

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

In the Matter of the Appeal of:

NEWSTAR FRESH FOODS, LLC.  
900 Work Street  
Salinas, CA 93901

Employer

Dockets. 12-R6D3-3183 through 3186

**DECISION AFTER**  
**RECONSIDERATION**  
**AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by Catalina Maldonado (Employee) under submission, renders the following decision after reconsideration.

**JURISDICTION**

On October 22, 2012, the Division of Occupational Safety and Health (Division) cited Newstar Fresh Foods, LLC (Employer) with multiple violations of workplace safety and health standards codified in California Code of Regulations, Title 8,<sup>1</sup> and proposing civil penalties. The citations included, without limitation: a serious violation of section 3203(a)(6) [failure to provide methods for correction of unsafe conditions in timely manner]; and, a serious violation of section 5141(a) [failure to provide effective engineering controls].<sup>2</sup>

Employer filed timely appeals for each of the aforementioned citations. In December 2012, the Board scheduled a Prehearing Conference for March 25, 2013.

On January 18, 2013, the Board received a Petition for Intervention filed by the California Rural Legal Assistance, Inc. (hereinafter "CRLA") on behalf of Employee. The Board construed the Petition as a motion for party

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

<sup>2</sup> Employer was cited for several additional violations, not pertinent here. This petition solely concerns the section 3203(a)(6) and 5141(a) violations.

status pursuant to section 354, and granted it by amended order on March 11, 2013.

A Prehearing Conference was held on March 25, 2013, which was attended by representatives of the Employer, Division, and Employee. Thereafter, hearings were scheduled for May 16 and May 17, 2013.

On May 8, 2013, the Division notified the ALJ that it had reached settlement with Employer and requested that the hearing be taken off calendar. Employee submitted objections to the proposed settlement. The ALJ subsequently took this matter off calendar.

On September 4, 2013, the ALJ issued an Order approving the stipulated settlement agreement between the Division and Employer. Pertinent here, the Order approved an agreement between the Division and Employer reducing the amount of penalties for the violation of section 3203(a)(6) [failure to provide methods for correction of unsafe conditions in timely manner] from the proposed \$9,000 to \$3,375 by lowering the “extent” and “likelihood” factors to “low”, and reducing the amount of penalties for the violation of section 5141(a) [failure to provide effective engineering controls] from the proposed \$11,250 to \$3,375 by lowering the same gravity factors. The ALJ’s Order approved the settlement agreement over the objections of Employee.

Employee filed a Petition for Reconsideration. Employee challenges the Order reducing the penalties for the sections 3203(a)(6) and 5141(a) violations. The Petition raises several issues. Employee complains that the settlement, and in particular the reduction in the aforementioned penalties, was not permitted by law under the facts of this case. Employee complains that she was not served all documents and notices to which she was entitled due to her party status, which prevented her from fully participating in settlement discussions. Employee complains that she was denied the opportunity to meaningfully participate in settlement proceedings. Employee also contends that the Board was required to afford her a hearing.

### **DECISION AFTER RECONSIDERATION**

The Board has reviewed and considered the entire record in this matter. In making this decision, the Board relies upon its independent review of the entire record in this proceeding.

On March 11, 2013, the Board granted party status to Employee under section 354. Following the grant of party status, Employee was

entitled to service of all documents previously filed with the Appeals Board. Section 354(i)<sup>3</sup> states:

A person whose motion for party status has been granted by the Appeals Board becomes a party to the proceeding and is entitled to service of all documents and notices. Each party shall serve within 10 working days of the order granting party status, copies of all documents previously filed with the Appeals Board and not served on the new party. Service shall be in a manner as prescribed in Section 355(c) and proof of such service meeting the requirements of Section 355(e) shall be filed with the Appeals Board.

Employee states the parties failed to serve her with all required documents upon the grant of party status, including copies of the Employer's appeals. For instance, within her Petition, Employee contends she never received a copy of any document from Employer indicating intent to appeal, or the grounds for the appeal. (Petition for Reconsideration, at p. 2, 5-6.)

Neither the Division nor Employer contest Employee's assertion that she was not served with all required documents.<sup>4</sup> Employer acknowledges that "an oversight occurred when Maldonado was granted status on March 11, 2013. Appellant did fail to provide a copy of its appeals to Maldonado." (Response to Petition for Reconsideration, p. 6.)

The failure of the parties to comply with section 354(i) and serve Employee with all required documents constituted a significant oversight, requiring reversal of the previous order approving the settlement agreement.

An employee granted party status by the Board must be given the opportunity to participate in the appeal process and provide input into settlement discussions. (*See, Dey Laboratories Inc.*, Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995).) To enable an employee to participate and provide input into settlement discussions, an employee must be provided copies of all previously filed documents as required by section 354(i) upon the grant of party status.

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<sup>3</sup> This provision was formerly located under subsection (h) of section 354, but it was renumbered to subsection (i) following an amendment to the regulation in 2013. There were no substantive changes to requirements, and for convenience this section will be referred to herein under its current subsection designation.

<sup>4</sup> The Division did not file an Answer to the Petition, and did not rebut the Employee's contention that it was not served with all required documents.

Here, Employee's ability to provide effective input into settlement discussions was improperly impeded due to non-compliance with the requirements of the regulation. Therefore, we vacate the Order of the ALJ and remand this matter back to Hearing Operations for a further Pretrial Conference, attended by all Parties, after Employee has been served by the parties with all required documents pursuant to section 354(i).

We do not, and need not, address the other contentions and arguments within Employee's Petition for Reconsideration as they are not yet ripe for consideration due to this order of remand.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MAY 29, 2015