

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

In the Matter of the Appeal of:

**STATE OF CALIFORNIA DEPARTMENT OF
TRANSPORTATION
DBA DIVISION OF MAINTENANCE DISTRICT 4
111 Grand Avenue, Suite 11-100
Oakland, CA 94612**

Employer

**Inspection No.
1600556**

**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 State of California Department of Transportation (Employer).

JURISDICTION

Employer, commonly known as Caltrans, is a state agency which oversees and manages transportation networks in California. On December 2, 2022, following an inspection at a place of employment maintained by Employer at “US Interstate 80, West of Cherry Glenn Rd., Post Mile 23.4,” Vacaville, California, 95688, the Division of Occupational Safety and Health (the Division) issued two citations, both classified as Serious, to Employer for alleged violations of workplace safety and health standards codified in California Code of Regulations, title 8.¹

Citation 1 alleged a violation of section 1598, subdivision (a) [failure to conform with the “California Manual on Uniform Traffic Control Devices for Streets and Highways” when a hazard exists to employees due to traffic or haulage conditions at work sites that encroach upon public streets or highways]. Citation 2 alleged a violation of section 3203, subdivisions (a)(4), (a)(6), and (a)(7) [failure to implement and maintain an effective Injury and Illness Prevention Program].

Section 359, subdivision (d), and Labor Code sections 6600 and 6602 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 filed its appeal on February 7, 2023. The Board sent the Division a letter requesting proof of delivery for the citations so the Board could determine whether Employer’s appeal was timely. In response, the Division provided a certified mail receipt with an illegible signature, and a printout of corresponding USPS tracking information, which indicated that the citation package had been received by Employer, the sole occupant of the

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

building at 111 Grande Avenue in Oakland, on December 6, 2022. Assuming that date of receipt, which Employer does not dispute, Employer was required to file its appeal no later than December 28, 2022.

The Board issued to Employer a Notice of Untimely Appeal (Notice) on March 3, 2023, providing Employer 20 days from the date of service to show good cause for initiating its appeal late. Section 359 and Labor Code section 6601 allow an employer to submit a written statement that contains sufficient facts to show or establish good cause for the late filing.

In response, Employer timely submitted sworn Declarations from Deana Abello (Abello), Employer's Safety Staff Services Manager II for Caltrans District 4, who was the named addressee on the citation package, and from Athena Cline (Cline), Employer's Deputy District Director of Administration for Caltrans District 4, who is Ms. Abello's direct supervisor. Employer's Declarations stated that the appeal was late because the citation package had not been timely directed to Ms. Abello, that this delay was due to an internal operating failure which resulted in the delay of the citation package being delivered to Ms. Abello, that Ms. Abello was on vacation during the time period to file the appeal, that Ms. Abello did not receive the citation package until January 24, 2023, and that Employer believed that the timeline for filing its appeal began to run not when the citation package was received and accepted at Employer's Oakland office on December 6, 2022, but when Ms. Abello personally received the citation package.

On March 29, 2023, ALJ Kerry Lewis issued an Order denying the late appeal, finding that Employer failed to demonstrate good cause for the late filing.

On May 3, 2023, Employer timely filed a Petition for Reconsideration, asserting that it established good cause for the late appeal.

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 findings of fact do not support the Order. (Lab. Code, § 6617, subs. (c), (e).)

Section 359, subdivision (d), and Labor Code sections 6600 and 6602, provide that an appeal is timely if the cited employer initiates its appeal within 15 working days of receipt of the citations. Here, the citation package was received and signed for by an agent of Employer on December 6, 2022. Employer was therefore required to initiate its appeal no later than December 28, 2022. Employer filed its appeal on February 7, 2023.

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. (*Total Terminals International, LLC*, Cal/OSHA App. 1572962, Denial of Petition for Reconsideration (Feb. 22, 2023).) Generally, 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).)

It is long-settled that when an appeal is late due to an employer’s internal operating problems – which includes the mishandling of documents – the Board customarily 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).) For example, when a document is “lost in the paper shuffle” in a place of business, and an untimely appeal results, no good cause exists to extend the 15 working day filing period. (*Kaweah Construction Company*, Cal/OSHA App. 87-9005, Denial of Petition for Reconsideration (March 5, 1987).) As the ALJ pointed out here, it is an employer’s obligation to put procedures in place that will ensure that important documents are properly handled, and processed in a timely manner. (*Rui Liang dba TE Construction and Electric, Inc.*, Cal/OSHA App. 1312675, Denial of Petition for Reconsideration (Feb. 14, 2019); *Consttech Construction Corporation*, Cal/OSHA App. 05-9060, Denial of Petition for Reconsideration (Jul. 28, 2005).)

The Board has accordingly held that employers in California must establish means of dealing with important legal matters which arise in the absence of principals or members of management, and that failing to do so is a specific example of “an internal operating problem,” which is not good cause for a late appeal. (*A L S Fashion, Inc.*, Cal/OSHA App. 14-9046, Denial of Petition for Reconsideration (Jul. 8, 2014).) A manager’s extended absence from the office, without arrangements for the handling of important matters such as receiving a citation package, is therefore not good cause for a late appeal. (*Id.*)

Here, Ms. Abello’s Declaration stated that communications from the Division were customarily sent to David Ross (Ross), but that in this matter, Mr. Ross had requested that the Division instead send a hard copy of the Division’s Notice of Intent to Classify a Violation as Serious (Notice of Intent) to Ms. Abello, whose office was located in Oakland, because Mr. Ross’s office, located in Sacramento, was in the process of moving to a different building. Mr. Ross notified Ms. Abello on November 15, 2022, that she would be receiving the hard copy of the Notice of Intent. Both Ms. Abello and Mr. Ross received electronic copies of the Notice of Intent on November 17, 2022. Ms. Abello subsequently received a hard copy of the Notice of Intent, addressed to her at the Oakland office. Ms. Abello stated that she “thought the citation would be handled in the same manner, with an electronic copy sent to David Ross and to me, and a hard copy mailed, but this time to David Ross whose office in Sacramento had completed its move.” Ms. Abello was on vacation from December 13, 2022, through January 16, 2023. Upon her return to the office, she noted that the citation package was not in her mail slot. The citation package appeared in her mail slot on January 24, 2023. Ms. Abello stated that she did not recognize the signature accepting receipt of the citation package on December 6, 2022. Ms. Abello interpreted the 15 working day filing deadline to begin to run on January 24, 2023, the day she personally received the citation package, and Ms. Abello was informed by Mr. Ross that he also believed this was correct.

Ms. Cline’s Declaration stated, “I do not recognize the signature of the individual at our Caltrans building who signed for delivery, but around that time in December there were several circumstances that inadvertently contributed to the lag in internal mail distribution.” Ms. Cline stated that she believed, and was also informed by Mr. Ross, that the appeal would be timely if filed within 15 working days after the citation package was delivered to Ms. Abello, on January 24, 2023.

The ALJ concluded that Employer failed to demonstrate good cause for its late appeal, and issued the Order rejecting Employer’s late appeal, on March 29, 2023. We agree.

First, Ms. Cline states, in her Declaration, that “around that time in December there were several circumstances that inadvertently contributed to the lag in internal mail distribution.” This is an example of an internal operating problem, and is not good cause for a late appeal. In addition, Ms. Abello’s vacation began on December 13, 2022, a week after the citation package was received. Even if her absence from the office during the filing period was good cause for the late filing, which it is not, Employer offers no further explanation for why the citation package was not discovered and processed between December 6 and December 13, before Ms. Abello left for vacation. Nor does Employer dispute that the citation package was received at its Oakland office on December 6, 2022.

Regarding Employer’s belief that the time to file an appeal began to run when the citation package was placed in Ms. Abello’s mail slot, Labor Code sections 6600 and 6602, and section 359, provide that “the appeal period commences when *the cited employer* receives the citation.” (*Golden State Construction & Framing, Inc.*, Cal/OSHA App. 1532874, Denial of Petition for Reconsideration (Sep. 16, 2022) (emphasis in original).) The Board has therefore held that the notification requirements of the Labor Code and the Board’s regulations 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); *United Parcel Service, Inc., dba UPS*, Cal/OSHA App. 1273411, Denial of Petition for Reconsideration (Oct. 31, 2018).) Employer does not dispute that this occurred here.

In its Petition, Employer argues that “unlike the employers who were the subjects of the precedential cases cited in the Order, Caltrans is not a ‘business.’ It is a large, statewide government entity, with 22,000 employees who oversee 50,000 miles of highway, maintain approximately 20,000 bridges, and engage in a number of other public services.” (Petition, p. 3.) Employer asserts that there should be a distinction between “the proper service of citations on a State entity, or service on a particular individual in a large entity not expecting, accustomed, or designated to receive such documents,” as opposed, it is implied, to service of citations on a small, private employer. (Petition, p. 4.) This argument is without merit. Neither the nature, nor the size, nor the complexity of an employer’s operations is relevant to that employer’s obligation to comply with the requirements of the Labor Code and the Cal/OSH Act. There is no reason to distinguish Caltrans from any other employer in its responsibility to exercise appropriate care and prudence in the handling of its legal affairs.

Labor Code section 6304 specifies, “‘Employer’ shall have the same meaning as in [Labor Code] Section 3300.” Labor Code section 3300, in turn, defines “employer” to include “The State and every State agency.” (Labor Code, § 3300, subd. (a).) The Legislature has therefore explicitly included state agencies within the purview of Cal/OSHA requirements. The Board has previously held that governmental entities, for example, public school districts, are not exempt from timeliness requirements when filing appeals. (See, e.g., *San Mateo Union High School District, Capuchino HS*, Cal/OSHA App. 09-9342, Denial of Petition for Reconsideration (Mar. 4, 2010).)

This argument is also undercut by Employer’s statement that “Caltrans showed its intent early on to engage in the citation proceedings, by way of its December 5, 2022 response to the Notice of Intent.” (Petition, p. 4.) Employer, by its own admission, was aware that the citations were being issued, regardless of whether it anticipated that the citation package would be sent to the Sacramento or Oakland office. Ms. Abello’s Declaration stated that she was aware of the forthcoming citations on November 15, 2022, when she was informed by Mr. Ross of the Notice of Intent. It was the responsibility of Employer to ensure that the citation package was appropriately processed and the citations were timely appealed. Employer failed to do so.

Employer further argues that “neither Ms. Abello nor the Caltrans Oakland office are proper recipients” of communications from the Division such as citation packages. (Petition, p. 3.) Again, this argument is without merit. The Board has held that the Division is not required to send citations to a specific location or individual. (*San Mateo Union High School District, Capuchino HS*, *supra*, Cal/OSHA App. 09-9342; *United Parcel Service, Inc.*, Cal/OSHA App. 16-9109, Denial of Petition for Reconsideration (Oct. 7, 2016).) As noted, it is the employer’s duty to ensure that important communications are properly and timely routed, received, and processed. Further, Ms. Abello had been previously designated to receive communications from the Division.

Finally, Employer argues that “the circumstances presented here ... do not involve a deliberate choice by an employer to forego filing an appeal during the operative time to do so.” (Petition, p, 4.) This is irrelevant. There is no exception in the Board’s regulations or the Labor Code for the late filing of an appeal as a result of other than “deliberate choice.” Indeed, the Board has consistently held, as discussed, that good cause is not established when an appeal was untimely filed due to the employer’s mistake or oversight. (See, e.g., *Total Terminals International, LLC*, *supra*, Cal/OSHA App. 1572962.)

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: 06/14/2023

