

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

In the Matter of the Appeal of:

C. R. ENGLAND, INC.  
4701 West 2100 South  
Salt Lake City, UT 84120

Employer

Docket. 14-R3D3-0649

**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 C. R. England, Inc. (Employer).

**JURISDICTION**

Commencing on November 19, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On January 31, 2014, the Division issued one 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 timely appealed.

Thereafter administrative proceedings before an Administrative Law Judge (ALJ) of the Board commenced. On June 11, 2014 the ALJ duly notified the parties that a telephonic Prehearing Conference (“PHC”) was to be held on June 30, 2014. The Division attended the PHC, and Employer failed to do so.

On July 10, 2014 the ALJ issued a Notice of Intent to Dismiss Appeal (Notice) to Employer informing it that its appeal was subject to dismissal due to its failure to attend the PHC unless Employer timely provided a statement and declaration showing that the failure to attend was reasonable and for good cause. No response to the Notice was received from Employer.

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

On August 1, 2014, the ALJ issued an Order Dismissing Appeal (Order) based on the circumstances summarized above.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

### **ISSUE**

Did Employer establish good cause for its failure to attend the Prehearing Conference?

### **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 Order was "based on misrepresentations by the Division[,]" which we construe to fall within the ambit of Labor Code section 6617(b).

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 "provide[s]" a number of assertions in response to the Order. The first and central premise among them is, "The Board finds [Employer] failed to participate in a telephonic Prehearing Conference (PHC) on June 11, 2014." That is not correct. As the Order itself states, Employer failed to participate in the PHC "on June 30, 2014." The failure to participate on June 30, 2014 was also stated in the ALJ's Notice issued on July 10, 2014.

A detailed review of the record shows that Employer sent documents commencing its appeal of the citation to the Board. The Board in due course docketed the appeal and on April 14, 2014 sent the parties notice of a pre-hearing conference (PHC) to be held on August 25, 2014.

The Division moved for a continuance of the PHC on June 4, 2014 due to conflict with training on the new federal OSHA electronic database. On June 11, 2014 the Board sent the parties an amended PHC notice changing the PHC date to June 30, 2014. The addresses used for the foregoing were those in the Board's record and there is no claim or indication mail was not received in the normal course. (See Evid. Code § 641 [presumption mail properly addressed is received], cited in *Chamlan Enterprises, Inc.*, Cal/OSHA App. 08-1322, Denial of Petition for Reconsideration (Aug. 13, 2009).)

Employer's petition further states that it did not receive notice from the Board re-setting the PHC date to June 11, 2014, and was unaware the Board would call on that date. Since the Board did not set the PHC in this proceeding for June 11, 2014 it follows that the Board would not have given such notice and did not call to conduct the conference.

The Amended Notice of Prehearing Conference was issued on June 11, 2014. Its first paragraph states in pertinent part: "**NOTICE IS HEREBY GIVEN** that a prehearing conference in the above-captioned matter will be conducted by telephone on **June 30, 2014 – 09:00 AM.**" (Original emphases.) It appears that Employer has misunderstood or mis-read the Amended Notice, and confused the date it was issued with the date it stated the PHC would be held. Thus, Employer's argument rests on a misapprehension of the facts, and despite its misapprehension it was in fact properly notified of the PHC's new date.

Employer also argues in its petition that it "reasonably expected that the date of the PHC would be reset to sometime after the original August 25 date." While Employer's expectation likely derived from the Division's request that the PHC be set for a date after the original date, it was not "reasonable" to assume such would be the result. Board regulations do not restrict the Board's discretion to rescheduling an event to dates after the date initially set. Notice of the new date was sent to the parties more than two weeks before the new date. And even if Employer's expectation or assumption concerning a new date was reasonable in the abstract, it was explicitly disproved by the Amended Notice. Employer's continuing to believe that the PHC would be held after August 25 when it had been officially informed that the new date was June 30 was unreasonable. In addition, Employer's misunderstanding of the dates involved and its assumption that the PHC would be set for a date after August 25, 2014 suggest Employer did not read, or read with adequate care, the amended notice of PHC. Parties to Board proceedings are expected to deal with them as they would their most important legal affairs. (*Ray Cammack Shows*,

*Inc.*, Cal/OSHA App. 02-9240, Denial of Petition for Reconsideration (Apr. 30, 2003).) Doing so includes reading notices from the Board with sufficient care to ascertain the date or dates set for proceedings.

Employer also claims that “failing to grant [its] Petition for Reconsideration deprives [it] of due process.” That is not correct. “It is fundamental that due process requires notice [citation] and opportunity for hearing [citation] before an impartial tribunal [citation].” (*Bennett v. Bodily* (1989) 211 Cal.App.3d 133, 141.) As we have pointed out, Employer received notice of the new prehearing date. Our considering Employer’s petition, as we have, satisfies the hearing requirement of due process, although the result is not what Employer had hoped to achieve. In addition, dismissal of an appeal for failure to appear is authorized by Labor Code section 6611(a), so that there is a rationale and a statutory basis for our decision here. Finally, our only concern in this matter is to correctly apply the law to the facts and thereby render the appropriate decision.

### **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: October 21, 2014