

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

In the Matter of the Appeal of:

**SIBONEY CONTRACTING CO.
1450 Centrepark Boulevard, Suite 100
West Palm Beach, FL 33401**

Employer

Inspection No.

1280908

**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 Siboney Contracting Co. (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued three citations to Employer on May 17, 2018, alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Employer timely appealed the citations on June 7, 2018.

After Employer appealed, the proceeding was assigned to an administrative law judge (ALJ) of the Board. Since Employer's appeal alleged that the citations were not properly served and that, as a consequence, the Division lacked jurisdiction to cite it, the parties agreed to bifurcate the proceeding, first holding a hearing to resolve the jurisdictional issue and later, if necessary, a second hearing to address the merits of the citations.

The ALJ heard the evidence and arguments of the parties on the issue of jurisdiction. On February 28, 2020, the ALJ issued an order (Order) which held the citations were timely issued and served, and, therefore, the Division had jurisdiction to cite Employer.

Employer timely filed a petition for reconsideration.

The Division answered the petition.

ISSUES

Is Employer's petition for reconsideration interlocutory?

Was the ALJ correct in holding that the Division had jurisdiction to cite Employer?

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

**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 asserts that the Order was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Order.

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.

1. Interlocutory Petition.

The petition is interlocutory since there has been no final decision on the merits of the citation, and instead the Order states that a hearing on the merits is to be noticed. (*Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014).) Board precedent holds that reconsideration will not be granted concerning interlocutory rulings, reasoning that they are not 'final' orders within the meaning of the Labor Code section 6614. (*Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013).)

We hold that the Order which Employer petitions us to reconsider is interlocutory, and we decline to reconsider the petition on that basis.

The Board has recognized exceptions to the rule against reconsideration of interlocutory orders. We may reconsider interlocutory orders if they involve questions of law, are orders which are effectively final regarding issues independent of a case's merits, or matters which are final as to a particular person. (*Gardner Trucking, Inc.*, *supra*, Cal/OSHA App. 12-0782.) In deciding whether to grant an interlocutory order, the Board may consider "general principles" "followed by the courts" that allow for interlocutory review. (See *Muse Trucking Company*, Cal/OSHA App. 03-4535, Denial of Petition for Reconsideration (Dec. 24, 2004).)

The question of jurisdiction is an issue of law, which the Board may choose to rule on under that exception to the general rule that interlocutory matters are not appealable. Even applying this exception here, and reconsidering the merits of the Order, we would affirm. As we explain next, the ALJ was correct in holding that the citations were issued in the manner required and within the statute of limitations, and that they were received within a reasonable time after they were served.

2. Jurisdictional Issue.

Employer is based in Florida, and in November 2017 was working in or around Santa Rosa, California, to clear trees after the then-recent wildfires there. After one of Employer's employees was injured in an accident, the Division inspected the worksite and ultimately issued three citations to Employer.

The Division's inspector was given two addresses for Employer during the inspection. He designated one, in California, as Employer's mailing address, and the other, in Florida, as the address of Employer's corporate offices. The Order explains that the California address was also the place where Employer's employees were housed during their work on the tree removal project.

Labor Code section 6317 provides, in part, that the Division must issue a citation within six months of the occurrence of the violation. Here, the accident and the related violations occurred on November 17, 2017. It follows that the last day on which the Division could issue citations to Employer was May 17, 2018. The citations were sent to Employer's address in California by certified mail on May 17, 2018. They were timely issued. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).)

Employer contends that the citations were untimely because they were not mailed to Employer's corporate address in Florida. The evidence at hearing established that the Division's inspector was on vacation on May 17, 2018, the last day the citations could be issued. In order to meet the statutory deadline, he telephoned his district manager and she caused the citations to be issued that day. The district office's office technician sent the citations by certified mail to the California address. But, because Employer had completed its work, that address was no longer occupied and the citation package was returned to the Division undelivered on June 5, 2018. Then the Division sent the citations to Employer's Florida address that same day, June 5, 2018, and, through counsel, Employer filed its appeals timely, even calculating the appeal period based on the May 17th mailing date. (Lab. Code, § 6601 [citations must be appealed within 15 working days of *receipt*, not mailing].)

The ALJ ruled the citations were timely issued, even though not received within six months of the violation, because they were sent by certified mail to Employer before expiration of the statutory time limit. We agree with that analysis. The statute of limitations in Labor Code section 6317 is jurisdictional. (*Key Energy Services*, Cal/OSHA App. 15-0255, Decision After Reconsideration (Oct. 7, 2016).) The citations here were issued timely, albeit on the last day of the statutory period. We have also distinguished between the time a citation is served and when it is received. (Lab. Code, § 6319, subd. (a); *Pouk & Steinle, Inc.* Cal/OSHA App. 03-1495, Decision After Reconsideration (June 10, 2010).) Here, Employer received and appealed the citations within 15 working days of when they were *issued*, and thus necessarily within fifteen days after it *received* them. (Cf. Lab. Code, §§ 6317 and 6601.) We find under the circumstances that the citations were both issued within the statute of limitations and received in a reasonable time after being issued.

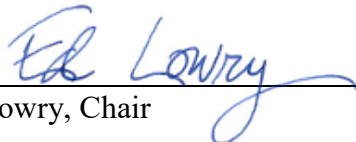
We note that the ALJ stated in the Order that testimony at the hearing on the jurisdiction issue established that District personnel did not know the California address was no longer valid for Employer. The Order also pointed out that the Division sent the citations to Employer's address in Florida the same day the original citation package was returned undelivered, and that Employer appealed two days after the second (Florida) mailing. The Division's same-day remailing of the citations was found to be an exercise of due diligence, and it did result in the timely receipt of the citations.

The case of *Vial v. California Occupational Safety and Health Appeals Bd.*, (1977) 75 Cal. App. 3d 997, is instructive. The Court of Appeal there held that if the Division issues a citation to an employer within six months of the occurrence of the violation, it has done so "with reasonable promptness" as required by Labor Code section 6317. (*Ibid.*, at p. 1005.) Applying the lesson of *Vial* here, we conclude that citations issued within the time the statute allows and received by the Employer within fifteen working days of their issuance was timely. And, to hold otherwise would "thwart" the purpose of the California Occupational Safety and Health Act (Lab. Code sect. 6300 et seq.). (*Ibid.*) Since a citation is timely even if issued on the last day of the six-month limitations period, and must be served by certified mail, such a citation will not arrive on the same day it was placed in the mail. But, to hold that the citation must be received within six months would effectively deprive the Division of some of the time the Legislature has granted it to act, which we cannot do. And, since the first attempt to serve the citations on Employer was timely and performed in the manner prescribed by statute, we decline to hold that the Division's mailing to the citations to the California address was an error or should impel us to void them. (See *Vial, supra*, 75 Cal.App.3d at pp. 1004-1005.)

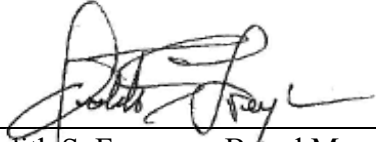
DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's Order is affirmed.


OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member

FILED ON: **05/11/2020**



DECLARATION OF SERVICE BY MAIL OR EMAIL

Inspection Number
1280908

I, Sarsvati Patel, declare:

1. I am at least 18 years of age, not a party to this action, and I am employed in Sacramento County at 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
2. On 05/11/2020, I served a copy of the attached DENIAL OF PETITION FOR RECONSIDERATION in an envelope addressed as shown below and placed the envelope for collection and mailing on the date and at the place shown in item 3 following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
3. Date mailed: 05/11/2020 Place mailed: (city, state): Sacramento, CA

ATTN: Christopher B. Cortez
Siboney Contracting Co dba Siboney Forestry
1450 Centrepark Boulevard, Suite 100
West Palm Beach, FL 33401

4. On 05/11/2020, I electronically served the document listed in item 2 as follows:

NAME OF PERSON SERVED	ELECTRONIC SERVICE ADDRESS
<u>Chris Grossgart, DOSH Legal</u>	<u>cgrossgart_doshlegal@dir.ca.gov</u>
<u>Rocio Reyes, DOSH Legal</u>	<u>rreyes_doshlegal@dir.ca.gov</u>
<u>DOSH Northern Office</u>	<u>doshlegal_oak@dir.ca.gov</u>
<u>Michelle G. Bethge</u>	<u>mbethge@dir.ca.gov</u>
<u>Kathy Lynn Garner</u>	<u>KGarner@dir.ca.gov</u>
<u>Manuel M. Melgoza</u>	<u>office@oshalaw.net</u>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sarsvati Patel

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)