

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

**In the Matter of the Appeal of:**

**TOTAL TERMINALS INTERNATIONAL, LLC  
301 Mediterranean Way  
Long Beach, CA 90802**

**Employer**

**Inspection No.  
1572962**

**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 Total Terminals International, LLC (Employer).

**JURISDICTION**

Following an incident resulting in an employee fatality, the Division of Occupational Safety and Health (Division) commenced an investigation of a worksite maintained by Employer in Long Beach, California. On July 15, 2022, the Division issued five citations to Employer alleging violations of the workplace safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup> One citation was classified as General, three as Serious, and one as Serious Accident-Related, with proposed penalties totaling \$52,875. The United States Postal Service (USPS) Domestic Return Receipt indicates the citation packet was delivered via certified mail and signed for by an agent of Employer on July 18, 2022.

Section 359, subdivision (d) and Labor Code section 6600 provide that an appeal is timely if the cited employer notifies the Board of its intent to appeal a citation within 15 working days of receipt of the citations. Employer was thus required to notify the Board of its intent to appeal the citations no later than August 8, 2022. Employer filed its appeal on August 9, 2022.

The Board issued a Notice of Untimely Appeal (Notice) on November 18, 2022. On December 8, 2022, Employer timely filed a written statement and sworn declaration in support of its request to file a late appeal. Section 359 and Labor Code section 6601 authorize the Board to extend the 15 working day deadline for initiating an appeal if the employer provides a written statement and declaration demonstrating good cause. Employer's declaration stated that the citation package was internally misdirected because an administrative clerk failed to identify it as correspondence from the Division.

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<sup>1</sup> Unless otherwise specified, section references are to California Code of Regulations, title 8.

On December 15, 2022, Administrative Law Judge (ALJ) for the Board Les E. Murad, II, issued an Order Denying Late Appeal (Order), finding that Employer failed to demonstrate good cause for its late appeal. Employer's timely Petition for Reconsideration (Petition), which elaborates upon the arguments made in its written statement and declaration, followed.

## ISSUE

Did Employer demonstrate good cause for filing a late appeal?

## REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case. 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 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 asserts that the evidence does not justify the findings of fact, and that the Board acted without or in excess of its powers in issuing the Order. (Lab. Code, § 6617, subds. (a), (c).)

Section 359, subdivision (d) and Labor Code section 6600 provide that an appeal is timely if the cited employer initiates its appeal within 15 working days of receipt of the citations. Here, Employer filed its appeal on August 9, 2022. On September 28, 2022, the Board requested the Division to provide a proof of service for the citation package, to determine whether the appeal was timely. In response, the Division provided to the Board and Employer a copy of the citation package envelope, postmarked July 15, 2022, and addressed from the Division's Long Beach District Office, located at 1500 Hughes Way, Suite C201, Long Beach, CA 90810, to "Total Terminals Intl, LLC, 301 Mediterranean Way, Long Beach, CA 90802." In addition, the Division provided a copy of the USPS confirmation of receipt of domestic certified mail, bearing the signature "Susan Said" and dated "7-18-22." Having received the citation package on July 18, 2022, Employer was thus required to file its appeal no later than August 8, 2022. Its appeal was filed one day after that deadline.

Section 359 and Labor Code section 6601 authorize the Board to extend the 15 working day deadline to initiate an appeal if the employer provides a written statement and declaration demonstrating good cause for the late appeal. Section 359, subdivision (d) defines “good cause” for a late appeal as “sufficient facts to show or establish a reasonable basis for the late filing.” To provide guidance to employers, the Board has, over the years, attempted to clarify this broad definition by explaining what does and does not constitute good cause under various circumstances. Primarily, the Board’s longstanding rule is that in pursuing an appeal, an employer must “act with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs.” (*Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).)

In general, when an appeal is late due to the employer’s internal operating problems – which includes the mishandling of documents – the Board treats this as an example of an employer’s failure to handle an appeal with the requisite degree of care, and therefore not good cause for a late appeal. (See, e.g., *Southern California Edison*, Cal/OSHA App 08-9062, Denial of Petition for Reconsideration (Jan. 30, 2009); *American Waste Industries*, Cal/OSHA App. 06-3943, Denial of Petition for Reconsideration (Aug. 12, 2008).) The Board has consistently held that when a document is “lost in the paper shuffle” in a place of business, and an untimely appeal results, no good cause exists to justify an extension of the 15 working day filing period. (*Kaweah Construction Company*, Cal/OSHA App. 87-9005, Denial of Petition for Reconsideration (March 5, 1987).) Rather, it is an employer’s obligation to put procedures into place that will ensure important documents are processed in a timely manner. (*Consttech Construction Corporation*, Cal/OSHA App. 05-9060, Denial of Petition for Reconsideration (Jul. 28, 2005).)

The Board issued to Employer a Notice of Untimely Appeal (Notice) on November 18, 2022. On December 8, 2022, Employer filed a written statement and declaration in support of its request to file a late appeal, signed under penalty of perjury by Employer’s Senior Manager of Health, Safety and Environment, Jennifer Jennings (Jennings). Ms. Jennings declared that Employer has a system to screen mail and route it to the appropriate department. Under this system, administrative clerks check the return address on each incoming envelope to determine the sender, and then, based on that return address, route the unopened mail to the appropriate department. Legal correspondence, including mail from a state agency, is customarily routed to the Director of Risk Management, Manuel Alvarez (Alvarez). If an administrative clerk is unsure of where a particular item should be directed, Employer’s procedures dictate that the item is to be placed in the inbox of a specified manager.

On this occasion, however, that system failed. Employer’s basic argument is that its appeal was late because the last two letters of “DIR/CALOSHA” were obscured on the return address label of the citation package envelope, causing the agency’s name to appear as “DIR/CALOS.” Employer provided a photocopy of the citation package envelope in its written statement and declaration in support of its request to file a late appeal, as well as in its Petition. There appears to be a USPS sticker, containing a bar code, partially obscuring the agency’s name on the return address label, so that instead of “DIR/CALOSHA” the visible letters are “DIR/CALOS.” The address itself is not obscured, including, in boldface, “LONG BEACH DISTRICT OFFICE.”

According to Ms. Jennings’s declaration and Employer’s Petition, administrative clerk Susan Said (Said) received the citation package on July 18, 2022, but, due to the two obscured letters on the return label, failed to identify the package as legal correspondence from the Division. This caused the package to be incorrectly routed to a department where mail was opened less than once every three weeks, resulting in the late appeal. Employer asserts that Ms. Said “departed from TTI’s regular and reliable mail-handling procedures, which departure was beyond TTI’s control and could not have been anticipated.” (Petition, p. 8.) Ms. Jennings’s declaration stated that she was anticipating the citation packet, and had notified the administrative staff to that effect. Ms. Jennings also stated that she followed up with administrative staff on several occasions, but was informed that the packet had not been received. Employer asserts that this error constitutes good cause, and did not amount to an internal operations problem, or a failure to handle an appeal with the requisite degree of care, on its part.

The ALJ concluded that Employer failed to demonstrate good cause for its late appeal and issued the Order rejecting Employer’s late appeal on December 15, 2022. We agree.

Employer states that, upon seeing the letters “DIR/CALOS” on the return label, Ms. Said concluded the envelope containing the citation packet was sent by a person named “CARLOS.” Rather than removing the sticker over the two letters on the return label, or following Employer’s internal procedures for handling mail when there are questions as to where it should be directed, Ms. Said apparently assumed (based on the name “CARLOS”) the envelope contained a résumé for a mechanic job. She then routed the citation package to the Maintenance and Repair Department (M&R) rather than to Mr. Alvarez. In M&R, mail is not opened on a daily basis. Rather, “accumulated batches” of mail are opened “every 3 to 4 weeks.” (Petition, pp. 5, 7.) As a result, Ms. Jennings and Mr. Alvarez did not receive the citation packet in a timely fashion. Employer states that M&R contacted Ms. Jennings on August 9, 2022, informing her they had opened the envelope and discovered that it contained the citation packet. Employer’s appeal was filed on the same day.

Employer’s argument is unpersuasive. The return address was not handwritten; it was on a machine-printed label. There could be no reasonable confusion as to what the letters spelled out. The return label clearly did not say “CARLOS.” Only two letters of “DIR/CALOSHA” were obscured, leaving most of the agency name visible, along with the entirety of the District Office address, including the identifier “LONG BEACH DISTRICT OFFICE.” With even a cursory glance, it should have been obvious that part of the agency’s name was obscured by the sticker. A reasonable person should not have simply interpreted “DIR/CALOS” to mean “CARLOS” without taking action such as removing the sticker to verify the name, checking the “LONG BEACH DISTRICT OFFICE” address, or following Employer’s own purported procedures for handling mail when there was uncertainty regarding where it should be routed.

Employer further argues that Ms. Said’s mistake was understandable because the “generic manila envelope [...] was different from other mail that Cal/OSHA” had previously sent to Employer, because it did not contain, for example, any governmental logo or seal to identify it as coming from the Division. (Petition, pp. 5, 9.) The type of envelope used by the Division is irrelevant. It was Employer’s responsibility to ensure that incoming mail was appropriately routed and received. The Board has held that the notification requirements of Labor Code section 6319,

subdivision (a), are satisfied if the Division serves a citation by certified mail, which has been signed for by an agent or employee of the employer. (*Pyramid Telecommunications, Inc.*, Cal/OSHA App. 04-9063, Denial of Petition for Reconsideration (Jul. 11, 2005).) The presumption of adequate service can be rebutted only by clear evidence of an actual failure of the delivery at the mailing address. (*Id.*) Employer here admits the citation packet was received and signed for by its administrative clerk, Ms. Said, who then failed to properly identify and direct the package.

Employer nonetheless argues that it acted with reasonable care in this matter. Employer asserts that, despite Ms. Said's error in routing the citation package, and Employer's subsequent failure to timely open and examine the contents of the package, Ms. Jennings "spoke with" administrative staff, "on at least five separate occasions between July 6 and 20, 2022," alerted them to the fact that Employer was expecting mail from the Division, and asked them whether any such mail had been received. (Petition, pp. 6, 9.) However, the administrative clerks, including Ms. Said, "advised [Jennings] that TTI had not received any such mail." (*Id.* at p. 6.) Employer also asserts that "Ms. Jennings did not receive any email correspondence from the Division" after approximately June 29, 2022, to inform her that the citation package had been sent. (*Id.*)

This argument also fails. First, if Employer had effectively informed its administrative clerks to be alert for mail from the Division, this should have been sufficient notice for the clerks to identify an envelope with a return label indicating the sender as "DIR/CALOS" from the "LONG BEACH DISTRICT OFFICE" as containing important legal correspondence from that agency, despite the obscuration of the last two letters in the agency name. Second, rather than contacting the Division or attempting to track the package, Ms. Jennings simply assumed that the package had not arrived. It was the responsibility of Employer, not the Division, to ensure that Employer's mail was properly routed and timely processed upon receipt.

In addition to Ms. Said misrouting the package, Employer admits that the package, which was received on July 18, was not opened, and its contents thus not examined, until August 9, 2022, a day after the 15 day deadline. This was entirely due to Employer's own practice of opening mail in the M&R Department only once every three or four weeks, as Employer concedes. This falls well within the scope of the type of "internal operating problem" that the Board has consistently declined to treat as good cause for a late appeal. (See, e.g., *Southern California Edison, supra*, Cal/OSHA App 08-9062.)

Finally, Employer emphasizes that the appeal was filed only one day late, and filed on the very day the citation package was discovered. The Board does understand Employer's frustration in that regard. However, whether its appeal is late by a day, a week, or a month, an employer still bears the burden of demonstrating good cause for the late initiation of its appeal. The Board has never held that an employer's burden to demonstrate good cause for a late appeal is lowered or eliminated because its appeal is only one day late. (See *Miramar Seafood Products, Inc. dba Miramar Fish Tacos & Beer*, Cal/OSHA App. 1374116, Denial of Petition for Reconsideration (Nov. 4, 2019). [Appeal filed one day late, but no good cause shown to allow late appeal].) The Board declines to do so now. To do so may be interpreted as weakening the fifteen working day requirement by establishing a precedent which could be used to argue that it should not apply, even without a showing of good cause. Moreover, it is not appropriate for the Board to ignore or revise its procedural regulations without following required rulemaking procedures; nor does the Board

have authority to ignore or revise the terms of the Labor Code. (See, e.g., *E.L. Yeager Construction Co.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) Here, Employer has failed to demonstrate good cause for its late appeal, and the fact that the appeal was late by only one day is irrelevant.

### DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's Order Denying Late Appeal is affirmed.

### OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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



FILED ON: 02/22/2023