

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

In the Matter of the Appeal of:

**ROBERT E. SUTTON COMPANY, INC.
P.O. Box 34032
Truckee, CA 96160**

Employer

Inspection No.
1417616

**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 Robert E. Sutton Company, Inc. (Employer).

JURISDICTION

On November 14, 2019, the Division issued one citation to Employer for violation of California Code of Regulations, title 8, section 4184, subdivision (b)¹ [failure to guard machine at its point of operation]. The citation package was served at Employer’s correct business address by certified mail. The certified mail receipt, provided by the Division, indicates the citation package was received, and signed for by an agent of Employer, on November 26, 2019.

The Appeals Board has no record of a timely appeal. The Appeals Board has no record of any communication from Employer until receiving Employer’s letter on September 24, 2021, nearly two years after its deadline to file an appeal had expired. Employer’s letter alleges it mailed the Board its original appeal on December 4, 2019. Employer’s aforementioned letter attached a copy of appeal forms that were filled out by hand with a date of December 4, 2019 reflected on the date line.

On April 14, 2022, the Board served upon Employer a Notice of Untimely Appeal (Notice). The Notice explained that Employer’s appeal “appears untimely.” The Notice explained that Employer could submit a declaration with facts to show good cause for filing a late appeal. The Board did not receive a response to the Notice.

¹ Unless otherwise specified, all section references are to California Code of Regulations, title 8.

Administrative Law Judge (ALJ), Jennie Culjat, issued an Order Denying Late Appeal (Order) on May 18, 2022. The Order noted Employer had failed to file a declaration in response to the Notice as required. Further, the Order stated,

Here, while it may be that Employer mailed an appeal to the Appeals Board on December 4, 2019, there is no record of the [sic] this appeal. Despite receiving nothing confirming that the appeal had been received or any communication at all from the Appeals Board, Sutton did not make any inquiry about the status of his appeal until almost two years after he supposedly filed the appeal. Having received no contact from the Appeals Board, a reasonably prudent employer would have been diligent in pursuing its appeal by following up to ensure that the appeal was received.

[. . .]

To be sure, Employer is not being penalized if the appeal was, in fact, lost in the mail or some other event outside of Employer's control caused the appeal to be lost. The issue is that Employer took no action to pursue its appeal for nearly two years. Employer cannot now benefit from its own failure to act by asserting that it actually filed a timely appeal, never heard from the Appeals Board, and assumed the appeal was lost. Employer failed to take any reasonable steps to protect its appeal rights. (Order, p. 2.)

Employer filed a verified Petition for Reconsideration (Petition) on June 22, 2022, challenging the ALJ's Order. Employer's Petition seeks to demonstrate that it was promptly addressing the Division's citations, and attempts to corroborate its assertion that it filed a timely appeal on December 4, 2019. Employer's Petition also seeks to defend its failure to follow up with its purported December 4, 2019 appeal until September 24, 2021, pointing to challenges associated with the Covid-19 pandemic, among other allegations. The Division did not file an Answer.

ISSUE

1) Has Employer demonstrated good cause for reinstatement of its appeal?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case, including the arguments presented in the Petition. We have taken no new evidence. 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 for several reasons, any of which would be sufficient to deny the petition.

First, although Employer contends it filed its appeal in December 2019, the Board has no record of any communication from Employer until a letter dated September 24, 2021. If Employer had actually submitted an appeal on December 4, 2019, it stands to reason that it would have followed-up to determine the status of its appeal within a reasonable amount of time. (E.g., *People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 663-664.) The Board’s rules, at the time, stated “Upon docketing of an appeal, the Appeals Board shall serve on each party the appeal information, copies of documents required to perfect the appeal, and the docket number(s) assigned to the appeal.” (§ 359.1, subd. (e).) When Employer was not served with any of the aforementioned documents for weeks, months, and then nearly two years, Employer should have been on notice that something was wrong and needed correction. (E.g., *People ex rel. Lockyer v. Brar, supra*, 134 Cal.App.4th at 633-664.) Action should have been taken earlier, notwithstanding the existence of the Covid-19 pandemic. Employer’s apparent indifference to the receipt of any docketing documentation (or any other information), for nearly two years, supports a reasonable inference that Employer never put the appeal forms in the mail in the first place. (*Ibid.*)

Second, even if the Board credits Employer’s assertion that the appeal was somehow lost in the mail, that alone is not necessarily grounds for automatic relief. (E.g., *People ex rel. Lockyer v. Brar, supra*, 134 Cal.App.4th at 663.) As the ALJ noted, Employer took no action on its appeal for an extended period of time. Employers are required to handle their appeals with the degree of care a reasonably prudent person would undertake in the conduct of its most important legal affairs. (*Rafidain, Inc. dba Genie Car Wash & Oil Change*, Cal/OSHA App. 1162918, Denial of Petition for Reconsideration (May 12, 2017).) Here, the ALJ properly concluded that Employer failed to take any reasonable steps to protect its appeal rights, warranting a determination not to process the appeal.

Finally, the first communication the Board received from Employer was dated September 24, 2021, nearly two years after the deadline to file an appeal had expired. In response to Employer’s letter, the Board served upon Employer a Notice of Untimely Appeal (Notice) on April 14, 2022. The Notice advised Employer “your appeal cannot proceed because it appears untimely.” The Notice, however, gave Employer an opportunity to respond. The Notice stated, “The Appeals Board cannot process your appeal unless you show good cause for initiating your appeal late. If you believe you do have good cause for initiating your appeal late, a Declaration explaining the facts you rely upon to show good cause why a late appeal should be accepted must be sent to the Appeals Board.” Employer did not respond to the Notice with a written declaration or otherwise. Employer merely relied upon the unverified letter it sent months earlier, on September 24, 2021. With no sworn statements from Employer, the ALJ had no actual evidence that Employer had timely appealed the citations, nor evidence demonstrating good cause for initiating its appeal late, only unsworn allegations. Therefore, the ALJ properly rejected Employer’s request to have its appeal processed as timely.

Further, the Board sees no grounds to revisit the ALJ's Order. Although the Petition contains verified statements, those statements should have been first presented to the ALJ via a declaration, as noted above. The Board will not consider new evidence in the first instance unless a party demonstrates that they could not, with reasonable diligence, have discovered and produced the evidence at the hearing before the ALJ. (*Lion Raisins*, Cal/OSHA App. 08-2253, Decision After Reconsideration (Nov. 26, 2013).) Employer makes no such showing here.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 08/22/2022

