

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

In the Matter of the Appeal of:

AGC COMMUNICATIONS
2 Boreal Place
Petaluma, CA 94954

Employer

Docket No. 03-R1D4-3121

**DECISION AFTER
RECONSIDERATION
AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board, (Board) pursuant to authority vested in it by the California Labor Code, and having taken the petition for reconsideration filed by AGC Communications (Employer) in this matter under submission, issues this Decision after Reconsideration and Order of Remand.

Factual Background

The Division of Occupational Safety and Health (Division) issued a citation to Employer on July 23, 2003, and Employer timely appealed. A prehearing conference was held that resulted in partial settlement of the appeal and an order issued, which was apparently sent to Employer at its then new address, 1953 Matzen Ranch Circle, Petaluma, California, 94954. Although this address was clearly communicated to the Board, the subsequent Notice of Hearing was sent to Employer's prior address, 2 Boreal Place, Petaluma, California.¹ As a result, Employer did not receive the notice² and consequently did not appear at the hearing. Similarly, because the Notice of Intent to Dismiss Appeals and the Order Dismissing Appeal were also sent to Employer's prior address³, Employer was unaware of the subsequent proceedings or that its appeal had been dismissed on October 26, 2005.

Employer first learned that something had transpired regarding its appeal on February 9, 2007, when it was contacted by a collection agency regarding the outstanding penalty. In response, Employer immediately began

¹ While the body of the Notice of Intent to Dismiss Appeals states that the Notice of Hearing was sent to "2 Normal Place, Petaluma, CA," the proof of service for the Notice of Hearing itself reflects the Boreal Place address.

² The envelope containing the notice was returned to the Board by the post office marked "Return to sender; not deliverable as addressed; unable to forward".

³ The envelopes containing these documents were also returned to the Board by the post office as undeliverable.

investigating the matter. After various phone inquiries, and being transferred back and forth between the Division and the Board, Employer filed a petition for reconsideration on March 13, 2007.

Included with Employer's petition was a photocopy of an envelope postmarked November 23, 2004, which was sent to Employer by the Board at its current address and apparently contained the prehearing order, which is the last document Employer received from the Board prior to March 2007. In addition, although the Order Dismissing Appeal stated that Employer's phone was disconnected and that no alternative listings could be obtained, Employer's petition asserts that it had the same phone number at both addresses and continues to use the number now. The Division did not file an Answer to the petition for reconsideration.

Issues

- 1) Was Employer afforded due process?
- 2) Does the Board have jurisdiction to consider Employer's petition for reconsideration?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Employer was not afforded due process.

It is indisputable that the Board was informed of Employer's change in address, because the Board used that address on at least one occasion, as evidenced by the envelope supplied by Employer, which was sent by the Board to Employer's correct address. The Board's acceptance and use of Employer's correct address is a key factor in our decision.

Despite the Board's knowledge of Employer's change in address, the Notice of Hearing and subsequent documents were sent to Employer's old address. Consequently, the Notice of Hearing was addressed incorrectly and did not reach Employer, which, we infer, accounts for Employer's failure to attend the hearing.

Labor Code section 6602 requires that the Board afford an employer a hearing. The right to have a hearing necessarily includes the right to have notice of such hearing in time to attend. *Lydikainen v. Industrial Accident Commission* (1939) 36 Cal. App. 2d 298, 304, *citing, Carstens v. Pillsbury* 172 Cal. 572, 576. Failure to provide adequate notice of a hearing constitutes a failure of due process. *Id.*; *see, Jones v. Flowers* (2006) 547 U.S. 220, 226. Based on the evidence before us, we must conclude that Employer was not given adequate notice of the hearing, so was not afforded due process.

2. The Board has jurisdiction to consider Employer's petition for reconsideration.

Labor Code section 6614(a) requires a petition for reconsideration to be filed within 30 days of the service of any final order. Here, the Order of Dismissal was dated October 26, 2005 and Employer's petition for reconsideration was filed on March 13, 2007. Nonetheless, we conclude that we retain jurisdiction to consider this petition because, where service is not properly affected, the applicable limitations period for seeking redress does not begin to run. See, *Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal. App. 4th 819, 829; see also, *Warmington Old Town Associates v. Tustin Unified School Dist.*, *supra*. Here, as in *Herman*, *supra*, the 30-day limitations period was never triggered because the Board never served Employer with the Order Dismissing Appeal.

Moreover, while we conclude that the 30-day limitations period was never initiated, even if we were to apply it here, we would find that it did not begin to run until Employer learned that its appeal was dismissed.

Employer first learned of an outstanding debt associated with the appeal when it was contacted by the collection agency on February 9, 2007, the Friday before a holiday weekend. At that time, Employer did not know that its appeal had been dismissed. In its verified petition, Employer contends that it immediately began to investigate what had transpired and that it left multiple unanswered messages with the Board before it learned of the dismissal. If we were to assume that Employer learned of the dismissal as early as February 13, 2007,⁴ the Tuesday following the three-day weekend and the first day that Employer realistically could have received this news, then Employer's petition would be timely.

**Decision After Reconsideration
And
Order Of Remand**

Under the facts of this case, we must conclude that the Board's failure to use Employer's correct address when mailing the Notice of Hearing deprived Employer of due process because Employer was not given adequate notice of the hearing scheduled in January 2006, or of the Board's intended action following Employer's failure to appear at the hearing.

In light of the legal principles previously discussed, and the facts presented, we find that the Order Dismissing Appeal in this matter was invalid.

⁴ Accepting the veracity of Employer's claim that it left multiple unanswered messages before learning of the dismissal, we think it is more likely that Employer did not know the fate of its appeal until a significantly later date.

As a result, we remand this matter to the Board's hearing operations unit to schedule further proceedings.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: January 17, 2008