

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

In the Matter of the Appeal of:

GUARDSMARK, LLC.
22 South Second Street
Memphis, TN 38103-2965

Employer

Docket 12-R3D1-0056

**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 Guardsmark, LLC. (Employer).

JURISDICTION

Commencing on December 5, 2011, the Division of Occupational Safety and Health (Division) conducted a re-inspection of a place of employment in California maintained by Employer.

On December 27, 2011 the Division issued a “failure to abate” citation to Employer for allegedly not correcting a violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 3364(b) [toilet facilities not accessible].¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On January 31, 2013, the ALJ issued a Decision sustaining the alleged violation and imposing a civil penalty of \$20,400.

Employer timely filed a petition for reconsideration.

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

The Division did not answer the petition.

ISSUES

Whether the ALJ was correct in upholding the violation.

Whether the penalty assessed was appropriate under the circumstances.

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 explicitly states section 6617, subdivisions (a), (c), (d) and (e) as its grounds for reconsideration.

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 correct in upholding the alleged violation, and that equitable considerations require an adjustment of the penalty.

Before we address the merits of the petition and underlying citation, we briefly review the background of this matter.

Employer provides security personnel to client organizations. At one such client's facility in California, Employer stationed two of its employees, one to staff a guard shack and the other to patrol the facility. The guard shack at this facility was several hundred feet from a toilet, more than the maximum distance allowed in section 3364(b), which states: "Toilet facilities shall be kept clean, maintained in good working order and be accessible to the employees at all times. Where practicable, toilet facilities should be within 200 feet of

locations at which workers are regularly employed and should not be more than one floor-to-floor flight of stairs from working areas.” Also, because Employer’s personnel were on another company’s property, Employer could not install a new toilet without its client’s permission.

The Division cited Employer for violation section 3364(b), which the ALJ upheld. Employer then petitioned for reconsideration, which we denied. (*Guardsmark*, Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011).)

When the Board’s Denial was issued, Labor Code section 6627 gave Employer the option either (a) to seek judicial review within 30 days or (b) the remainder of the time stated in the original citation to come into compliance, i.e. to “abate”, the violative condition. Employer also appears to have done neither.

After the conclusion of the *Guardsmark* matter cited immediately above, Employer petitioned the California Occupational Safety and Health Standards Board (Standards Board) for a variance from the requirements of section 3364(b).² Ultimately that variance was granted;³ however, there is nothing in the record here showing that Employer did anything to comply with section 3364(b) while its variance application was under consideration. Board precedent requires employers to be in compliance while a variance application is pending. (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).)

While the variance application was pending with the Standards Board, the Division re-inspected the place of employment and found that the toilet facility was still about 700 feet from the guard shack and that no closer toilet facility had been provided. The Division therefore issued the citation at issue here for failure to abate the violative condition within the time allowed.

In its instant petition Employer makes four arguments we address. First it argues it was never told how to come into compliance, in violation of its due process rights. We are not persuaded. Section 3364(b) makes it plain that a toilet must be within 200 feet of the place an employee works. The safety order does not specify how that requirement is to be met, leaving it to employers to select the means of meeting the requirement. For example, if a permanent toilet facility is not within the required distance, an employer could provide

² If an employer can satisfy the Standards Board that it can provide the same or a greater degree of protection from a hazard addressed by a safety order through alternative means, the Standards Board is authorized to grant a variance from the particular requirement. See Labor Code sections 143 through 143.2; 8 CCR, tit. 8, sections 401 through 427.

³ The alternative means of compliance approved by the Standards Board involved providing another person to staff the guard shack and a motorized vehicle for the employee to use to travel to the toilet.

portable toilets within 200 feet of the workplace. It is not the Division's obligation to advise or inform employers how they may or should satisfy a safety order's requirements. Employers have the duty to know which safety orders are applicable to their workplaces and ensure they comply with them. (*Crescent Metal Products*, Cal/OSHA App. 92-629, Decision After Reconsideration (Dec. 6, 1994).) If, alternatively, Employer is contending that section 3364(b) is vague, we think the following resolves the question against Employer: "In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case." (*Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890-891.) We conclude the safety order is not vague, either in its plain language or under the "specific facts of [this] particular case." (*Id.*) It is undisputed there was no toilet within 200 feet of the guard shack, and that Employer did not provide either a temporary or permanent one. Instead, Employer argues that it was uneconomic to build a permanent toilet within the required distance, and that space considerations near the guard shack militated against putting a portable toilet there. Be that as it may—and we touch upon that later—there was no lack of clarity in the safety order such that Employer was denied due process.

Second, Employer argues that it was not told that it would be cited for failure to abate. The original citation alleging non-compliance with section 3364(b), which was issued on August 4, 2010, stated: "Date By Which Violation Must be Abated: 09/06/10." Thus, Employer was aware that it had a limited time to comply. And, the Labor Code provides for penalties should a cited employer not abate a violative condition. Labor Code section 6430(a) specifically imposes penalties for failure to abate. Labor Code section 6319.5 [modification of abatement requirements] also address the concept of abatement. In addition, Director's Regulation section 336(f) also addresses penalties for failure to abate. Therefore, Employer was on notice that it was subject to penalties for failure to abate.

Third, Employer contends that the penalty for the failure to abate was miscalculated. This is incorrect. "Failure to abate" penalties are determined by multiplying a base penalty by the number of days the condition remains unabated. (See Director's Regulation § 336(f).) The undisputed base penalty is \$450. When Employer appealed the original citation, abatement was an issue on appeal and was stayed until final resolution of the appeal. (Board Regulation § 362.) The ALJ decision upheld the citation alleging violation of section 3364(b), and Employer sought reconsideration. After the Board denied Employer's petition for reconsideration, Employer had 30 days within which to seek judicial review (Labor Code § 6627), which it did not. When that period

expired, the abatement clock began to run again. Employer believes that it had an additional 10 days in which to abate because of service by mail on an out-of-state entity. (Board Regulation § 348(c); Code of Civil Procedure § 1013(a).) What Employer misses, however, is that Labor Code section 6627 provides that the Board's Denial is effective on the date it is "*filed*," not served, and therefore time to abate (or petition a court) is not extended by mailing time. (Emphasis added.) We consider, however, the question of the proper penalty from a different perspective below.

Employer's fourth argument is that it believed it was required to construct a permanent toilet facility to come into compliance. This is inconsistent with its application for a variance to the Standards Board, which was ultimately granted. If Employer believed its alternative means of complying provided at least an equivalent degree of protection to employees as would providing a plumbed, permanent toilet (as, by implication it did in seeking variance approval of its alternative plan), it could have instituted that alternative pending the granting of its variance. There is no indication it did so. Further, it appears Employer overlooked the option of seeking a temporary variance from the Division. (Labor Code sections 6450 through 6457.) While there is no provision for not coming into compliance in some fashion while seeking a variance, Employer does not seem to have pursued *any* options other than insisting it could not come into compliance in the time allowed.

On the other hand, it seems to us from the record that the Division did little if anything to cooperate with Employer to solve the problem. If the Division had corrected Employer's apparent misconception that a permanent toilet was *the* required solution, or had agreed to allow Employer more time to abate, as Employer requested, or had suggested that Employer seek a temporary variance from the Division while its variance application was pending before the Standards Board, the current proceeding may have been unnecessary. Particularly since the alternative solution proposed by Employer was approved by the Standards Board, we think both parties could and should have been more mutually cooperative in addressing the situation, and that had they done so it would have been resolved more quickly. Thus, the equities of the situation compel us to reduce the final penalty by fifty percent, to \$10,200, because the period of non-abatement could have been reduced had both the parties been communicating more effectively and both not been so adamant in their views. (Labor Code § 6602; *Ray Cammack Shows*, Cal/OSHA App. 99-496, Order (Mar. 19, 2004) (disapproved on other grounds, *Kinder Morgan Energy Partners, L.P.*, Cal/OSHA App. 05-2013, Decision After Reconsideration and Order of Remand (Oct. 28, 2011).)

DECISION

For the reasons stated above, the petition for reconsideration is denied, but the penalty for Citation 1, Item 2 is reduced to \$10,200.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 22, 2013