

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

AMISH COUNTRY GAZEBOS, INC.

739 East Francis Street
Ontario, CA 91761

Employer

Docket Nos.08-R6D2-0227
through 0231

**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 this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On December 21, 2007, the Division of Occupational Safety and Health (the Division) issued five citations to Amish Country Gazebos (Employer) for violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ Employer timely appealed the existence, classification, penalty and abatement requirements for each citation.

A hearing before an Administrative Law Judge (ALJ) for the Board was noticed for November 14, 2008. Neither party appeared at the hearing. On December 1, 2008, a Notice of Intent to Dismiss Appeal issued stating that the parties had 10 days to demonstrate good cause for the failure to appear. Neither party responded. Accordingly, an Order Dismissing Appeal issued on December 29, 2008.

On January 26, 2009, the Board took reconsideration of this matter on its own motion. The Division filed an answer on February 27, 2009.

ISSUE

Were the appeals properly dismissed?

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

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

The Division has the burden of proving each element of its case including the applicability of the safety order cited, by a preponderance of the evidence. *Cambrio Manufacturing Co. dba Environ*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983). Where, as here, the Division fails to appear for a hearing, it has not satisfied this burden and the appeals must be granted unless the Division demonstrates good cause for its failure to appear pursuant to section 383. *Wesley Burnett*, Cal/OSHA App. 01-491, Denial of Petition for Reconsideration (Sept. 23, 2002).

Here, instead of issuing an Order Granting Appeals in response to the parties' failure to appear, the ALJ mistakenly issued a Notice of Intent to Dismiss Appeals and an Order Dismissing Appeals. This Notice and Order issued in error, and the Order is hereby vacated.

The Division's answer to the Board's Order of Reconsideration agrees that the appeals should not have been dismissed. The Division asserts, however, that the parties reached a settlement agreement, which they communicated via e-mail to the ALJ well in advance of the hearing along with a request that the matter be taken off calendar. The referenced e-mails were exhibits to the Division's answer. Based on these communications, the Division assumed that it did not need to appear at the hearing. It further contends that it failed to respond to the Notice of Intent to Dismiss because a "one time" clerical oversight resulted in the matter not being calendared to the District Manager's attention. The Division argues that the Board should give effect to the parties' settlement agreement rather than dismiss the appeals.

Assuming that the parties' e-mails in fact reached the ALJ prior to the hearing date, an assumption we deem reasonable, the parties were still not at liberty to neglect to appear at the hearing until they were informed that their settlement agreement had been accepted by the ALJ. Once a Notice of Hearing issues, the parties may not assume that a matter has been taken off calendar absent official notice from the Board to that effect. *Rodin & Co., Inc.* Cal/OSHA App. 05-1198 Denial of Petition for Reconsideration (Feb. 7, 2008).

To allow parties to function on assumptions would be inconsistent with the Board's long held position that "appeals to the Board should be pursued by the parties to the appeal with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs." *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001). The Division's lack of attention to the

appeals' import was compounded when it failed to respond to the Notice of Intent to Dismiss.

Moreover, submission of a settlement agreement alone does not resolve an appeal. Board rule section 364.2(a) states that the Board may accept a case disposition upon a showing of good cause. The ALJ must review the agreement, be satisfied that the good cause has been shown, and, if so, inform the parties that the agreement is accepted. Until the agreement is accepted, the settlement is without effect. While it is unclear why the ALJ did not respond to the parties in this case, given that she did not, it was incumbent upon the parties to either appear at the hearing, or to ascertain the status of the case prior to the hearing and act accordingly.

DECISION AFTER RECONSIDERATION

The Board vacates the ALJ's Order Dismissing Appeals and hereby grants the appeals in their entirety.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member
ART CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 1, 2009