

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

In the Matter of the Appeal of:

**MODERN PRO BUILDERS  
1340 N. Stimson Avenue  
La Puente, CA 91744**

**Employer**

Inspection No.  
**313381584**

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

**JURISDICTION**

On August 31, 2010, the Division of Occupational Safety and Health (the Division), through Compliance Health and Safety Officer Fred Porter (Porter) issued four citations to Modern Pro Builders (Employer), alleging seven violations of California Code of Regulations, title 8<sup>1</sup>. Three citations were classified as Serious.

On June 15, 2022, more than eleven years later, Employer filed an appeal. On July 25, 2022, the Appeals Board issued Employer a Notice of Untimely Appeal (Notice). On August 5, 2022, Employer filed a request to file a late appeal and supporting declaration. An Administrative Law Judge (ALJ) issued an Order Granting Late Appeal (Order) on August 18, 2022.

On September 16, 2022, the Division filed a timely Petition for Reconsideration (Petition) of the ALJ's Order, under Labor Code Section 6617, subdivisions (c) and (d), on the grounds that the evidence does not justify the findings of fact, and that the petitioner has discovered new evidence material to it, which it could not, with reasonable diligence, have discovered and produced at hearing.

In making this Decision After Reconsideration, the Board engaged in an independent review of the entire record. The Board has considered the pleadings and arguments filed by the parties.

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

## ISSUES

Has Employer demonstrating good cause for filing a late appeal?

## FINDINGS OF FACT

1. On or about June 21, 2010, a work-related accident occurred at Employer's jobsite located in La Canada, California.
2. The Division conducted an opening conference on July 24, 2010 and concluded its investigation on August 26, 2010.
3. On August 31, 2010, the Division issued four citations against Employer in connection with its inspection.
4. On June 15, 2022, more than eleven years later, Employer filed an appeal.
5. On July 13, 2022, the Board requested a copy of the citations and proof of service from the Division's District Office. The Division responded, based upon information and belief, that the file had been purged and no electronic copy was retained, and the Division was therefore unable to provide a copy.
6. The Board served Employer a Notice of Untimely Appeal on July 25, 2022. Employer timely submitted a verified declaration by the business owner, Robert Mendoza (Mendoza), in support of its request to file a late appeal, on August 5, 2022.
7. Mr. Mendoza's declaration stated that he never received the Citations.
8. The ALJ subsequently issued the Order, finding that Employer had demonstrated good cause for filing its appeal late, and reinstating Employer's appeal. At the time the ALJ issued the Order, the Division had been unable to locate a copy of the citation package and proof of service, and had advised the Board that the District Office did not have a copy. The ALJ therefore relied primarily upon Employer's declaration in issuing the Order.
9. Subsequently, on or about September 14, 2022, the Division located the citation package, case diary notes, and proof of service showing receipt of the citations at Employer's residential address on September 7, 2010.

## ANALYSIS

Section 359, subdivision (d), of the Board's regulations and Labor Code section 6601 provide that an appeal is timely if a cited employer initiates its appeal of the citation within 15 working days of receipt of the citation. The Board has held that if the Division serves a citation by certified mail, which has been signed for by an agent or employee of the employer, the notification requirements of the Labor Code are satisfied. (*Pyramid Telecommunications, Inc.*, Cal/OSHA App. 04-9063, Denial of Petition for Reconsideration (Jul. 11, 2005).)

Accordingly, Employer was required to initiate its appeal no later than fifteen working days after September 7, 2010, the verified date of service. Employer filed its appeal on June 15, 2022, more than eleven years after the citations were issued.

Section 359 and Labor Code section 6001 also authorize the Board to extend the 15- day filing period upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing. The Board has held “good cause” as used in Labor Code section 6601 means, “a substantial reason; one that affords a legal excuse.” (*SA Recycling, LLC*, Cal/OSHA App. 11-9059, Denial of Petition for Reconsideration (June 3, 2011), fn. 3; *A-1 Printing & Copy*, Cal/OSHA App. NDN, Denial of Petition for Reconsideration (Aug. 10, 1984).) It is an employer’s burden to establish good cause. (*Ameripride Uniform*, Cal/OSHA App. 04-106, Decision after Reconsideration (Apr. 3, 2008).)

Here, Employer denied having received the citation package. Mr. Mendoza’s declaration of August 5, 2022, states that he was unaware of the citations until he attempted to reinstate his business license in 2022. He stated:

When the citation was issued I had already stopped doing business for about a year. My [business] license had expired in 2009. [...] It was only when I tried to reinstate my license this year that I found out about the citation. [...] When the citation issued, I no longer had the mailing address because I was no longer in business any mail that was sent to me would have been returned to the sender. [...] this citation is not mine I feel I should not have this heavy burden of paying for a citation that was issued a year after I closed down my business. Nor was there anyway the office that issued the citation could reach me being that all contacts and addresses were closed when this citation issued. (Sic.)

Evidence Code section 641 provides a rebuttable presumption that mail that is correctly addressed and properly mailed is received. A specific denial of receipt by the addressee is sufficient to rebut the presumption and support a finding that there was no receipt. (*Club Fresh, LLC*, Cal/OSHA App. 06-9241, Decision After Reconsideration (Sept. 14, 2007).) The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received. (*Id.*, citing *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416.)

In this matter, at the time the ALJ issued the Order, the ALJ correctly noted that the Division was unable to provide proof of delivery to, or receipt by, Employer. Because the Division was informed and believed, at the time the ALJ’s Order was issued, that the file had been purged and no electronic copy retained, the Division was, at that time, unable to furnish evidence to dispute Employer’s verified declaration, such as proof of service, or other evidence showing or tending to show that Employer had in fact received the citations in due course after they were originally mailed; or that the address the Division used was Employer’s correct mailing address.

In the absence of such evidence, there was no proof that the citation package was properly addressed and mailed, let alone received. Further, the filing deadline for Employer’s appeal could not be calculated. Accordingly, the ALJ concluded, “Under these circumstances, it cannot be determined that Employer received the citation package as required under the regulation.” (Order, p. 4.) The ALJ therefore relied upon Mr. Mendoza’s declaration denying receipt, and concluded

that Employer had sufficiently rebutted the presumption that the citations were received, and good cause for the late appeal was established.

However, on or about September 14, 2022, after the Order had issued, the Division located the citation package and proof of service showing receipt of the citations. A Division Program Manager, who had noticed the old dates of the alleged violations related to the Expedited Appeal in OASIS (the Board's online case management system), tracked down the documents through the accounting office, to which the District Office did not have access, and was able to find a number of documents related to the citations. Among these were the Citation and Notification of Penalty package, Declaration of Service, and the case filing diary notes.

These documents demonstrate that the citation package was received and signed for, on September 7, 2010, at 660 Forbes Avenue, Montebello, CA 90604, the address listed on the California Secretary of State's website as Employer's principal address, mailing address, and the address of Mr. Mendoza. Mr. Porter, the Division Compliance Health and Safety Officer who conducted the investigation, served the citations by certified mail, with return receipt requested, to this address as well as to the UPS mail box which Employer had provided as its mailing address. The return receipt indicates that the package was received and signed for by one Rita Mendoza.

Mr. Porter also provided a declaration signed under penalty of perjury, on September 16, 2022, in support of the Division's Petition. Mr. Porter's declaration states that, to further confirm and ensure the citations were received, Mr. Porter hand delivered a copy of the citation package to the 660 Forbes Avenue address, on October 1, 2010. Upon arrival, Mr. Porter noticed that this was a residential address. When he knocked, a woman who identified herself as "Rita" answered the door. Mr. Porter asked her if she knew Roberto Mendoza, the owner of Modern Pro Builders. She confirmed that she did, and identified herself as a family member. Mr. Porter asked her if he could leave the citation documents with Rita, and if she would give them to Mr. Mendoza. She stated to Mr. Porter that she would. Mr. Porter gave her the documents and left the residence. He documented his personal service in his case file notes.

Labor Code section 6617, subdivision (d), and section 390.1, subdivision (a)(4) of the Board's regulations, provide that the discovery of new evidence, which the petitioner did not know about, and could not have known about through the exercise of reasonable diligence at the time of the hearing, is grounds for reconsideration. (*Polvera Drywall Corp., dba Great Western Drywall*, OSHAB 90-1246, Decision After Reconsideration (Sep. 6, 1991); *NCA Entertainment, Inc.*, Cal/OSHA App. 11-2740 and 11-2774, Denial of Petition for Reconsideration (Sep. 20, 2012).)

The Division's Petition explains that, at the time the District Office responded to the Board's request for the citation package in July of 2022, the Division was informed that the file had been purged and no copy retained. The citation package and other pertinent documents were later discovered after Employer's appeal was reinstated. These documents were discovered because a Division employee tracked the documents through the accounting office, to which the District Office lacked access. The Division therefore could not, in the exercise of reasonable diligence, have produced these documents prior to the issuance of the ALJ's Order. This newly discovered evidence is a sufficient basis to grant the Petition.

In particular, this evidence demonstrates that the citation package was received at the registered address, and signed for by a member of Mr. Mendoza's family, on September 7, 2010. Not only that, Mr. Porter's declaration indicates that the citation package was subsequently hand delivered to the same address, to the same family member, Rita, who stated to Mr. Porter that Mr.

Mendoza would receive the package. A trier of fact in weighing this evidence of delivery against the denial of receipt would be likely to determine that Mr. Mendoza received the citation package, and failed to timely file an appeal.

Further, the Division’s evidence casts serious doubt on the reliability and veracity of Mr. Mendoza’s declaration. Mr. Mendoza’s business, Modern Pro Builders, was registered at the 660 Forbes Avenue address until at least January 7, 2010, when Mr. Mendoza’s license went inactive. 660 Forbes Avenue is a residential address. Rita Mendoza and Robert Mendoza share the same surname, and a Rita Mendoza at 660 Forbes Avenue signed for service of the citation package on September 7, 2010. A woman identifying herself as Rita also accepted hand delivery of the citation package on behalf of Mr. Mendoza on October 1, 2010, after stating to Mr. Porter that she was Mr. Mendoza’s relative. Mr. Mendoza’s assertion that “When the citation was issued, I no longer had the mailing address because I was no longer in business [...] Nor was there anyway the office that issued the citation could reach me being that all contacts and addresses were closed when this citation was issued (Sic.),” is therefore misleading, at the very least.

Finally, Employer’s appeal forms, dated June 15, 2022, state that Mr. Mendoza received the citations on November 22, 2021. Even if Mr. Mendoza’s claim that he never received the citations in 2010 could still be considered credible, the appeal was nonetheless filed over six months after Mr. Mendoza admittedly became aware of the citations. Mr. Mendoza has provided no good cause justification as to why he waited over six months to file an appeal once he knew of the citations. This in itself is sufficient grounds to reject Employer’s appeal. An employer must handle its appeals to the Board “with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs.” (*Timothy J. Kock*, OSHAB 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) Here, Employer has failed to exercise the requisite degree of care in pursuing its appeal.

### DECISION

For the reasons stated above, the ALJ’s Order is reversed. Employer’s request to file a late appeal is denied.

Ed Lowry, Chair  
Judith S. Freyman, Board Member  
Marvin Kropke, Board Member



FILED ON: 01/06/2023