

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

In the Matter of the Appeal of:

DAMION MANTLE dba DAMION
MANTLE PAINTING & DECORATING
225 Wilson Street
Petaluma, CA 94952

Employer

Dockets. 12-R1D1-2569 and 2570

**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 Damion Mantle doing business as (dba) Damion Mantle Painting & Decorating (Employer).

JURISDICTION

Commencing on February 29, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On May 30, 2012, 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 and administrative proceedings were begun before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed pre-hearing conference scheduled for March 4, 2013 at 11:00 a.m. Employer failed to appear or attend that conference.

On April 5, 2013, the ALJ issued an Order Dismissing Appeal (Order).

Employer untimely filed a petition for reconsideration.

The Division did not answer the petition.

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

ISSUE(S)

Does the Board have jurisdiction to grant Employer's petition for reconsideration?

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.

Labor Code section 6614(a) requires that a petition for reconsideration be filed with the Board within 30 days of service of the order or decision which is the subject of the petition. In addition, Code of Civil Procedure section 1013(a) and Board Regulation section 348(c) provide that when a document is served by mail to an address in California, the time to act upon such document is extended by five days. Employer was therefore required to file (i.e. postmark or deliver, see Board Regulation sections 348(b) and 390(a)) its petition on or before May 10, 2013.

Employer's petition was filed on December 2, 2013, about 7 months after it was due.

The Board is without jurisdiction to grant reconsideration when a petition is late filed. (*ADECCO Inc. Branch 5100*, Cal/OSHA App. 08-4312, Denial of Petition for Reconsideration (Aug. 25, 2010), citing *Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1108.)

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. Moreover, were we able to reach the merits of Employer's petition we would deny reconsideration on that basis. Employer has not established that there was good cause for his failure to appear at the pre-hearing conference, which is grounds for dismissing its appeal. (*Central Freight Lines, Inc.*, Cal/OSHA App. 10-1888, Denial of Petition for Reconsideration (Jan. 9, 2012).) And Employer's arguments about the merits of the underlying citations are not on point nor supported by applicable authority. (See Labor Code § 6616.)

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: FEBRUARY 20, 2014