

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

In the Matter of the Appeal of:

DAVIS ROOFING, INC.
978 North Elm Street, Suite B
Orange, CA 92867

Employer

Docket No. 05-R3D3-4127

**DECISION AFTER
RECONSIDERATION
AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code.

JURISDICTION

On August 4, 2005 the Division of Occupational Safety and Health (Division) issued a citation to Davis Roofing, Inc. (Employer) alleging a regulatory violation of Title 8 California Code of Regulations section 342(a) [failure to report work-related serious injury].¹

Employer timely filed and perfected its appeal of the citation. When the matter was not resolved during a prehearing conference in November 2006, the Board mailed by regular mail a notice of hearing to the parties on May 25, 2007. The notice sent to Employer was returned to the Board by the Postal Service marked "Return to Sender – Attempted – Not Known – Unable to Forward". The notice was addressed to Employer at the address of record with the Board. On June 18, 2007 the Board, acting through its Administrative Law Judge (ALJ) sent Employer a "Notice of Intent to Dismiss Appeal & Order Cancelling Hearing" (called "Notice of Intent" afterward for brevity) by certified mail, return receipt requested. The Order gave Employer 10 days to provide

¹ Unless otherwise indicated, references are to Title 8 California Code of Regulations.

the Board with its current address. No response was received.² Accordingly, on July 30, 2007 the ALJ issued an “Order Dismissing Appeal.”

On August 29, 2007, the Board ordered reconsideration of the Order Dismissing Appeal on its own motion pursuant to its authority to do so under Labor Code section 6614(b), to address the issue of whether Employer received the Notice of Hearing and Notice of Intent. Subsequently the Board received and took under submission a petition for reconsideration filed by Employer on August 30, 2007. The Division filed an Answer to the Order of Reconsideration on October 3, 2007.

EVIDENCE

The evidence in this proceeding consists of the two returned envelopes and Employer’s verified petition for reconsideration.

The most significant fact is that Employer’s address has not changed since it received the citation in question and filed its appeal; it is the address to which all correspondence from the Board has been sent.³

The petition also states that Employer’s address is correct and unchanged. Employer states the Postal Service made an error in returning the first mailing (transmitting the Notice of Hearing). It further states that its offices were closed during the period from late June 20 to July 9 when the Postal Service made three attempts to deliver the piece of certified mail containing the Notice of Intent. Further, Employer states that the Postal Service did not inform it of the identity of the sender regarding the undelivered mail.

ISSUE

Did Employer receive the Notice of Hearing and Notice of Intent to Dismiss Appeal?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

We held in *Club Fresh, LLC*, Cal/OSHA App. 06-9241, Decision After Reconsideration (Sep. 14, 2007) that “both the Labor Code and due process require that an employer *receive* notice of the citations issued against it; mere dispatch by mailing them is not adequate.” (Original emphasis.) While *Club Fresh, supra*, involved the issue of whether a citation was received by an

² The Postal Service returned the certified mail letter to the Board marked “Return to Sender - Unclaimed” on July 19, 2007.

³ The Division’s Answer also states that it had verified Employer’s address to be that in the Board’s and its own records.

employer, the same principles apply to notices from the Board. If they are not received through no fault of the employer, the employer is not aware that it has some obligation to act or respond to the Board. *See, also*, Labor Code section 6610. We believe this is consistent with the principles of due process, for example as explained in *Jones v. Flowers*, 547 U.S. 220 (2006); *Chaidez v. Gonzales*, 476 F.3d 773 (CA9 2007); and *Yi Tu v. NTSB*, 470 F.3d 941 (CA9 2006). In fact, *Chaidez, supra*, refers to a precedential immigration case, *Matter of Huete*, 20 I & N Dec 250 (Feb. 19, 1991), which held that a notice sent by certified mail but not delivered to the addressee did not provide notice of the hearing such that action could be taken against the addressee in the nature of default.

Board precedents concerning actual receipt of a citation by an agent or employee of the employer are distinguished by the fact of actual receipt. *See*, for example, *Zacky Farms LLC*, Cal/OSHA App. 05-9022, Denial of Petition for Reconsideration (May 27, 2005).

The Division's Answer makes much of the fact that Employer's address has not changed despite the mail delivery problems and seeks to suggest that Employer therefore must have failed to fulfill its obligation under Board regulation section 355(a) to notify the Board of a change of address. That misses the point that there was no change to report, and thus there was no reporting obligation. The Answer also suggests Employer was avoiding delivery of the mail. We find this unlikely for two reasons. First, Employer has explained the circumstances behind the two mis-deliveries (error by Postal Service and closed office due to vacation). Second, it is unlikely that Employer would put its appeal at risk by avoiding the mail and then seek to have its appeal reinstated by petitioning for reconsideration when the less fraught course of action is to accept the mail in the first place.

Finally the Division points out that there is a presumption that mail properly addressed is received, such as in Evidence Code section 641. In this case, however, it is known that the mail was not received. The Postal Service has indicated as much on the envelopes of the two mailings in question. Thus, the presumption does not apply. And even if it did apply, it is rebuttable. *Craig v. Brown & Root, Inc.*, (2000) 84 Cal.App.4th 416.

Knowing that Employer did not receive the two Notices in question we find that it did not receive the Notice of Hearing due to a delivery problem of the Postal Service and that Employer's closing the office for summer vacation subsequently was coincidental and a faultless reason for not receiving the Notice of Intent. Upon these facts, therefore, we find that due process requires this proceeding be remanded with orders to set the matter for hearing.

DECISION

For the reasons stated above this matter is remanded to the Hearing Operations Unit of the Board to schedule it for hearing.

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CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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