

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

In the Matter of the Appeal of:

DIANA'S MEXICAN FOOD PRODUCTS, INC.
16330 Pioneer Blvd.
Norwalk, CA 90650

Employer

Docket No. 2012-R4D4-9094

**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 Diana's Mexican Food Products, Inc. (Employer).

JURISDICTION

Commencing on July 11, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 3, 2012 the Division issued a citation (Citation 1) to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer received the citation on December 4, 2012 but did not appeal within the time allowed by Labor Code section 6600.

Subsequently, the Division issued a second citation alleging other violations on January 11, 2013, which citation Employer appealed timely.

On July 2, 2013, an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave to File Late Appeal (Order) as to Citation 1.

Employer timely filed a petition for reconsideration of the Order.

The Division did not answer the petition.

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

ISSUE

Did Employer establish good cause for its late appeal of Citation 1?

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).) Construed in the light most favorable to Employer, however, the petition may be deemed to assert that the evidence does not justify the findings of fact.

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.

Citation 1 was issued on December 3, 2012 and Employer received it on December 4, 2012. Labor Code section 6600 provides that a cited employer has 15 working days to appeal a citation, which day was December 26, 2012 in this situation. Employer did not initiate its appeal until January 22, 2013, and had paid the proposed penalty for Citation 1 on December 17, 2012.

It appears from Employer's petition that after it received the second citation from the Division, which citation it did timely appeal, Employer was encouraged by the Division to file an appeal of Citation 1. It further appears

that it was understood that appeal was late and therefore unlikely to succeed, but also that there was little or nothing to lose for trying.

The Board may extend the appeal period for good cause shown. (Lab. Code § 6601.) We do not find good cause in this situation. Employer did not appeal Citation 1 within the statutory appeal period, and paid the proposed penalty within two weeks of receiving the Citation. Since there is no allegation of fraud or misrepresentation which induced that payment, we understand it to have been an acceptance of the allegation or at the least a decision not to contest, and see no basis to consider Employer's doing so as unfounded or voidable. (*cf. Dhanraj*, Cal/OSHA App. 94-9002, Decision After Reconsideration (Jun. 6, 1994) [detrimental reliance on misinformation from Division grounds for granting late appeal].)

Employer does not appear to have misunderstood the appeal process, and even if that were the case, it would not be good cause for a late appeal. (*19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).)

Even if Employer's motivation for appealing Citation 1 when it did was regret or remorse for having paid the penalty, there is nothing in the record providing grounds on which to relieve Employer of the consequences of its decision. Paying the proposed penalty within the appeal period may reasonably be seen as admitting the existence of the violation and conceding the reasonableness of the penalty. Absent evidence of fraud or misrepresentation in the record, a party is bound by its agreements or stipulations. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).)

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: September 20, 2013