

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

LIMA DAIRY
7622 14th Street
Hanford, CA 93230

Employer

Docket Nos. 02-R2D5-9231,
03-R2D5-9133
and 9134

**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 Lima Dairy (Employer).

JURISDICTION

On May 24, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an inspection at a place of employment maintained by Employer at 7622 14th Street, Hanford, California (the site).

On September 20, 2001, the Division issued to Employer citations alleging a general violations of section 3203(a) [Injury and Illness Prevention Program]; section 3366(e) [hand towels or blowers]; section 2340.16(a) [suitable access around equipment]; and serious violations of section 3440(c)(1) [PTO shaft guarding] and section 4070(a) [moving parts for belt and pulley drives] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹

Employer initiated its appeal by phone on May 28, 2002, and submitted its completed appeal forms on June 4, 2002. The Board sent Employer a letter on September 12, 2002, asking it to explain why the appeal was filed approximately 7½ months late. In its petition Employer states it never received this letter. Employer was given until September 27, 2002, to respond. Employer did not respond and on February 7, 2003, the Board issued an order denying Employer's appeal as untimely. An Amended Order Denying Late Appeal was issued February 28, 2003, which added two docket numbers to the

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

original order. Employer filed a timely petition for reconsideration on March 26, 2003.

Employer contends it did respond to the Board's letter and indeed it does appear that Employer responded in a case involving a different inspection with a different IMIS number. In that case the Division issued to Employer citations for a general violation of section 5194(e)(1) [written hazard communication program]; and a serious violation of section 5162 [self-contained eyewash]. In that case Employer also initiated its appeal by phone on May 28, 2002, and submitted its completed appeal forms on June 4, 2002. The Board sent Employer a letter in that case on September 19, 2002, asking it to explain why the appeal was filed late. Employer was given until October 5, 2002, to respond. Employer responded on October 2, 2002, and claims it meant for that letter to apply to both cases but the letter had only one IMIS number on it.

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

Labor Code section 6319 states that an "employer has 15 working days from receipt of the notice [of citation] within which to notify the appeals board that he or she wishes to contest the citation or order..." Section 359 of the Board's regulations states:

- (a) Except as provided in Section 361.1(b), an appeal shall be deemed filed on the date a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal.
- (b) The 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.
- (c) A request to file a late appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

Section 359.1 states:

- (a) A completed appeal form shall be filed for each contested Division action.
- (b) If an appeal is initiated by other than an appeal form, a completed appeal form shall be filed with the Appeals Board within 10 days of acknowledgement by the Appeals Board of

the desire to appeal. Failure to file a completed appeal form may result in dismissal of the appeal.

- (c) The Appeals Board shall furnish appeal forms upon request and shall provide them to the district offices of the Division.
- (d) Upon receipt of a timely completed appeal form, the Appeals Board shall assign a docket number and deliver or mail a copy of the docketed appeal to each party.

In this case, Employer was served with the citations by certified mail acknowledged by a return receipt indicating they were received at Employer's address on September 24, 2001. Employer filed its appeal by telephone on May 28, 2002---over 7½ months later. The Board sent a letter on September 12, 2002, informing Employer of the late appeal and informing Employer that for the Board to consider extending the appeal period, it must provide a written statement explaining the specific reasons why the appeal was not timely filed. (§359(b)) The letter also stated that Employer must submit the information to the Board no later than September 27, 2002. Because no response was received from Employer, the Board ordered that the appeal not be docketed and that the file be closed, i.e., denied the late-filed appeal.

In its petition for reconsideration from the Board's order denying late appeal, Employer states that it did not receive the Board's September 12 letter for the subject violations but did receive a letter from the Board dated September 19 which required submission of the same information but for a different identified inspection made by the Division (and for a different appeal filed by Employer). Since Employer timely responded to the September 19th letter on October 2, 2002, within the period specified therein, Employer essentially argues that it effectively responded to the Board's September 12th letter for purposes of the instant appeal.

We do not find merit in Employer's argument. A completed appeal form is required for each contested Division action. (§359.1) Employer filed separate appeal forms for alleged violations made pursuant to *two* separately identified inspections. Each of the two Board letters to Employer identified the proceedings by reference to the respective inspection numbers as indicated on the face of the citations.² Thus, Employer's response to the Board's September 19th letter, referencing only one of the inspection numbers, cannot be interpreted to apply to the other identified inspection number.

We find that Employer's October 2, 2002 response for a different appeal did not satisfy the Board's request for a response in this appeal, and further, insufficient information was provided to establish that Employer did not receive the Board's September 12th letter. Also, even if the same facts and reasons

² Our review of the Board's letters to Employer for the two different inspections (identified by their respective IMIS Numbers) indicates that the letters were addressed to the same person at the same address.

applicable in Employer's October 2nd response also applied to the instant appeal proceeding, it was still not received within the time period prescribed by the Board, i.e., not later than September 27, 2002.

Moreover, in reviewing Employer's explanation regarding the failure to respond to the Board's September 12th letter, Employer did not and has not given a plausible explanation why its appeal was filed 7½ months late. The citations were sent to Employer by certified mail which was signed for on September 24, 2001 (Exhibit A attached hereto). The Appeals Board has previously held that an appealing party must exercise 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.)) Employer's pursuit of a timely appeal following service of the citations requires that it have in place measures or procedures sufficient to insure handling and processing of the citations in a manner allowing Employer to review and act (appeal) within the required time period.

Employer in this case has not explained why it should be excused (or an extension granted) from the 7½ month late filing other than to simply suggest it did not receive the citations, which is deemed unbelievable in light of the signed certified mail return receipt.

DECISION

We find that Employer has not shown good cause for the late filed appeal and the petition for reconsideration is denied.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 14, 2003