

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SA RECYCLING, LLC
3200 E. Frontera Street
Anaheim, CA 92806

Employer

Docket No. 11-R2D5-9059

**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 SA Recycling, LLC (Employer).

JURISDICTION

Commencing on October 6, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 23, 2010, the Division issued two citations to Employer alleging one "general" and one "serious" violation of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer received the citation documents by certified mail and signed the acknowledgement of receipt form used by the U.S. Postal Service on November 29, 2010. Employer untimely initiated its appeals on January 4, 2011.²

On March 17, 2011 an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave to File Late Appeal (Order).

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

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

² In pertinent part Board regulation section 359(a) provides that "an appeal shall be deemed filed on the date a communication indicating a desire to appeal [is] received by the Appeals Board[.]"

ISSUE

Whether Employer established 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.
- (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 lists all of the above, but does not state which of them it rests upon. (See *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) The arguments advanced in the petition, however, are deemed to be based on Labor Code section 6617(a), (c), and (e).

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 substantial evidence in the record as a whole and appropriate under the circumstances.

Labor Code section 6601 provides that an employer must appeal a citation within 15 working days of receipt of the citation, that failure to timely file results in the citation being deemed a final order of the Board, and further that the Board may extend the 15 working day period "for good cause." (Id.) Given the dates involved here (receipt of the citation on November 29, 2010 and initiation of the appeal on January 4, 2011) Employer's appeal was filed 24 working (36 calendar) days late. Accordingly, as did the ALJ, we must decide whether the circumstances giving rise to the late appeal show it was late for

good cause.³ As explained below, the ALJ ruled correctly, and we affirm the Order.

Employer received the citations at its offices in Anaheim, California. The facility where the alleged violations occurred is in Bakersfield. During the inspection giving rise to the citations, the employee who met with the Division inspector told the inspector he was Employer's "point of contact," and requested citations be sent to the Bakersfield facility. Employer's petition makes four main contentions: (1) the citations were never received by it at the Anaheim address; (2) the citations should have been sent to Bakersfield; (3) it acted promptly and timely by filing its appeal within 15 working days after the citations were received after follow-up with the Division; and (4) that the Board and the Division lack jurisdiction because the statute of limitations had run. Each of these contentions is unavailing, as explained below.

(1) Delivery of the Citations

As noted above, the return receipt form acknowledging delivery of the citations was signed for by someone at Employer's Anaheim offices on November 29, 2010. The citations were sent by certified mail, as required by Labor Code section 6319(a), and received at Employer's home office address in Anaheim. The Division was not obligated to send the citations to Employer's Bakersfield address as requested. (*San Mateo Union High School District, Capuchino 1-I.S.*, Cal/OSHA App. 09-9242, Denial of Petition for Reconsideration (Mar. 4, 2010) [sending citation to employer's business address adequate].) Further, Employer's "point of contact" person was not its representative as that term is used in the Board's regulations. (See Board regulations sections 346(x), 355.) The citations were received and signed for at Employer's home office. That Employer does not know who signed for them or what happened to them speaks to its internal procedures, and does not contradict the proof of delivery. (Evidence Code section 641 [letter properly addressed presumed received]; *Consttech Construction Corporation*, Cal/OSHA App. 05-9060, Denial of Petition for Reconsideration (Jul. 28, 2005) [citation served by certified mail and signed for by employee of employer satisfies notification requirements]; *San Mateo, supra.*)

Further; although Employer points out that Board regulation section 355 establishes notice requirements, the petition also recognizes that those requirements apply *after* an appeal is commenced, and do not apply to giving an employer notice that a citation has been issued in the first place. Providing initial notice of a citation to the cited employer is governed by Labor Code section 6319.

(2) Service at Anaheim or Bakersfield

³ The Board has held "good cause" as used in Labor Code section 6601 "means a substantial reason; one that affords a legal excuse." (*A-1 Printing & Copy*, Cal/OSHA App. NDN, Denial of Petition for Reconsideration (Aug. 10, 1984).)

Employer next argues that it "should. not be deprived of due process" given the "improper service of the citation[s]." As shown above, however, the main premise of this argument is false: service of the citations was proper under Labor Code section 6319.

Moreover, in this portion of its petition Employer claims it is entitled to a hearing under Labor Code section 6602, and that the failure of the Board to provide "adequate notice of a hearing" denied it due process. There was no hearing scheduled or had, thus no notice of hearing was required. Here, however, Labor Code section 6601 controls, and Labor Code section 6602 is conditional: "If an employer notifies the appeals board that he or she intends to contest a citation...[.]" (Emphasis added.) Conversely, if the employer does not timely notify the Board of its intent to appeal (or fails to establish good cause for a late filing, the citation is deemed a final order of the Board. (Labor Code section 6601.) In such case there is no hearing required under Labor Code section 6602. There is no denial of due process where the employer fails to satisfy the prerequisites to obtaining due process. (See *Jack Barcewski, dba Sunshine Construction*, Cal/ OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).)

Employer also argues that the Board "penalizes employers" for the mistake of an employee in processing mail, and challenges the reliability of service by certified mail. While it is true that Board precedent holds that employers are responsible to establish internal procedures for processing important documents such as citations, and further that "internal operating problems" are not good cause for a late appeal (*Pacific American Fish Company, Inc.*, Cal/OSHA App. 10-9121, Denial of Petition for Reconsideration (Aug. 6, 2010)), service by certified mail is the method established by statute, and is thus beyond the Board's authority to alter. (Labor Code section 6319.)

(3) Employer Actions After Receiving Copy of Citations

Employer next argues that when the citations were not received at its Bakersfield facility some weeks after they were expected, it contacted the Division and obtained copies of the citations on December 21, 2010. (Note that the citations were received in Anaheim on November 29, 2010.) It then filed its appeal within 15 working days of December 21, 2010. Employer argues this was due diligence and thus good cause for leave to file a late appeal. The flaw in this argument is that Employer apparently mishandled the properly served citations in the first instance. The evidence establishes the citations were received by Employer at Anaheim on November 29, 2010. It appears the citations were mishandled or lost at the Anaheim office, which is not good cause for a late appeal. (*Agri-Feed Industries, Inc.*, Cal/OSHA App. 09-4055, Denial of Petition for Reconsideration (Dec. 6, 2010); *Cleveland Wrecking Company*, Cal/ OSHA App. 92-9054, Denial of Petition for Reconsideration (Nov. 18, 1992).) We note December 21, 2010, the day Employer contacted the

Division to ask about the citations, was the sixteenth working day after the citations were received, and by operation of law the citations had become a final order of the Board. (Labor Code section 6601.) Thus, the subsequent follow-up was too late from the beginning, and further we find it troubling that Employer took yet another two weeks to initiate its appeal.

(4) Jurisdiction

Lastly, Employer contends the Board and Division had no jurisdiction over the alleged violation because the citation was issued more than 180 days after the accident which gave rise to the inspection and citations occurred. Regarding this argument, only one of the two citations related to the accident, which happened on May 27, 2010. Second, the citation was issued on November 24, 2010, which was within six months of the event. The statute of limitations, Labor Code section 6317, provides: "No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since the occurrence of the violation." The Board has interpreted the term "six months" to mean six months date-to-date, not 180 days as argued by Employer. (*Sierra Wes Drywall, Inc.*, Cal/OSHA App. 97-1071, Decision After Reconsideration: (Nov. 18, 1998).) In this matter, the violation caused an accident on May 27, 2010; the six months period of limitations would have expired six months later, i.e. on November 27, 2010. Since the citation was issued on November 24, 2010, it was timely. Thus the Division had the jurisdiction to issue the citation, and the Board had jurisdiction to rule on it. Employer's reference to and reliance on the Division's Policy and Procedures manual, which it contends uses a 180 day and not six month period, is not persuasive. It is the language of the statute which controls, not the Division's internal policy manual. (*Tri-City Reinforcing Corp.*, Cal/OSHA App. 93-3101, Decision After Reconsideration (Jun. 30, 1999), citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.)

DECISION

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

/s/ ART R. CARTER, Chairman
/s/ CANDICE A. TRAEGER, Member
/s/ ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: 06/03/2011

