

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

In the Matter of the Appeal of:

**Otay Mesa Sales, Inc.
1596 Radar Road
San Diego, CA 92154**

Employer

Inspection No.
1539535

**DENIAL OF PETITION FOR
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to the authority vested in it by the California Labor Code, hereby denies the petition for reconsideration (Petition) filed in the above-entitled matter by Otay Mesa Sales, Inc. (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) began an inspection of a place of employment in California maintained by Employer on July 1, 2021. On December 28, 2021, the Division issued a Citation to Employer alleging violations of safety orders contained in title 8 of the California Code of Regulations.¹ Citation 1, Item 1, alleged a Regulatory violation of Section 3203, subdivision (b), paragraph 1 [failure to maintain required jobsite safety inspection records], Citation 1, Item 2, alleged a Regulatory violation of Section 3203, subdivision (b), paragraph 2 [failure to maintain required safety training records], Citation 1, Item 3, alleged a General violation of Section 3203, subdivision (a), paragraph 4 [failure to effectively inspect, identify, and evaluate workplace hazards], Citation 1, Item 4, alleged a General violation of Section 3668 [Powered Industrial Truck Operator Training], Citation 2, Item 1, alleged a Serious, Accident-Related violation of Section 3653 [Seat Belts]. The Citations assessed proposed penalties totaling \$18,150.00. The citations were delivered to Employer on December 30, 2021, at its address in San Diego, California.

On June 24, 2024, Employer filed its appeals. On July 16, 2024, the Appeals Board issued a Notice of Untimely Appeal (Notice). On August 1, 2024, the Appeals Board provided Employer an extension until August 12, 2024 to file its late appeal application.

¹ Unless otherwise specified all references are to title 8 of the California Code of Regulations.

On August 12, 2024, Employer filed its motion for a late appeal.² Employer's Branch Manager, Brent Swain (Swain), declares that after the Division's inspection, Employer hired non-attorney safety consultant Melissa Bewley (Bewley), based on a recommendation that she had considerable experience with Appeals Board matters. Swain declares that he first met with Bewley on August 2, 2021, and that Employer received the citations on or about December 28, 2021. Swain's declaration states he authorized Bewley to file an appeal on Employer's behalf, and that Bewley told him she would start the appeal and address abatement. Employer thereafter entrusted Bewley to manage the appeal and took no further action. Swain declares that he is unable to retrieve his email history but asserts that Employer asked Bewley about abatement. In response, Bewley told Swain that all evidence of abatement was sent via email with a copy to Employer. Employer has no record of these emails. After receiving a collections letter, Swain tried to contact Bewley at least eight times and received no response.

Shannon Blair (Blair), Employer's counsel in the related worker's compensation case, provided a supporting declaration. In May of 2022, Employer apprised Blair that Bewley was its representative for the appeal of the citations. Blair subsequently contacted Bewley. Blair declares she received Bewley's express representation that she timely filed the appeal but she was going to re-file the appeal because the appeal did not appear online. On July 14, 2022, Blair and Bewley spoke. Blair requested copies of Bewley's correspondence with the Division and received none. On February 27, 2023, they spoke again about the status of the appeal. Blair was unable to reach Bewley thereafter.

Scott Wilson (Wilson), counsel for Employer in this appeal, also provided a supporting declaration. Wilson declared that his office sent emails to Bewley on January 2, 2023, and May 30, 2023, and received no response. He represents that on August 22, 2023, while his law office spoke with Bewley about another matter, Bewley represented that she would send information about the appeal at issue, but she never did.

ISSUE

Was there good cause for the late appeal?

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.

² Unless otherwise specified, the following facts are derived from the allegations set forth in Employer's Petition and the Declaration of Brent Swain.

- 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.

As Employer's Petition asserts none of these statutory grounds, the Board construes the Petition in the light most favorable to the Employer as advancing all five grounds.

Here, Employer filed its appeal late. Section 359, subdivision (d), of the Board's regulations provides that an appeal is timely if a cited employer initiates an appeal within 15 working days of receipt of the citations. Employer received the citations on December 30, 2021. The fifteenth working day and last day to timely appeal the citations was in January of 2022. The appeal here was filed two years and four months later on June 24, 2024. The remaining issue is whether good cause exists for a late appeal.

Labor Code section 6601 and section 359 both authorize the Board to extend the appeal period upon a showing of good cause. "Good cause" as used in Labor Code section 6601 is defined by the Appeals Board as meaning "a substantial reason; one that affords a legal excuse." (*See's Candies, Inc.*, Cal/OSHA App. 1652414, Decision After Reconsideration (Oct. 6, 2023).) The authority to determine the existence of good cause lies solely with the Appeals Board. (*See James M. Houillion*, Cal/OSHA App. 96-9080, Decision After Reconsideration (Oct. 8, 1996).) It is an employer's burden to establish good cause. (*Ameripride Uniform*, Cal/OSHA App. 04-106, Decision After Reconsideration (Apr. 3, 2008).)

Employer's Petition states that good cause exists due to Employer's justifiable reliance upon misrepresentations made by Bewley, a non-attorney OSHA consultant hired by Employer. Employer asserts that Bewley misrepresented to Employer and Employer's WCAB specialist attorney that she had filed an appeal on Employer's behalf and was handling the abatement. Employer's Petition asserts additional good cause arose due to Cal-OSHA's sending Employer a March 2022 Collection Letter and then delaying 17 months before filing for Judgment on August 4, 2023, coupled with the San Diego District Office's failure to follow up with Employer on completing abatement requirements.

We need not decide whether good cause exists for the late appeal based on alleged misrepresentations made by Bewley to Employer.

Even if we were to accept Employer's assertion that Bewley did indeed misrepresent that she had filed a timely appeal on Employer's behalf, Employer still fails to state good cause for a late appeal. The Board must note that Employer had objective indicators that no appeal had been filed as early as March of 2022 when it received a collection letter. It had to have become increasingly evident that no appeal had been filed on Employer's behalf when Employer received the Request for Judgment in August of 2023. Even if the Division did unreasonably delay in seeking judgment until August of 2023, Employer fails to explain why it took no action to pursue the appeal from August of 2023 to July of 2024 (a ten-month delay).

Appeals should be pursued with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs. (*Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) We conclude that a prudent person would not have failed to contact the Board for an additional ten months after receiving a request for judgment. A prudent person receiving a request for judgment would immediately follow up with their representative, and insist their representative provide them with a copy of the appeal, of emails exchanged with the Division in connection with the abatement, and any other documents that would rebut or clarify the request for judgment received.

The Board also notes that all three declarations make no reference to Bewley ever charging Employer for her services. If Employer was not billed by Bewley for the cost of handling the abatement issue for Employer and submitting an appeal on Employer's behalf, after months of not receiving a bill, a prudent person would view this as an indication something was awry. That, in turn, would trigger the need to follow up as a part of basic due diligence, which is an even lower standard of care than the degree of care required for appeals.

If Employer believes its representative's actions were inadequate or misleading, Employer may pursue whatever remedies it may have against that representative. But Employer has no remedy before this Board, as the facts set forth in Employer's petition and declarations are insufficient to establish good cause for the 28-month delay in filing its appeal.

Further, even if Bewley had merely made an error when attempting to file an appeal, rather than engaging in an intentional misrepresentation to Employer as Employer asserts, it would still not demonstrate good cause for the late appeal. Board precedent is clear that an employer's representative's error is attributed to the employer. (*Union Pacific Railroad*, Cal/OSHA App. #1402052 Denial of Petition for Reconsideration (Jan. 8, 2021); *Dynaelectric Company dba Wasatch Electric*, Cal OSHA App. #1083985, Denial of Petition for Reconsideration (Jan. 27, 2017); *Ameripride Uniform*, Cal OSHA App. 04-104, Decision After Reconsideration (Apr. 3, 2008).) When an employer's counsel or representative mishandles citations, that does not constitute good cause for a late appeal. (*Kitagawa & Sons, Inc. dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004).)

An employer's representative's mishandling of employer's appeal is attributable to the employer. (*EDCO Waste & Recycling Services, Inc.*, Cal/OSHA App. 12-0163 et seq., Decision After Reconsideration (Mar. 7, 2013).) Miscommunication between an employer and its attorney is not good cause for a late appeal (*Ibid.*) This applies equally for miscommunication between an employer and its non-attorney representative. An employer is not entitled to a finding of "good cause" based merely on its representative's mistakes. The risk of such mistakes is one that parties assume when selecting representatives, whether their representative is a licensed attorney or not.

DECISION

For the reasons stated above, Employer's Petition is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 11/07/2024

