

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

In the Matter of the Appeal of:

LEVEL 3 CONSTRUCTION, INC.
5910 Sea Lion Place, Suite 180
Carlsbad, CA 92010

Employer

Docket. 14-R1D5-9131

**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 Level 3 Construction, Inc. (Employer).

JURISDICTION

Commencing on July 12, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On October 21, 2013, 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 initiated its appeals by telephone call to the Board on July 21, 2014, and filed its completed appeal forms on July 30, 2014. (See Board regulations [California Code of Regulations] §§ 359, 359.1.) The appeals were late filed. (Lab. Code § 6601 [appeal to be filed within 15 working days of receiving citation].)

On August 1, 2014 the Board wrote both parties. The Board's letter to Employer explained the apparent lateness of the appeals and informed Employer that if it wanted the Board to extend the appeal filing period it must submit a statement and declaration showing the appeal was late for good cause. The Board's letter to the Division requested documentation showing the date the citations were delivered to Employer.

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

Employer submitted a statement explaining the reasons for the late appeal, and the Division submitted documents showing the citations were received and signed for by someone at Employer's address on October 25, 2013.

On September 10, 2014, an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave to File Late Appeal (Order). The Order recited the facts summarized above and held Employer had not established good cause for the late appeals.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE(S)

Did Employer establish good cause for the late appeals?

FINDINGS OF FACT

The Board has taken no new evidence in this proceeding. Based on the record in this proceeding, we make the following findings of fact:

1. Employer received the citations at issue on October 25, 2013.
2. Employer's appeals were due to be initiated or filed on or before November 18, 2013.
3. Employer initiated its appeals on July 21, 2014.
4. Employer's appeals were approximately 8 months late.
5. Employer has explained that the appeals were late because "the paperwork for this incident was either lost or misplaced."

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.

Although Employer's petition does not state any of the bases set forth in Labor Code section 6617 above, it may be construed to assert that the evidence does not justify the findings of fact and/or that the findings of fact do not support the Order.

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.

Labor Code section 6601 requires appeals to be filed within fifteen working days of the cited employer's receiving the citation(s) at issue. If the appeal is not timely filed the citation is deemed a final order of the Board. (*Id.*) The Board may extend the appeal period "for good cause." (*Id.*)

As Employer acknowledges in its petition, the citations were "lost or misplaced[,]" with the consequence that the appeals were not timely filed. Employer states that the main reason for filing its appeals late was that it has a two-person administrative staff (Employer's president and an "administrator" who was pregnant and then on maternity leave during and after the appeal period) which was overwhelmed by the paperwork demands of running a small business. While we appreciate that handling the demands of paperwork is not always easy, managing such administrative tasks is a necessary component of running a business. (See *OC Turf and Putting Greens*, Cal/OSHA App. 13-1751, Denial of Petition for Reconsideration (Jun. 9, 2014).) We have consistently reasoned over the years that employers must "handle their appeals with the degree of care a reasonably prudent person would undertake in the conduct of its most important legal affairs." (*Chamlan Enterprises, Inc.*, Cal/OSHA App. 08-1322, *et al.*, Consolidated Denials of Petitions for Reconsideration (Aug. 13, 2009), citing *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).)

The specific circumstances Employer gives for its tardiness in appealing fall within the scope of what we have termed "internal operating problems" which do not amount to good cause. (*Western Milling, LLC*, Cal/OSHA App. 06-9039, Denial of Petition for Reconsideration (Nov. 3, 2006).) That rationale is applicable here as well, since the late appeal was due to absence and/or inadequacy of staff. (*Laselco Pacific*, Cal/OSHA App. 96-9084, Denial of Petition for Reconsideration (Jul. 16, 1996).)

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: NOVEMBER 24, 2014