

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

In the Matter of the Appeal of:

ACE COMMERCIAL PLASTERING, INC.  
P.O. Box 2660  
1320 Rockefeller Drive  
Ceres, CA 95307

Employer

Docket. 2013-R2D2-9154

**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 Ace Commercial Plastering, Inc. (Employer).

**JURISDICTION**

Commencing on August 3, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 18, 2012 the Division issued a citation to Employer alleging three General violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer telephoned the Board on July 19, 2013 indicating its intent to appeal the citation, which appeared to be untimely. Accordingly, the Board wrote both Employer and the Division, informing Employer that its appeal appeared untimely unless it could show good cause and requesting the Division provide documentation of when the citation was served on and received by Employer.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board.

After considering the information received from Employer and the Division, on October 15, 2013 the ALJ issued an Order Denying Leave to File Late Appeal (Order).

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

### **ISSUE**

Did Employer establish good cause for its late appeal?

### **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 that the Order was issued in excess of the ALJ's powers.

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.

Employer's petition for reconsideration states, in pertinent part: "Our position solely rests on the fact that 2 different citations should have been mailed separately in 2 different certified envelopes whereas there could be a definite distinction between the 2 different citations."

Employer received two citations related to two separate inspections of its workplaces. It resolved the one other than the instant citation by agreement with the Division after filing an appeal on December 12, 2012. (Docket No. 12-R2D2-3504; inspection no. 314332172.) In that other matter, the citation was mailed on November 26, 2012 and the certified mail receipt signed for by Employer on December 11, 2012. (Copies of the certified mail tracking slip and acknowledgment of receipt card in file for the instant matter.) The citation at issue here was mailed on November 28, 2012, and signed for by Employer on January 16, 2013. Although Employer seems to have failed to realize that the

instant citation concerned a different inspection, the record shows that each citation was mailed separately and signed for on different dates by Employer. Thus, the condition asserted as Employer's "position" in its petition (quoted above) was in fact satisfied.

Labor Code sections 6600 and 6601 require that a cited employer must appeal within 15 working days of receiving a citation. As noted, Employer acknowledged receipt of the subject citation on January 16, 2013. It therefore had to initiate its appeal on or before February 5, 2013, and did not.

Labor Code section 6601 also provides that the Board may extend the appeal period for good cause. Misunderstanding the appeal process or failing to give the appropriate level of attention and care to the documents constituting a citation are not good cause for a late appeal. (*19<sup>th</sup> Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995); *Ray Cammack Shows, Inc.*, Cal/OSHA App. 02-9240, Denial of Petition for Reconsideration (Apr. 30, 2003).)

The record shows that Employer either confused one citation with the other, failed to peruse the second citation carefully, or mishandled the second citation by transmitting it internally after placing the first citation in the same envelope. For example, Employer contends that it received the two citations in one envelope on February 4, 2013, while the certified mail documentation in the record establishes that the two citations were received separately, in December 2012 and January 2013, a month apart. It would seem that placing the two citations in a single envelope was an action performed by someone on Employer's staff. Be that as it may, it was not the Division's doing, and is not good cause for the late appeal.

### **DECISION**

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: December 13, 2013