

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

ISM VUZEM USA, INC.
304 Azalea Hill Drive
Greenville, SC 29607

Employer

Docket. 16-R1D2-9047

**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 ISM VUZEM USA, INC. (Employer).

JURISDICTION

On May 22, 2015, the California Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer. On September 28, 2015, the Division issued correspondence (referred to as 1BY form) stating its intent to cite the alleged violation of Title 8 CCR section 1632(b)(3) (failure to cover floor and roof holes) as “serious”, to which Employer responded. The Division subsequently issued the Citation on October 22, 2015, and Employer received the citation on October 29, 2015. Employer initiated its appeal by telephoning the Board on January 8, 2016. This appeal was not timely because it was not initiated within 15 working days of receiving the citation, as required by Labor Code section 6600. Thereafter, Employer’s counsel filed appeal forms and other documents.

On March 16, 2016, the Board issued an “unable to process” letter to Employer stating its appeal could not be processed because it was untimely. The letter explained that in order to file a timely appeal, the Board must be

contacted “within 15 working days from the date of receipt of citation.” (Unable to Process Letter.) The Board’s letter informed Employer that it had the opportunity to make a showing of “good cause” for its delay in filing the appeal. On April 6, 2016, the Board issued an Order Dismissing Appeal because Employer did not respond to unable to process letter. On the same day the Order was issued, Employer submitted its Declaration purporting to show good cause to the Board.

ISSUES

Did the Employer show good cause for its late appeal?

Did the Employer show good cause for its failure to respond to the Board’s “unable to process” letter?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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’s petition does not specifically assert any grounds for its reconsideration but construed in the light most favorable to Employer, it may be taken to state that the evidence does not justify the findings of fact and/or the findings of fact do not support the Decision. Furthermore, Employer alleges a failure to serve the correct employer.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. 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.

Firstly, the Employer argues the service of process must have been made on its parent corporation in Slovenia, ISM Vuzem DOO. However, the Labor Code defines employer as “Every person including any public service corporation, which has any natural person in service.” (Labor Code section 6304, ref. Lab. Code section 3300, subd. (c).) Vuzem USA had the injured employee in service. California law does not require service of process on a foreign parent corporation. Serving the domestic subsidiary has been upheld as a valid service of process. (*Yamaha Motor Co., Ltd. v. Superior Court* (2009) 174 Cal.App.4th 264, 269.) Also, under California law, service on a person who is ostensibly, even if not actually, a corporate officer is sufficient. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313.) Service of process made upon certain corporate officers including a general manager will suffice. (*General Motors Corp. v. Superior Court* (1971) 15 Cal.App.3d 81, 84.) A general manager has general direction and control of the business, and can do everything which the corporation could do in transaction of its business. (*Id.* at p. 85.) In the instant case, process was served on ISM VUZEM USA, Inc., which is the subsidiary of ISM Vuzem DOO. Acknowledgement of service was signed by Robert Vuzem, the president of ISM VUZEM USA, Inc., which supports the inference that Robert Vuzem had general control of the business and had the power to do everything which the corporation could do in transacting its business. Thus, ISM VUZEM USA, Inc. was properly served under California law.

Furthermore, the Employer gave the Division its South Carolina address instead of a Slovenian address; therefore, any misinformation was the result of Employer’s own actions.

Next, the Employer argues its response to the Division’s correspondence, the 1BY, gave the Board notice of appeal. However, the correspondence was sent prior to the issuance of the citation. (Petition, p. 1.) Also, the Employer’s response was sent to the Division, not the Board, as part of the process established under Labor Code section 6432, to provide the Division and employers the opportunity to clarify issues in situations where the Division believes a serious citation is warranted. The Board had no knowledge of this exchange between the Division and the Employer, and it is not relevant to the issue of whether Employer’s appeal was timely or, if not, was untimely for good cause.

To the extent Employer’s argument based on its response to the 1BY reflects a misunderstanding of the appeal process, such a misunderstanding could have been avoided had Employer heeded the legally sufficient information provided in the citation package. (*Graciana Tortilla Factory, Inc.*, Cal/OSHA App. 15-9010, Denial of Petition for Reconsideration (Apr. 23, 2015).) Employer’s misunderstanding of the appeal process is not good cause for filing a late appeal. (*Ukiah Ford-Lincoln-Mercury, Inc.*, Cal/OSHA App. 06-

2556, Decision After Reconsideration (Jun. 15, 2011); *19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).) Likewise, Employer did not timely respond to the “unable to process letter” from the Board. Employer took 21 days to respond to the Board’s letter, which stated that a response was required in 10 days.

The petition goes on to argue the merits of the citation, which is not appropriate under the circumstances of a late appeal. (*Superb Auto Repair & Tire Center*, Cal/OSHA App. 09-9263, Denial of Petition for Reconsideration (Dec. 23, 2009).)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 27, 2016