

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

In the Matter of the Appeal of:

CLUB FRESH, LLC
3880 Seaport Boulevard
West Sacramento, CA 95691

Employer

Docket Nos. 06-R2D1-9241
and 9242

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board, pursuant to authority vested in it by the California Labor Code, took the petition for reconsideration filed by Club Fresh, LLC (Employer) under submission on January 16, 2007. An order notifying all parties of the Board action taking the Petition for Reconsideration under Submission was served on March 6, 2007. The Division did not file an answer to the petition.

After full review of Employer's declaration and all records and files of the Board, it is ordered that the petition for reconsideration filed by Employer is granted and its appeal is reinstated.

JURISDICTION AND BACKGROUND INFORMATION

Employer was issued one general citation with one item and one serious citation on June 8, 2006. The Division contends it mailed the citations to Employer by certified mail, return receipt requested and that they were delivered on June 9, 2006. Employer denies receipt of the citations. Employer initiated its appeal on August 17, 2006, a date more than 60 days from the issuance date on the citations.

On August 14, 2006, Employer's safety manager received a past due notice from the DIR Accounting Office, dated August 8, 2006, relating to the penalty assessed against Employer stating that payment was 60 days past due. On August 17, 2006, Employer's safety manager contacted the Division to inform it that she had never seen the notice or a citation before receiving the

past due notice.¹ The Division faxed her copies of the citations issued to Employer. On August 17th Employer also called the Appeals Board to inquire and to initiate the appeal.²

On October 17, 2006, after receiving the written appeal and documentation required, the Appeals Board sent Employer a letter informing it that the appeal was initiated 48 days late. Employer was told to submit a statement of reasons and a declaration, stating why the appeal was filed late, if it wanted the Appeals Board to consider allowing the appeal. On December 11, 2006, after review of Employer's declaration, an Order Denying Leave to File Late Appeal was sent to Employer. Employer petitions for reconsideration of the Order.

ANALYSIS

In its petition Employer alleges that it has discovered new material evidence.³ Labor Code section 6617(d) provides that a petition for reconsideration may be based on the ground that petitioner has discovered new evidence material to it which could not, in the exercise of reasonable diligence, have been discovered and produced at hearing. The new evidence is that Employer has recently discovered that the Division never received the green return receipt card from the Postal Service and that the Appeals Board, despite having requested it from the Division, also did not receive it.

When the Appeals Board requested the return receipt card signed by Employer, the Division instead sent a photo copy of a document apparently from the Postal Service entitled "Track & Confirm". That document, however, does not identify the addressee and does not confirm that it is related to the original certified mailing of the citations. Moreover, the "Track & Confirm" document is not accompanied by a declaration from the Division authenticating it.

With respect to appealing a citation, an employer's legal duties begin upon receipt of the citation in question. For example, Labor Code section 6317 provides that the period of abatement specified (if any) shall not commence running until the date the citation or notice is received by certified mail and the certified mail receipt is signed, or if not signed, the date the return is made to the post office. More to the point in this matter, Labor Code section 6601

¹ Employer's petition for reconsideration states that its previous safety manager terminated his employment with Employer on May 30, 2006. Employer did not have a safety manager when the citations are alleged to have been delivered. A new safety manager was hired by Employer beginning June 30, 2006.

² Assuming that Employer first received notice of the citations on August 14th, its appeal was timely initiated. Employer's immediate action after getting the past-due notice is indicative of its good faith willingness to act responsibly.

³ The petition may also be construed to claim the evidence does not justify the findings of fact, Labor Code section 6617(c).

provides that an employer has 15 working days from “receipt of a citation or notice of civil penalty” to appeal the action taken by the Division. If an employer fails to appeal, the citation or notice of civil penalty is deemed a final order of the Appeals Board and is not subject to review by any court or agency. The Appeals Board may extend the 15-day period, but only upon a showing of good cause. Receipt of the certified mail is intended to begin Employer’s obligations under the labor code. Proof of receipt of the citations is critical to protect an employer’s due process rights. It is important to know when an employer receives citations because that is when the fifteen-day appeal period commences, and time of receipt may also be a factor in determining whether good cause for filing a late appeal has been shown.

Employer’s right to receive proper notice of the accusations contained in the citations cannot be denied. (*E.g.*, Labor Code sections 6600, 6600.5, 6601, 6601.5, and 6319(a) and (b).) Although not artfully stated in its petition for reconsideration, Employer contends that it never received the mailed citations and that proof that the citations may have been delivered to *someone*, (the track and confirm document produced by the Division) is not proof of receipt by Employer. We agree for the following reasons.

ISSUE

Whether Employer established good cause for filing a late appeal.

DISCUSSION

Resolution of this question requires us first to examine the law as it relates to service of citations and then to apply the law to the facts of this case.

We find that the Labor Code imposes independent but related obligations on the Division and employers to which the Division issues citations. The obligations are related because they are sequential; the Division acts first, and the employer may act in response.

The first obligation in the sequence is the Division’s under Labor Code section 6319:

(a) If, after an inspection or investigation, the division issues a citation pursuant to Section 6317 or an order pursuant to Section 6308, [the Division] shall, within a reasonable time after the termination of the inspection or investigation, *notify the employer by certified mail of the citation or order[.]* (Emphasis added).

In *Zacky Farms, LLC*, Cal/OSHA App. 05-9022, Denial of Petition for Reconsideration (May 27, 2005) it was stated: “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 and nothing more is required. (*Food Town (IGA) J. Gill International, Inc.*, Cal/OSHA App. 98-9312, Denial of Petition for Reconsideration (Mar. 23 1999); *C & R Transfer, Inc.*, Cal/OSHA App. 97-9051, Denial of Petition for Reconsideration (Jul. 16, 1997); *Del Monte Glass, Inc.*, Cal/OSHA App. 87-9009, Denial of Petition for Reconsideration (May 7, 1987).)”

Thus, the certified mailing of citation(s) sets the stage for the second obligation in the sequence. The cited employer must either pay the proposed penalty and abate the violative condition, if required, or initiate an appeal within fifteen working days of receiving the citation. (Labor Code sections 6600, 6601.)

While the Labor Code does not require the Division guarantee receipt of mailed citations, 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. For example, Labor Code section 6601 states, “If within 15 working days from *receipt* of the citation . . .”, indicating the Legislature’s intent that the employer actually receive the citations, not merely that they be mailed to it. (Emphasis added) Further, Labor Code section 6317 provides that the abatement period, if any, specified in a citation “shall not commence running until the date the citation or notice is *received*.” (Emphasis added) We believe this is consistent with the principles of due process, for example as explained in *Jones v. Flowers* 547 U.S. 220, 126 Sup. Ct 1708 (2006) and *Yi Tu v. NTSB*, 470 F.3d 941(2006).⁴

An employer’s rights and obligations under the Labor Code provisions applicable here commence upon receipt of a citation. And it seems incontrovertible to us that if an employer does not receive a citation even if properly mailed the fifteen working day period within which to initiate an appeal does not begin to run.⁵

It follows we must next examine the facts available in the record to determine whether Employer received the citations after they were mailed in June 2006. We must also deal with the presumption regarding receipt of mail in the ordinary course. First, the presumption.

That presumption, stated in Evidence Code section 641 (mail correctly addressed and properly mailed is received) is rebuttable. *Craig v. Brown &*

⁴ Of course, an employer may not act to evade or frustrate delivery.

⁵ Alternatively, even if the appeal period were to be deemed to have commenced, good cause would exist for extending it.

Root, Inc., (2000) 84 Cal.App.4th 416, Cal.App.2.Dist. If a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence, but if the adverse party denies receipt, the presumption is gone from the case; 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.*; (see *Nunley v. City of Los Angeles*, 52 F.3d 792 (CA 9, 1995)) Under the “bursting bubble” approach to presumptions, a presumption disappears where rebuttal evidence is presented; a specific denial of receipt by the addressee is sufficient to support a finding that it did not receive the notice in question.⁶ *Id.*

Turning to the specific facts here, Employer asserts in its verified petition for reconsideration that the citations were not received and further that the Division is unable to produce a return receipt card signed by Employer showing it in fact did receive the citations.⁷ Therefore the presumption of delivery disappears. We must then weigh the available facts to determine whether they show Employer received the citations.

The Division is unable to provide evidence showing that Employer received the citations. The evidence of delivery the Division did provide, the track and confirm document, does not show to whom the piece of mail it relates to may have been delivered. Moreover the Division has failed to furnish evidence to overcome Employer’s verified petition, i.e., evidence showing or tending to show Employer had in fact received the citations in due course after they were originally mailed. Therefore we hold that there is no proof of receipt of the citations by Employer.⁸ Under these circumstances we are unable to determine Employer received the citations in June 2006.

Since there is no evidence in this record to show Employer received the citations issued to it in June 2006, or to overcome Employer’s verified declaration that it had not received them, we hold that good cause exists for reinstatement of Employer’s appeal. We also find that Employer’s prompt action in August 2006 in contacting both the Division and the Board within three days of receiving the past due notice indicates good faith and is a timely

⁶ The Board has recognized the presumption exists. See, e.g., *Zacky Farms LLC*, Cal/OSHA App. 05-9022, Denial of Petition for Reconsideration (May 27, 2005). The *Zacky Farms* case involved existence of a signed return receipt card, thus distinguishing it from the instant case. It is cited here merely because it acknowledged Evidence Code section 641 (at footnote 2).

⁷ Employer submitted a declaration in support of its petition for reconsideration. Therein Employer states under penalty of perjury, “It is the company’s position that Club Fresh, LLC never received the original citation. This is why the original citation was never processed and the appeal was not submitted within the legally required timelines.”

⁸ The Board made its own request of the Division for the return receipt card, and the Division was unable to provide the acknowledgement and receipt signed by Employer. Further, had the Division connected the “Track & Confirm” document sent to the Board with the mailing of the citations to Employer to show receipt of the mailing, such proof would have carried substantial weight in our analysis.

response, since Employer acted within fifteen working days after it had actual notice of the underlying enforcement action. (See Labor Code section 6600).

As we stated in footnote 2 above, on these facts Employer initiated its appeal in a timely fashion.

DECISION

Upon consideration of the evidence before this Board, the petition for reconsideration is granted. Employer's appeal is reinstated and the case is referred to the Board's appeal initiation unit for docketing and further proceedings.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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