

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

UPS GROUND FREIGHT, INC.
dba UPS FREIGHT
20760 Spence Road
Salinas, CA 93908

Employer

Docket. 16-R1D2-9043

**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 UPS Ground Freight, Inc. dba UPS Freight (Employer).

JURISDICTION

Commencing on May 14, 2015, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 30, 2015, the Division issued one citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

On October 13, 2015, Employer sent an intent to appeal letter to the Division's District Office which issued the citations. On November 30, 2015, the Division's Accounting department sent a notice of collection letter to the Employer, seeking to collect the civil penalty assessed by the citation.

On December 10, 2015, Employer's counsel sent a letter to the Board with a completed appeal form and citation attached.

On January 27, 2016, the Board sent a letter to Employer's counsel stating the appeal could not be processed because it was untimely filed.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

On February 9, 2016, Employer's counsel sent a letter to the Board attempting to establish good cause for the late appeal.

On April 5, 2016, an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave To File Late Appeal (Order) which held Employer did not establish good cause for its late appeal and thus sustained the alleged violation and assessed civil penalty.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

ISSUES

Did Employer timely appeal? If not, did Employer establish good cause for filing its appeal late?

FINDINGS OF FACT

The Division issued the citation to Employer on September 30, 2015, and it was received by Employer on October 5, 2016.

Employer sent a letter to the Division on October 13, 2015, stating its "intent to contest the citation[.]"

Since no appeal had been filed with the Board, the Division issued a collection notice on November 30, 2015.

Employer faxed a notice of intent to appeal to the Board on December 10, 2015.

Board staff sent Employer an "unable to process" letter on January 27, 2016, due to the apparent untimeliness of the appeal. Contemporaneously, the Board asked the Division to provide proof of receipt of the citations by Employer, which it did.

Employer responded to the Board's "unable to process" letter with documents showing that it had sent the Division its letter of contest. Employer's letter to the Division states Employer's intent to contest the citation in its entirety, but provided no other detail or information pertaining to the alleged violation.

**REASONS FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

Labor Code section 6600 states that a cited employer may appeal the citation to the Appeals Board within fifteen working days of receipt of the citation. That requirement is also stated in the written information provided to Employer in what we term the “citation package.” Labor Code section 6601 further states that if an employer does not notify the Appeals Board of its intent to appeal the citation within fifteen working days of receiving it, the citation shall be deemed a final order of the Board and not be subject to review by any court or agency. Section 6601 also states that the Board may extend the fifteen day period for good cause.

The statutes summarized above and Board jurisprudence make clear that a cited employer is to file its appeal with the Board, not the Division. (Lab. Code sections 6600 and 6601; *Oltmans Construction Co.*, Cal/OSHA App. 08-9435, Denial of Petition for Reconsideration (Feb. 2, 2009).) Employer was provided notice of those requirements in the citation package, which information has been held to be legally sufficient to place it on notice of its appeal rights and obligations. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43.)

The ALJ’s Order considered the arguments advanced in Employer’s response to the “unable to process” letter in light of the applicable law, and found that Employer had not established good cause for its late appeal.

In considering Employer’s petition for reconsideration, we first ask whether Employer’s appeal was late.

As we indicated above, the Labor Code requires that an appeal of a citation be filed with the Board, not the Division. (Lab. Code sections 6600, 6601.) Employer was informed of that requirement in the documents which were sent with the citation itself. (See the “Citation and Notification of Penalty,” p. 1, received by Employer “[y]ou **must** contact the Appeals Board[.]” (original emphasis)); *Graciana Tortilla Factory Inc.*, Cal/OSHA App. 15-9010, Denial of Petition for Reconsideration (Apr. 23, 2015).) Informing the Division instead of the Board of one’s intent to appeal is not sufficient. (Board regulation (Cal. Code Regulations, tit. 8) sec. 359, subd. (a); *Oltman’s Construction Company*, Cal/OSHA App. 08-9435, Denial of Petition for Reconsideration (Feb. 2, 2009).) Employer’s petition acknowledges that it filed its “notice of contest” with the Division, not the Board. It follows that the appeal was late because it was not filed with the Board within the statutory fifteen working-day period.

Given that the appeal was late, the next question is whether there was good cause for the late appeal.

Under federal law a cited employer must send a “notice of contest” to the federal OSHA district office which issues a citation within 15 working days of receiving the citation in order to contest or appeal. Since Employer sent a notice of contest to the Division and not the Board, it appears that Employer was following federal, rather than California, procedure for appealing the citation. As we have noted above, Employer was adequately informed of what it must do to appeal should it choose to do so, and in this instance it failed to follow required procedures.

Employer argues there are Board cases which established an exception to the general rule which applies here, citing *Harris & Ruth Painting Contracting, Inc.*, Cal/OSHA App. 86-9024, Decision After Reconsideration (Nov. 17, 1986), among others. The instant matter is factually distinct from *Harris & Ruth, supra*, and the other authorities Employer advances. In *Harris & Ruth, supra*, the employer filed a detailed response with the Division explaining why it had not committed the violations alleged, but did not initially appeal to the Board. When it learned of its error, employer timely appealed to the Board. The Board’s decision held that the detailed response to the Division showed an intent to appeal. Here, in contrast, Employer provided no details or explanation of why it believed its contest had merit or would succeed. As noted above, the notice of contest sent to the Division evidences a belief that federal procedures applied. Here too the principle applies that misunderstanding the appeal process is not good cause for a late appeal, and that the information in the citation package is legally sufficient to place a cited employer on notice of both its rights and obligations in the appeal process. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4th 43.) Failure to follow the procedures applicable to filing an appeal, especially in light of the information provided to Employer with the citation regarding its appeal rights, shows a failure to attend to this matter with the required degree of diligence. (*Graciana Tortilla Factory, supra*; *Oltman’s Construction, supra*; *American Apparel Dyeing and Finishing, Inc.*, Cal/OSHA App. 08-9200, Denial of Petition for Reconsideration (Aug. 19, 2008).)

DECISION

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

ART R. CARTER, Chairman
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JUN 17, 2016