80-1218, Decision After Reconsideration (Feb. 27, 1985).

(*Arb Inc. supra*, bracketed words added, parentheses in original.) Here, the non-substantive change to correct the number of the regulation actually applied by the ALJ in the original decision similarly relates back to the original Decision. We note that the Board’s minutes reflect the initial concern that the Petition was not timely filed. On further review, it is clear that the Board lacks jurisdiction to reconsider the final decision rendered by the ALJ in this matter.

DECISION AFTER RECONSIDERATION

The ALJ's decision on the section 1632(b) violation is affirmed and is reinstated.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUGUST 13, 2010