

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

In the Matter of the Appeal of:

MF MILLER COATINGS, INC.
257 Cheyenne Lane
Auburn, CA 95603

Employer

Dockets. 12-R2D1-3488 and 3489

**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 MF Miller Coatings, Inc. (Employer).

JURISDICTION

Commencing on May 27, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 2, 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 Citation 1 alleged a general violation of section 3276(e)(15)(A) [portable ladders; using top step]. Citation 2 alleged a serious accident-related violation of section 1670(a) [failure to provide fall protection].

Employer timely appealed.

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

On July 10, 2014 the ALJ issued a Decision (Decision) which affirmed Citation 1 and Citation 2 but reclassified the violation to “serious,” adjusting the penalty accordingly.

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

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Does the evidence support the Decision?

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.

The petition asserts that the evidence does not justify the findings of fact, Employer “discovered additional material evidence,” and/or the findings of fact do not support the Decision.

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 based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer was engaged to paint two “shade structures” or pergolas, a structure consisting of columns supporting horizontal beams which create an open lattice to provide partial shade, at a private residence. One of the shade structures was set apart from the house, the other attached to it. Both were approximately nine feet high. The injured employee painted both, or portions of them, on the day of the accident. The employee fell while painting the shade structure connected to the house.

The employee suffered serious injuries as a result, including head trauma which caused amnesia regarding the fall itself. The employee's version of events immediately preceding the fall and Employer's were diametrically opposed: the employee said he was working on top of the structure; Employer testified that he was working from about the four- or five-foot level of an eight-foot step ladder.

Citation 1 alleged a general violation of section 3672(e)(15)(E), which states: "Employees shall not sit, kneel, step or stand on the pail shelf, top cap or the step below the topcap of a step ladder." The unrefuted testimony was that the employee had at some time during the day of the accident used the topcap and/or the step below it to access the top of at least one of the shade structures. A violation was thus established.

Similarly, although the evidence was that the employee more likely than not was not standing on top of the shade structure when he fell, there was unrefuted testimony that at some time before the accident he had worked on top of one or both structures. The shade structures' heights of approximately nine feet is in excess of the height at which section 1670(a) requires the use of personal fall protection, and the evidence established that the injured employee was not wearing any when he worked atop the structure(s). Therefore the violation of section 1670(a) was established.

Employer's petition argues that other evidence in the record requires one to conclude the violations were not established. While there was evidence in the record to contradict some of the evidence in support of the two citations, the ALJ held and we agree that the preponderance of the evidence supports finding that the two alleged violations were established. "Preponderance of the evidence is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Blattner Energy Inc.*, Cal/OSHA App. 12-0911, Denial of Petition for Reconsideration (Aug. 22, 2013, citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483 (internal quotations omitted).)

Although Employer's petition initially asserts that it had "discovered additional material evidence" it does not specifically identify any such additional or new evidence, explain what is new, or explain why it was evidence which could not have been discovered earlier in the exercise of reasonable diligence. (See Lab. Code § 6617(d).) Accordingly, even construing the petition liberally and deeming it to have made a Labor Code section 6617(d) assertion, we need not reach the point as the assertion is unsupported.

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 25, 2014