

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

In the Matter of the Appeal of:

BILL NELSON GENERAL
ENGINEERING CONSTRUCTION INC.
401 W. Fallbrook, #104
Fresno, CA 93711

Employer

Dockets. 10-R2D5-2399 and 2400

**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 Bill Nelson General Engineering Construction Inc. (Employer).

JURISDICTION

Commencing on May 6, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On July 14, 2010, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing. Prior to the hearing the Division and Employer agreed that the Division would reduce the penalties proposed in the citations to \$4,500 and Employer would withdraw its appeals of the existence and classifications of the violations. By motion of the parties, the issues at hearing were limited to the reasonableness of the penalties in view of Employer's financial condition.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

On February 21, 2013, the ALJ issued a Decision (Decision) which denied Employer's request that the penalties be further reduced, but did order them payable over a nine-month period in equal payments of \$500.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUES

Did Employer satisfy the requirements for filing a petition for reconsideration?

Did the ALJ correctly decline to reduce the penalty amount?

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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) We liberally construed in the light most favorable to Employer, however, and read the petition to assert that the evidence does not justify the findings of fact.

Before we discuss the merits of Employer's petition, we must address its technical deficiencies.

Labor Code sections 6616 and 6619, respectively, require that a petition for reconsideration be verified under oath and served on the other party or parties to the proceeding. Both sections make those requirements mandatory, as they provide a petitioner “shall” be verified and served. “Shall” is defined in Labor Code section 15 to mean “mandatory.” In view of the statutory language we have held that a failure to do both requires the subject petition for reconsideration to be denied. (*Ludivina Lopez-Hernandez dba Olivas Tires & Wheels*, Cal/OSHA App. 11-1965, Denial of Petition for Reconsideration (Dec. 10, 2012).)

On March 29, 2013, after determining Employer’s petition for reconsideration in this matter was not verified and there was no proof that the petition had been served on the Division, the Board wrote Employer to inform it of the requirement to do both and giving it 5 days to do so. Employer acknowledged receipt of the Board’s March 29, 2013 communication on April 2, 2013 and asked for “a little more time” to comply and request a subpoena *Duces Tecum*.

On April 3, 2013, a staff member of the Board contacted Employer, via telephone, explaining the Board has a legislative requirement to act on the petition within 50 days of the date the petition was filed. That Employer must submit the requested information as the Board must proceed with processing the petition. Employer did not file the necessary verification or proof of service in the more than one month following its request for an extension of time.

A failure to decide or rule on a motion is an implicit denial of the motion. (*Husmann Corporation*, Cal/OSHA App. 03-2939, Decision After Reconsideration (Jan. 21, 2011).) In any event, Employer’s failure to verify the petition and serve it on the Division indicates Employer has failed to satisfy Labor Code sections 6616 and 6619, and we must deny the petition on that basis.

Even if Employer had verified its petition and provided proof it had served the petition on the Division, we would deny the petition on its merits. 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 Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer’s petition begins with a statement that its offering evidence of its financial condition “was not done out of any admission of guilt, wrong doing of a violation[.]” What Employer fails to acknowledge is that it had agreed with the Division to withdraw its appeals of the existence and classifications of the alleged violations in exchange for the Division’s reducing the proposed

penalties. At the hearing, the ALJ stated on the record the substance of the parties' stipulation and Employer's representative acknowledged his agreement to them. The violations were therefore established by operation of law and by Employer's stipulation to them. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).) To the extent that Employer seeks now to back away from its agreement, there are no grounds such as fraud or misrepresentation alleged or present in the record for setting aside the parties' agreement. (*Id.*) To the extent that Employer misunderstood the significance of its agreement, there is no good cause for voiding it, particularly given that he had two opportunities to express doubt or confusion to the ALJ. (*Id.*)

Other statements in Employer's petition suggest it may have misunderstood the appeal process. For example, the petition states that if the Board would further reduce the penalties to \$2,000, Employer "would be willing to accept [that outcome], and not pursue my rights to appeal." It appears that Employer does not grasp that it has had its administrative appeal, which included the hearing on the claim of financial hardship after Employer stipulated to the alleged violations. Misunderstanding the appeal process is not good cause for reopening the proceeding at this stage. (*19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).) Employer goes on to state that he has only received the "violation notice[,]" which we take to mean the citations and accompanying documents. Employer seems to believe that since its attempt to have the penalties reduced was unsuccessful, it now can dispute the merits of the citations themselves. But, having stipulated to the existence and classifications of the violations, Employer may not do so, as explained above.

The issue presented by the petition is whether the ALJ abused his discretion in leaving the penalty unchanged and granting only an extended payment schedule. (See *Fleming Metal Fabrication*, Cal/OSHA App. 09-4309, Denial of Petition for Reconsideration (Dec. 27, 2010).) The Board has discretion to adjust penalties under appropriate circumstances. (Labor Code § 6602; *Stockton TRI Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Having reviewed the Decision and the record in this matter, we hold that the ALJ did not abuse his discretion in declining to reduce the penalty, and provided an appropriate degree of relief by ordered the penalty be paid in nine monthly installments of \$500. The evidence shows that Employer has the ability to make those payments in view of its cash flow.

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: MAY 8, 2013