

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

<p>In the Matter of the Appeal of:</p> <p>SHANKARA IND. DBA RUSS'S AUTO BODY & PAINT 7343 Canby Avenue] Reseda, CA 91335</p> <p style="text-align:right">Employer</p>	<p>Docket No. 09-R6D5-2135</p> <p style="text-align:center">DECISION AFTER RECONSIDERATION</p>
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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 November 12, 2008 the Division of Occupational Safety and Health issued a citation to Shankara Industries, dba Russ's Auto Body & Paint (Employer), alleging a violation of occupational safety and health standards. The citation, sent certified mail, was received by Employer on November 14, 2008.

Subsequently, the Division issued an amended citation to Employer, after Employer requested additional time to abate the alleged items of noncompliance. The amended citation, though bearing the same issuance date, was sent to Employer by certified mail on December 6, 2008 and received on December 8, 2008.

On February 2, 2009, the Board received a letter dated January 23, 2009 written by Employer but sent to and forwarded from the Division indicating its intent to appeal the citation. The Division's note on the forwarded documents is dated January 30, 2009. On March 2, 2009, the Board also received completed appeal forms from Employer.

On March 20, 2009, the Board wrote to both Employer and the Division regarding the intended appeal. The Board informed Employer that its appeal appeared to be late and further that if Employer wished the Board to extend

the appeal filing period it must submit a declaration and statement demonstrating good cause for the late appeal. The Board's letter to the Division requested copies of the return receipts from the certified mail sent to Employer.

Employer responded with a brief handwritten notation that it did not have the receipt and that it "did not know that I was late."

The Division forwarded copies of the certified mail return receipts from the original citation showing Employer had accepted delivery on November 14, 2008, and inadvertently did not provide information regarding service of the amended citation in December 2008.

On June 11, 2009, an administrative law judge (ALJ) of the Board issued an Order Granting Leave to Process Appeals As Timely (Order).

On July 7, 2009, the Board took the ALJ's Order under reconsideration on its own motion.

On August 11, 2009, the Division filed an Answer to the Board's Order of Reconsideration. The Answer included copies of the amended citation and proof of its service on Employer by certified mail.

EVIDENCE

As stated above, the Division issued the citation in question to Employer on November 12, 2008. Employer received the citation by certified mail on November 14, 2008, as indicated by a signature of Employer's "agent" on the U.S. Postal Service's return receipt form. Subsequently, the Division issued and served on Employer an amended citation, which Employer received on December 8, 2008. The record now includes proof of service of the amended citation.

The record contains copies of documents received by the Board on February 2, 2009 from the Division.

One of those documents is a copy of a California Division of Labor Standards Enforcement (DLSE) form titled "Request for Citation Appeal Hearing." It was filled in by hand and signed by Sam Narain, President of Employer, and dated December 8, 2008. It includes the DOSH inspection number from the citation issued to Employer as the "citation n[umber]" being appealed to DLSE.

Another document received by the Board on February 2, 2009, is a handwritten letter from Employer to the Division dated January 23, 2009 which transmitted to the Division “a copy of [Employer’s] Request for Citation Appeal Hearing mailed on Dec. 8th 2008.”

From the foregoing it appears: (1) Employer filled out a DLSE appeal form on December 8, 2008, though it is not possible to determine whether Employer filed that form and/or other documents with DLSE; (2) that Employer sent copies of the DLSE forms and other documents to the Division on January 23, 2009; that the Board received those Employer documents from the Division on February 2, 2009. Also, prior to February 2, 2009, the Board had no communication from anyone regarding Employer’s appeal.

The DLSE form and other documents were forwarded to the Board by the Division on January 30, 2009.

The appeal form submitted by Employer to the Board was signed by Mr. Narain and dated February 24, 2009.

ISSUES

1. Whether Employer established good cause for its late appeal.
2. Whether the Order was providently issued.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

In reaching the following Decision After Reconsideration the Board has fully reviewed the record in this matter. Based on our independent review of the record, we find that the ALJ’s Order was improvidently issued, that based on substantial evidence in the record as a whole Employer’s appeal was late and that there was no good cause for the late appeal shown.

The Division is required to notify employers that a citation has issued by certified mail or personal service. Labor Code section 6319(a); *Duran’s Body Shop*, Cal/OSHA App. 82-369, Decision After Reconsideration (Oct 3, 1985). The Division has furnished the Board with a copy of the certified mail return receipt indicating Employer received the amended citations on December 8, 2008. The Division also provided the Board with a copy of Employer’s documents showing Employer filed an “appeal” of the citation with DLSE on December 8, 2008.

An employer’s appeal of a citation issued by the Division must be filed with the Board within fifteen working days after the employer receives the citation. Labor Code section 6600, Board regulation section 359. If the appeal is not filed within that time, the citation and notice of civil penalty is deemed a

final order of the Board. Labor Code section 6601. The Board may extend the appeal period upon a showing of good cause. *Id*; Board regulation section 359(b).

We have considered this matter on two bases. First, we address the merits of Employer's case. Second, we address the ALJ's Order.

Merits of Employer's Case

In this proceeding Employer did not file its appeal with the Board until January 23, 2009 at the earliest. Having received the amended citation on December 8, 2008, Employer's last day for filing the appeal was December 30, 2008.¹ Thus, the appeal was filed 24 days late. Absent a showing of good cause, the citation and associated civil penalties are final orders of the Board (Labor Code section 6601; Board regulation section 359(b)). Board precedent has established that absent a showing of good cause, even appeals that are filed a few days late will not be accepted. *Four Seasons Roofing*, Cal/OSHA App. 08-9199, Denial of Petition for Reconsideration (July 16, 2008), citing *Insta-Office Manufacturing, Inc.*, Cal/OSHA App. 98-9211, Decision After Reconsideration (Feb. 22, 1999).

Employer's only statement that may be deemed an attempt at showing good cause was the statement that it "did know that [it] was late." That statement was not made in the form of a declaration under penalty of perjury, and in any case its substance does not constitute a showing of good cause. On that ground alone we may deny Employer's (implicit) request for leave to file a late appeal. *American Apparel Dyeing and Finishing, Inc.*, Cal/OSHA App. 08-9200, Denial of Petition for Reconsideration (Aug. 19, 2008) [request to file late appeal denied for failure to show good cause.]

That Employer appears to have filed an appeal of the citation with DLSE indicates Employer had a fundamental misunderstanding of the process for filing appeals of citations issued under the California Occupational Safety and Health Act (Labor Code sections 6300 and following).

Misunderstanding of the appeal process is not good cause for filing a late appeal. *West Coast Linen & Supply*, Cal/OSHA App. 06-9237, Denial of Petition for Reconsideration (Feb. 23, 2007). Further, the appeal filing requirement is printed twice on the citation Employer received. The first reference in the citation (page 1) states that the employer has a right to appeal with ". . . the Occupational Safety and Health Appeals Board. To initiate your appeal, you **must** contact the Appeal Board in writing or by telephone within 15 working days from the date of receipt of this Citation." (Original emphasis.)

¹ We calculate the fifteen working-day appeal period from the date Employer received the amended citations. *American Apparel Dyeing and Finishing, Inc.*, Cal/OSHA App. 08-9200, Denial of Petition for Reconsideration (Aug. 19, 2008)

The second reference appears on page 2 of the citation, where, among other items, the name and address of the Appeals Board are given, and it is stated: “**Important:** You must notify the Appeals Board, not the Division, of your intent to appeal[.]” (Original emphasis.) The Board has held that the information in the citation, including that quoted here, provides adequate notice to a cited employer of the appeal requirements. *Charles Krug*, Cal/OSHA App. 96-9221, Denial of Petition for Reconsideration (Feb. 7, 1997); *McLean Steel, Inc.*, Cal/OSHA App. 87-9002, Denial of Petition for Reconsideration (Mar. 27, 1987). Thus, the “appeal” filed with DLSE did not satisfy the filing requirement, since appeals must be filed with the Board. *Oltmans Construction Co.*, Cal/OSHA App. 08-9435, Denial of Petition for Reconsideration (Feb. 2, 2009).

Although on rare occasions we have held that an employer which has timely filed an appeal with the Division instead of the Board, this proceeding is factually distinct. (*Harris & Ruth Painting Contracting, Inc.*, Cal/OSHA App. 86-9024, Grant of Petition for Reconsideration and Order (Nov. 17, 1986) [Documents evidencing a good faith attempt to appeal citations timely filed with the Division.] Sending a DLSE appeal form to DSLE, then forwarding the same form to the Division after the appeal period has expired does not indicate the degree of attention to the appeal process required by ordinary prudence or Board precedent. (*Kulchin-Condon & Associates*, Cal/OSHA App. 96-9054, Denial of Petition for Reconsideration (May 29, 1996)) [Failure to review a citation with the care necessary to understand its legal import and the appeal process has been held by the Board not to be good cause for a late appeal.]

In view of the foregoing, Employer did not show good cause for its late appeal.

ALJ’s Order

The ALJ’s June 11, 2009 Order accepting Employer’s appeal as timely focused on the November 2008 proof of service (return receipt). The ALJ was not aware that the citation had been amended or that there was proof it had been properly served.² The Order also held, incorrectly, that the Division had not proved it had served the original citation by certified mail because the Division, though it sent copies of the certified mail return receipt, did not indicate that the citation had been sent by that mailing. The ALJ’s holding in that regard is unduly narrow. While it would have been better practice for the Division affirmatively to state that it had sent the citation in the mailing received by Employer, in this

² That information was included in the Division’s Answer to the Board’s Order of Reconsideration and thus not before the ALJ.

case the other facts indicate that Employer did receive the original citation. Also, since the citation was amended and re-served, any question about the November service is moot.

Given that service of the amended citation was the critical event, that the Division proved it had served the amended citation by certified mail as required, and that the citation was received by Employer, we hold the Order was improvidently issued and rescind it. Further, as we discussed earlier, Employer did not timely appeal the amended citation, and failed to show good cause for the late appeal.

DECISION

For the reasons stated above, the ALJ's Order is rescinded, and Employer's appeal is dismissed as untimely filed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 4, 2009