

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

AMERIPRIDE UNIFORM.
5950 Alcoa Avenue
Vernon, CA 90058

Employer

Docket Nos. 04-R4D2-106
and 107

**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 the petition for reconsideration filed in the above entitled matter by Ameripride Uniform (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On August 29, 2003, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 5950 Alcoa Avenue, Vernon, California.

On December 5, 2003, the Division issued two citations to Employer, alleging one regulatory, two general and one serious violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹ and proposed civil penalties totaling \$29,000.

Employer filed a timely appeal contesting the existence of the alleged violations and the reasonableness of the proposed penalties. Employer's appeal was filed on its behalf by Charles W. Berry, Consultant, as its representative.

On August 24, 2006, a Notice of Hearing was sent to the parties informing them of a hearing to be held in this proceeding on November 14,

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

2006. The Division appeared at the scheduled place and time, but Employer failed to appear for the hearing.

A “Notice of Intent to Dismiss Appeal(s)” was mailed to Employer’s representative by certified mail on November 17, 2006. That Notice informed Employer that unless it filed a motion with the Board containing sufficient facts to establish that the failure to appear at hearing was reasonable and for good cause, Employer’s appeal would be dismissed. No response was had from Employer.

On December 27, 2006, an Administrative Law Judge (ALJ) of the Board issued an Order Dismissing Appeal due to Employer’s failure to respond to the Notice of Intent to Dismiss Appeal(s).

Employer through its new representative Safety Compliance Institute (SCI), filed a timely petition for reconsideration which the Board took under submission on February 27, 2007, at which time it also stayed the Order Dismissing Appeal pending a decision.

On December 3, 2007, the Board sent Employer’s new representative a “Request for Additional Evidence” seeking information to supplement the record and help resolve the issues raised by Employer’s petition. The Request granted Employer 30 days to respond, but it failed to do so.

FACTUAL BACKGROUND AND DISCUSSION

In considering Employer’s request for relief we have concluded a full review of all information in the record of this proceeding, Employer’s case file.² The following is a summary of that information.

On January 9, 2004, Mr. Charles Berry (Berry) filed appeals to the citations on Employer’s behalf. On the appeal forms Berry named himself as Employer’s representative, using the title “Consultant.” It is not apparent from the appeal forms what relationship Berry had with Employer, for example whether he was an employee or a retained representative. It is noteworthy, however, that Berry gave Employer’s address as the address for future communications from the Board, and no change of representative or of address was provided to the Board prior to the filing of the petition for reconsideration. Thus all written correspondence sent to Employer by the Board was addressed to Berry, as “Consultant,” at Employer’s address in Vernon, California.

We further note that the first time the Board learned that Mr. Berry had been employed by American Safety Corporation (American Safety) was in a letter from that firm which was part of Employer’s petition. The contents and import of that letter are discussed in some detail below.

² The failure to respond to the Board’s Request for Additional Evidence limits our inquiry to the record already in place, and gives rise to negative inferences regarding the circumstances of the failure to appear.

On March 8, 2005 a notice for a pre-hearing conference, set for April 4, 2005, was served on Employer's consultant at the Alcoa Avenue address. The prehearing conference was convened but Mr. Barry was not ready to proceed, therefore no substantial discussions occurred. Accordingly, no settlement was reached then or later, and the case was set for hearing. A notice of hearing, set for November 14, 2006, was sent to all parties to their addresses of record.

As noted above, neither Employer nor its consultant appeared at the hearing and subsequently Employer failed to respond to the Notice of Intent to Dismiss.

All notices from the Board were served by mail on Employer's consultant at Employer's address. The Board received no notice of change of address from or on behalf of Mr. Berry as consultant, nor any notification of a change of representative until Employer's petition for reconsideration was filed.

On January 9, 2007 the Board received a letter dated January 10, 2007³ from Mike Rubell (Rubell) of Safety Compliance Institute, Employer's current representative. That letter sought to explain the failure to appear at the November 14, 2006, hearing and requested reinstatement of Employer's appeal. The Board considered the request from the representative to be a petition for reconsideration and a request for relief from the dismissal pursuant to Labor Code section 6611 and the Board took the petition under submission on February 27, 2007. Employer itself did not file any verified or unverified declaration or otherwise attempt to explain its failure to appear at the hearing.

Rubell, Employer's new representative, included with his letter a January 3rd letter from Dale Morris, President of American Safety, which explained the circumstances of the failure to appear at the November hearing. The Morris letter stated that Mr. Berry, Employer's original representative, was an employee of American Safety at the time the subject appeals were filed. Mr. Berry was "responsible for all OSHA Appeal work" for American Safety's clients, and had the related files in his possession. Mr. Berry resigned from American Safety "approximately 1 year" before January 2007, and apparently did not surrender the files for the matters he had been handling up to that time, including the one pertaining to Employer's appeal. Thereafter, it seems American Safety and Employer both lost track of the instant matter.

The Morris letter goes on to state that "because of Mr. Berry's actions [American Safety was] not notified of the hearing date, as he [Berry] failed to forward the notice to our office, the client, or respond to it himself. We also had no way of obtaining the files that would inform us of a hearing that was to take place."

We particularly note that the January 3, 2007 letter of explanation states that Berry submitted his resignation approximately one year before January 2007, which would have been late in 2005 or early in 2006.

³ An apparent typographical error in the date, as the letter was received by the Board on January 9, 2007.

From the facts provided by American Safety it appears that by August 26, 2006, when the notice of hearing was mailed, Charles Berry had been gone from American Safety's employ for over 7 months. The Morris letter does not say whether American Safety informed Employer that Berry was no longer representing it, or whether someone else was assigned to the case. We infer that this was not done, first because there was no claim of even an attempt to provide a substitute for Berry, and second because on the record before us both American Safety and Employer were completely passive concerning this appeal after the initial filing.⁴ It further appears that American Safety either had no idea of what matters it had assigned to Berry, and/or that it made no attempt to ascertain what matters he had been handling. Such inattention and lack of due diligence in light of Berry's resignation falls within the scope of what the Board has labeled as "internal operating problems," which do not constitute good cause for late appeals or failures to appear. Moreover, there is no explanation for why the notice of hearing, addressed to Berry at Employer's address, was never received by Employer. Even if we were to infer that Employer blindly forwarded correspondence from the Board to someone who was no longer its representative, it would not avail Employer.

Finally, the Morris letter states that American Safety "had no contact with [Berry] since [his resignation]." It is noteworthy that it does not claim it could not contact Berry, or tried to do so unsuccessfully. The implication is that American Safety took no action to recover files or learn from Berry what matters he had been working on in order to continue representing its clients and preserving its own business relationships.

ISSUE

Did Employer establish good cause for its failure to appear at a duly-noticed hearing, entitling it to reinstatement of its appeal?

ANALYSIS

California Labor Code, section 6611(a) provides the Board with the authority to dismiss an appeal if an appellant does not appear at a properly scheduled hearing. Labor Code section 6611(b) establishes the power in the Board to reinstate the appeal if an appellant can show that good cause existed for its absence.

The burden of proof is upon Employer to present facts to establish good cause for its failure to appear. If Employer does so the Board may reinstate the appeal. Therefore, we examine all the facts before us to determine if good cause exists.

⁴ There was a prehearing conference held on April 4, 2005, before the instant difficulties arose. Mr. Berry participated in the prehearing conference on behalf of Employer.

Since 1984, in several decisions after reconsideration (DARs), the Board has established criteria and direction on what constitutes good cause as a basis for relief by the Board.

In *A-1 Printing & Copy*, Cal/OSHA App. NDN, Denial of Petition for Reconsideration (Aug. 10, 1984), the Board held that good cause as used in Labor Code section 6601 “means a substantial reason; one that affords a legal excuse.” That definition is equally applicable to “good cause” in the context of a failure to appear at hearing, and in numerous cases over more than thirty years the Board has evaluated various situations and determined whether good cause was established.

In *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration, (Nov. 20, 2001) the Board held that: “appeals to the Board should be pursued by the appealing party with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs. It is incumbent upon an appealing party to become familiar with the appeal process and requirements in order to further its interests in an orderly disposition of the appeal by the Board, affording due process to all of the parties, and avoiding undue prejudice to the Division and any third party to the appeal.”

In a case with some similarities to the case at hand, *Kitagawa & Sons, Inc. dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004), the Board denied relief from the filing of a late appeal. In that case, Employer's attorney contended that Employer “should not be made to suffer any prejudice” because the delay in returning the appeal forms “was beyond its control”. Employer's attorney placed the blame squarely on a paralegal whom he said represented to Employer's counsel that the appeal forms had been sent to the Board. Employer's attorney represented that the paralegal was terminated and that her current whereabouts are unknown.

In a case dealing with the failure to appear at a hearing, *Regional Steel Corporation*, Cal/OSHA App. 04-2688, Denial of Petition for Reconsideration (Jan. 4, 2007), the Board held that it has been long established by Board precedent that failure to appear at a hearing without good cause is not grounds for reconsideration or reinstatement of an appeal. *Regional Steel, supra*, relied on other Board decisions, including *Arizona Pipeline Company*, Cal/OSHA App. 96-1132, Denial of Petition for Reconsideration (Oct. 7, 1998), and decisions holding that an employer's internal operating problems are not good cause, *Kaweah Construction Co.*, Cal/OSHA App. 87-9005, Denial of Petition for Reconsideration (Mar. 5, 1987); *Cleveland Wrecking Co.*, Cal/OSHA App. 92-9054, Denial of Petition for Reconsideration (Nov. 18, 1992); and *Hazardous Properties Clean-Up Corp.*, Cal/OSHA App. 93-9060, Denial of Petition for Reconsideration (Oct. 14, 1993).

Two cases where relief from failing to appear at a hearing was granted both involved unanticipated emergencies: one from an auto accident while on the way to the hearing, *Country French, CIE*, Cal/OSHA App. 77-760, Decision

After Reconsideration (Jan. 30, 1978); the second due to the unavailability of management personnel at the hearing due to exigent circumstances, *A-1 Industrial Laundry* Cal/OSHA App. 77-780, Decision After Reconsideration (Apr. 7, 1978). In another case, *Overland Mechanical*, Cal/OSHA App. 93-2099, Decision After Reconsideration (Mar. 28, 1995), the Board held that business disruption due to the Northridge earthquake was good cause for loss of the hearing notice and subsequent failure to appear.

In light of the foregoing authorities, the Morris letter fails to establish good cause for the failure to appear. The critical facts are Mr. Berry's written resignation and American Safety's apparent failure to react, or at least to provide us with details of its reaction.⁵ That failure to react includes the total failure to respond to the Board's December 2007 Request for Additional Evidence.⁶ American Safety now alleges neither the Notice of Hearing nor the file was available. We believe that good business practices by a firm such as American Safety would include mechanisms or procedures by which it would keep itself informed concerning what clients it has, where files are kept, who is handling each matter, and so on. Employer likewise appears to have failed to make diligent inquiry into the status of its appeal.

Under the facts of this case, we find no reasonable basis to find there was good cause for Employer's failure to appear at the scheduled hearing.⁷

DECISION AFTER RECONSIDERATION

The ALJ's Order Dismissing Appeal is affirmed and reinstated.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

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FILED ON: April 3, 2008

⁵ The record before us is devoid of information from Employer or its present or former representative showing that anyone involved reacted in any way to Berry's resignation.

⁶ That Request sought detailed information regarding Employer's involvement in its appeal, and inquired as to when Employer learned of Mr. Berry's resignation from American Safety Corporation, among other requests. We conclude from the lack of response that the information, had it been provided, would have been detrimental to Employer's petition.

⁷ Under different circumstances, we might have had cause to examine whether Employer may be entitled to relief pursuant to the provisions of California Code of Civil Procedure section 473, due to the misfeasance or malfeasance of its representative.