

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

In the Matter of the Appeal of:

BERRY'S SAWMILL, INC.  
P.O. Box 106  
Cazadero, CA 95421-0106

Employer

Docket. 12-R6D1-2331

**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 Berry's Sawmill, Inc., (Employer).

**JURISDICTION**

Commencing on April 19, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On July 20, 2012, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board. Prior to the conclusion of a duly-noticed evidentiary hearing before the ALJ, the parties agreed to resolve their dispute by settlement.

On September 10, 2013, the ALJ issued an Order (Order) resolving the matter on the terms agreed by the parties and establishing a payment plan for payment of the civil penalty.

Employer timely filed a petition for reconsideration.

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

The Division filed an answer to the petition.

**ISSUE**

Should Employer's petition be taken under submission in light of his agreement to settle the underlying appeals?

**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 contends the evidence does not justify the findings of fact and the findings of fact do not support the Order.

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 and the Division agreed to resolve the two citations. Their agreement was that Employer would waive the hearing and withdraw its appeal of Citation 1, which alleged a Regulatory violation of section 342(a), and pay the \$5,000 civil penalty associated with that violation. The Division in turn agreed to withdraw Citation 2, which had alleged a Serious, Accident-Related violation of section 3314(c), and sought a \$10,800 civil penalty.

When Employer withdrew its appeal of Citation 1, it was established by operation of law and became final. (Labor Code § 6601; *Bill Nelson General Engineering Construction, Inc.*, Cal/OSHA App. 10-2399, Denial of Petition for Reconsideration (May 8, 2013).) In light of that withdrawal, especially under the present circumstances, Employer cannot now dispute the facts of that Citation.

We have held that a party may not dispute the merits of a citation after agreeing to resolve its appeal of the same absent fraud or misrepresentation or an agreement in violation of law or public policy. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).) Employer does not allege or even suggest there was fraud or misrepresentation which induced him to agree to the settlement, and we discern none. Nor do we see any reason why the settlement and resulting Order would violate the law or public policy. Although Employer may now regret his decision to settle, or may be seeking to achieve an even more favorable outcome, we find no basis to grant the petition for reconsideration under the present circumstances.

### **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: NOVEMBER 26, 2013