

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

In the Matter of the Appeal of:

**ALBECO, INC. dba
MOLLIE STONE'S MARKETS
150 Shoreline Highway, Bldg. D
Mill Valley, CA 94941**

Employer

Inspection No.
1538332

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Albeco Inc., doing business as Mollie Stone's Markets (Employer), operates a Bay Area chain of grocery stores. On September 21, 2021, the Division of Occupational Safety and Health (Division) issued to Employer two citations alleging violations of California Code of Regulations, title 8.¹ Citation 1, Item 1 alleged a General violation of section 2340.16, subdivision (c) [failure to ensure clear working space around energized electrical panels]. Citation 1, Item 2 alleged a General violation of section 2500.9, subdivision (a) [failure to ensure that a flexible electric cord, supplying power to a meat slicer, was spliced so as to retain its original insulation, outer sheath properties, and usage characteristics]. Citation 2 alleged a Serious violation of section 5185, subdivision (n) [failure to provide facilities for quick drenching or flushing of the eyes or body for a forklift battery charging station].

Employer received the citations on September 22, 2021. Pursuant to section 359, and Labor Code sections 6600 and 6602, Employer was required to appeal the citations, or notify the Board of its intent to file appeals, within 15 working days of receipt of the citations.

On October 7, 2021, Employer timely filed an appeal to Citation 2. Employer did not file an appeal to Citation 1, Item 1, or Citation 1, Item 2.

A status conference was set for December 12, 2022, with Administrative Law Judge (ALJ) Jennie Culjat. During this status conference, Employer indicated that it meant to appeal not only Citation 2, but also Citation 1, Items 1 and 2. ALJ Culjat advised Employer that the appeal period had expired, but explained that Employer could file a motion requesting leave to file a late appeal.

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

Section 359 and Labor Code section 6601 provide that the Board may permit a late filing upon a showing of good cause where an employer submits a written declaration that contains sufficient facts to show or establish a reasonable basis for the late filing. On December 12, 2022, the Board provided Employer, via email, with instructions for filing a request for a late appeal.

On December 30, 2022, Employer submitted the declaration of Steve Stamos (Stamos), Chief Operations Officer (Declaration 1), requesting leave to file a late appeal of Citation 1, Items 1 and 2. Declaration 1 disputed the merits of Citation 1, Items 1 and 2, but provided no explanation for the untimely appeal.

On January 10, 2023, ALJ Culjat emailed the parties and informed Employer that additional information was required for proper consideration of its request to file a late appeal. In this email, ALJ Culjat clarified that the standard for considering a request for leave to file a late appeal is whether the employer has demonstrated good cause, as set forth in section 359. ALJ Culjat also provided information and instructions for filing a request for a late appeal.

On February 1, 2023, Employer submitted a second declaration from Stamos (Declaration 2). Declaration 2 asserted that Employer's newly hired Risk Manager had mistakenly believed that Citation 1, Items 1 and 2, could not be appealed. Declaration 2 also asserted that Employer has a positive safety record and that the violations alleged in Citation 1, Items 1 and 2, had been abated.

Finding that Employer failed to establish good cause, ALJ Culjat issued an Order Denying Late Appeal (Order) on February 17, 2023.

On March 16, 2023, the Board ordered reconsideration of the ALJ's Order on its own motion, to determine whether the ALJ properly denied the late appeal.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Employer demonstrate good cause for failing to file a timely appeal of Citation 1, Items 1 and 2?

DISCUSSION

Employer submitted Declaration 1, requesting leave to file a late appeal of Citation 1, Items 1 and 2, on December 30, 2022. If the date of Declaration 1 is considered the date Employer initiated its appeal of these alleged violations, then Employer initiated its appeal of Citation 1, Items 1 and 2, over a year after receiving all citations and filing its appeal to Citation 2. Employer's appeal of Citation 1, Items 1 and 2, was therefore late, as it was made well after the 15-working-day filing deadline, which began to run on September 22, 2021.

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, § 6601; § 359, subd. (d).) 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 attempted to clarify this broad definition by explaining what does and does not constitute good cause under various circumstances. (*Total Terminals International, LLC*, Cal/OSHA App. 1572962, Denial of Petition for Reconsideration (Feb. 22, 2023).) The overarching rule is that, in pursuing an appeal before the Board, 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 this matter, Employer was provided not once, but twice, with information and instructions on filing a motion to permit its late appeal. Employer’s Declaration 1, filed on December 30, 2022, merely disputed the merits of the alleged violations. However, the Board “cannot reach the merits unless Employer establishes good cause for the late appeal.” (*Miramar Seafood Products, Inc. dba Miramar Fish Tacos & Beer*, Cal/OSHA App. 1374116, Denial of Petition for Reconsideration (Nov. 4, 2019).)

Rather than simply denying the late appeal at that time, ALJ Culjat reiterated the filing instructions, clarified the good cause requirement to Employer, and provided Employer with another opportunity to show good cause for its late appeal. The information provided to Employer included the following statement:

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.

In Declaration 2, filed on February 1, 2023, Employer argued, first, that its “new Risk Manager at the time was unaware” that Citation 1, Items 1 and 2, could be appealed. Employer argued, second, that it had abated the violations alleged in Citation 1, Items 1 and 2. Neither of these arguments establishes a reasonable basis, or good cause, for the late filing.

First, it is long established that a failure to understand the appeal process is not good cause for a late appeal. (*19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).) The Board has held, “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[.]” (*Avexco Inc. dba Phoenix Apparel*, Cal/OSHA App. 01-9210, Denial of Petition for Reconsideration (March 26, 2002).) Employer does not explain why it timely appealed Citation 2, yet believed it could not appeal Citation 1, Items 1 and 2. ALJ Culjat posited that Employer may have formed this mistaken belief, and treated the citations differently, because Citation 2 was classified as Serious, while the violations alleged in Citation 1

were classified as General. Regardless of the reason, Employer's incorrect belief that Citation 1, Items 1 and 2, could not be appealed amounts to a misunderstanding of the appeal process.

The "Citation and Notification of Penalty" packet ("citation packet") served on Employer contains detailed information regarding filing an appeal. On page 1, the citation packet states:

YOU HAVE A RIGHT to contest this Citation and Notification of Penalty by filing an appeal with the Occupational Safety and Health Appeals Board. To initiate your appeal, you **must** contact the Appeals Board, in writing or by telephone, or online, within 15 working days from the date of receipt of this Citation.

(Emphasis in original.)

This information regarding a cited employer's appeal rights, which was included in the citation packet, has been held legally adequate to give the employer notice of those rights, and the steps necessary to exercise them. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43 (*Murray Company*)). An employer's misunderstanding of the appeals process, and its failure to act in accordance with the instructions provided in the citation packet, do not rise to the requisite level of care necessary to establish good cause.

Moreover, in this matter, ALJ Culjat addressed Employer's confusion, first at the status conference on December 12, 2022, which was followed up on that same day with information from the Board on filing a late appeal, and again in an email, on January 10, 2023. Despite no requirement to do so, ALJ Culjat provided Employer with a second opportunity to establish good cause, and file a late appeal of Citation 1, Items 1 and 2. Employer still failed to offer any facts, other than its confusion, to establish good cause for a late appeal. Employer's motion for a late appeal was therefore denied, not because Employer was confused about the process, but because Employer failed to establish good cause after receiving an explanation of the process.

Second, the Board has held that abating the cited violation or hazard is not good cause for a late appeal. (*Antonio Corona dba Central Valley Upholstery*, Cal/OSHA App. 1395729, Denial of Petition for Reconsideration (Apr. 13, 2020).) Confusing the requirements for abatement with the requirements for filing an appeal amounts to a misunderstanding of the appeal process. (*Victorio Mufflers, Inc.*, Cal/OSHA App. 1565022, Denial of Petition for Reconsideration (Feb. 3, 2023).) Therefore, while Employer's efforts to address safety issues in its workplace are to be commended, they do not provide good cause for a late appeal. (*Id.*)

DECISION

For the reasons stated, 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 Kropke, Board Member

FILED ON: 08/11/2023

