

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

In the Matter of the Appeal of:

**MASTER TREE SERVICE, INC.
1235 South H Street
Oxnard, CA 93033**

Employer

Inspection No.
1304615

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration of the administrative law judge's Order Denying Late Appeal dated January 30, 2020, on its own motion, issues the following Decision After Reconsideration.

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued four citations to Employer alleging a total of nine violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Employer received the citations by certified mail on September 18, 2018, and timely appealed Citation 4 on September 24, 2018. Employer's appeal was docketed by the Board on October 3, 2018.

On October 25, 2019, Employer's newly retained counsel filed a Motion and Declaration for Late Appeal, as to Citations 1, 2, and 3, and then a Motion to File Late Appeal on January 7, 2020. An administrative law judge (ALJ) of the Board issued an Order Denying Late Appeal (Order) on January 30, 2020, which was served on February 5, 2020. The Board, on its own motion, ordered reconsideration of the Order on February 20, 2020. Also, on February 7, 2020, Employer filed a Motion to Amend Appeal. Since our reconsideration order was issued after Employer's Motion to Amend Appeal was filed, we will deal with it in this Decision After Reconsideration.

The Division filed a response to the Order of Reconsideration.

ISSUES

1. Was there good cause for Employer's late appeals of Citations 1, 2, and 3?
2. Should Employer's motion to amend its appeal to include Citations 1, 2 and 3 be granted?

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

FINDINGS OF FACT

1.The Division issued the four citations on September 14, 2018, and Employer received them on September 18, 2018.

2.Employer timely appealed Citation 4 on September 24, 2018. Employer’s appeal challenged only the proposed penalty, on the basis that it was unreasonable.

3.Employer filed a notice of abatement of Citation 4 on September 21, 2018, with the Division.

4.Employer first attempted to appeal Citations 1, 2, and 3 on October 25, 2019, more than one year after receiving all four citations and appealing Citation 4. The appeal of those citations were filed more than 15 working days after September 18, 2018.

DISCUSSION

1. Was there good cause for Employer’s late appeals of Citations 1, 2, and 3?

Employer moved to file late appeals of Citations 1, 2 and 3 in October 2019, more than one year after receiving all four citations and appealing Citation 4. Those appeals were late, as they were filed well more than 15 working days after September 18, 2018. Notwithstanding the lateness of the appeals, “[t]he time for filing any appeal may be extended or a late filing permitted upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing.” (Lab. Code sect. 6601; Board regulation sect. 359, subd. (d).) Petitioner argues good cause exists her for the late appeal, a point we next consider.

Employer principally argues that good cause exists to allow the late filing of the appeal due to confusion. That argument is rejected.

The documents included in “citation package” transmitting the citations themselves and related information to Employer have been held to legally sufficient to put it on notice of its rights and obligations. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App. 4th 43.) The citation package received by Employer states, in part, on page 2, “[Y]ou must then file a completed appeal form with the Appeals Board . . . for each contested Citation. Failure to file a completed appeal form with the Appeals Board may result in dismissal of the appeal.” (Original emphasis.) Employer appealed the penalty proposed in Citation 4 on the grounds that it was unreasonable and later notified the Division that it had abated the violative condition, establishing it had received the citations and knew what actions to take to file an appeal. The citation package put Employer on notice that to appeal any or all the other three citations, it had to file appeal forms challenging those other citations, as it had done regarding Citation 4. Employer did not do so. The appealing party should pursue its appeal(s) to the Board with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs. (*Avexco Inc. dba Pheonix Apparel*, Cal/OSHA App. 01-9210, Denial of Petition for Reconsideration (March 26, 2002) [“It is incumbent upon an appealing party to become familiar with the appeal process and requirements in order to further its interests in an orderly disposition of the appeal by the Board...”].)

In seeking to show there was good cause for appealing Citations 1, 2, and 3 late, Employer also claimed the existence of language difficulties and that he had asked a friend for help, with the appeal of Citation 4 resulting from that assistance. Although we have held that language difficulties are not good cause for a late appeal, (*19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995); *Freight Rider Express*, Cal/OSHA App. 04-9115, Denial of Petition for Reconsideration (Jan. 14, 2005)), we need not and do not resolve this matter on that basis.

Employer also contends that it believed that filing the appeal of Citation 4 also appealed the other three citations. As pointed out above, the citation package states that an appeal form has to be filed for each citation being appealed, and Employer's appeal form addressed only Citation 4. Misunderstanding the appeal process is not good cause for a late appeal. (*Hemington Landscape Services, Inc.*, Cal/OSHA App. # 1300729, Denial of Petition for Reconsideration (Nov. 20, 2018).)

2. Should Employer's motion to amend its appeal to include Citations 1, 2 and 3 be granted?

Employer's counsel also filed a motion to amend the appeal of Citation 4 to include Citations 1, 2, and 3.² The Motion argues that the amendment should be allowed under Board regulation section 371.2. However, when an employer fails to appeal a citation or files a late appeal without good cause, Labor Code section 6601 provides that the citation(s) "shall be deemed a final order of the [Board] and not subject to review by any court or agency." Neither the Board nor Employer can circumvent section 6601 through procedural maneuvering or ledgerdemain. Employer's Motion seeks to accomplish indirectly what Employer cannot do directly, namely to affect a late appeal where there was no good cause for the failure to timely appeal.

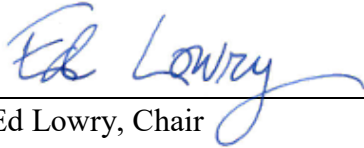
Since Employer's appeal of Citations 1, 2, and 3 were late without good cause, the citations became final under Labor Code section 6601. Thus Employer's Motion to Amend its appeal of Citation 4 is moot. And, even if we were to ignore that factor, Board regulation section 371.2, subdivision (b) provides that: "Amendment of a citation or an appeal is not permitted when: (1) The amendment concerns a general set of facts sufficiently different from the facts contained in the citation or appeal that the proposed amendment does not relate back to the original citation or appeal[.]" Citation 4, the citation which Employer appealed, alleged that Employer allowed an employee to get too close to high voltage electric transmission lines while trimming a tree. By comparison, Citation 1 alleged the following violations: Item 1, heat illness prevention; Item 2, establish, implement and maintain an effective injury and illness prevention plan; Item 3, train employees to recognize and avoid electrical hazards; Item 4, have a "qualified tree worker" brief employees before work begins; Item 5, establish and train employees on emergency response procedures; Item 6, the required number of employees had not been trained in first aid. Citation 2 alleged that the tree trimming work was not under the direction of a qualified tree worker. Citation 3 alleged a qualified tree worker did not perform a visual inspection and determine a safe means of entry into trees or identify the location of all electrical hazards. As is apparent from this summary, the proposed amendment would involve litigating facts different and distinct from those at issue in Citation 4 and so the amendment is not permitted. (§371.2, subd. (b)(1).)

² The Motion at page 2 incorrectly states that Employer "filed a timely appeal concerning Inspection No. 1304615 on or about September 24, 2019." That appeal was filed on September 24, 2018, and it was limited to Citation 4.

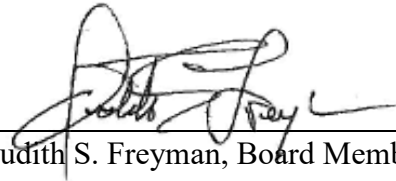
DECISION

For the reasons stated above, we affirm the Order Denying Late Appeal and deny Employer's Motion to Amend Appeal. We affirm the ALJ as to Citation 4.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member

Marvin P. Kropke, Board Member



FILED ON: **02/24/2021**

DECLARATION OF SERVICE BY MAIL OR EMAIL

Inspection Number
1304615

I, Sarsvati Patel, declare: **DECISION AFTER RECONSIDERATION**

1. I am at least 18 years of age, not a party to this action, and I am employed in Sacramento County at 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
2. On 02/24/2021, I served a copy of the attached DECISION AFTER RECONSIDERATION in an envelope addressed as shown below and placed the envelope for collection and mailing on the date and at the place shown in item 3 following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
3. Date mailed: 02/24/2021 Place mailed: (city, state): Sacramento, CA

David Martinez
Law Office of David Martinez
674 County Square Drive, Suite 207-E
Ventura, CA 93003

4. On 02/24/2021, I electronically served the document listed in item 2 as follows:

NAME OF PERSON SERVED	ELECTRONIC SERVICE ADDRESS
<u>Chris Grossgart, DOSH Legal</u>	<u>cgrossgart_doshlegal@dir.ca.gov</u>
<u>Rocio Reyes, DOSH Legal</u>	<u>rreyes_doshlegal@dir.ca.gov</u>
<u>DOSH Southern Office</u>	<u>doshlegal_la@dir.ca.gov</u>
<u>William Cregar</u>	<u>wcregar@dir.ca.gov</u>
<u>Zulfiquar Merchant</u>	<u>ZMerchant@dir.ca.gov</u>
<u>Abiud Baca Rodriguez</u>	<u>mastertreeservice805@gmail.com</u>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sarsvati Patel

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)

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**ERRATA TO
DECISION AFTER
RECONSIDERATION**

On February 24, 2021, the Occupational Safety and Health Appeals Board (Board) issued a Decision After Reconsideration (DAR) in the above-entitled matter. A clerical error has been noted in the Decision section of the DAR. By this Errata, the Board corrects the DAR as follows:

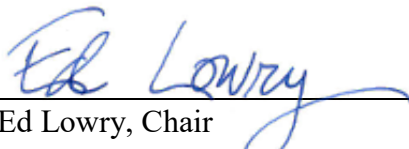
The last sentence of the Decision section, at page 4 is incorrect.

The sentence reads: **We affirm the ALJ as to Citation 4.** It should say: **The matter remains with the administrative law judge specific to the appeal and resolution of Citation 4, Item 1.**

The remainder of the DAR is unaffected.

This Errata to the DAR relates back to the original date of issuance: February 24, 2021, and is effective as of that date.

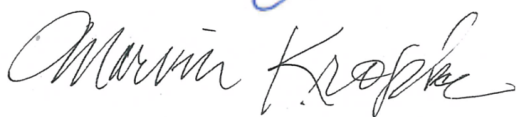
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin Kropke, Board Member



FILED ON: **03/08/2021**