

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

In the Matter of the Appeal of:

BARNARD IMPREGILO HEALY JV  
P.O. Box 99  
Bozeman, MT 59771

Employer

Docket: 2014-R5D1-9013

**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 Barnard Impregilo Healy JV (Employer).

**JURISDICTION**

Commencing on June 25, 2013 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On August 23, 2013 the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup> The citations were sent by certified mail as required by Labor Code section 6317 and an agent of Employer received and signed for them on August 29, 2013.

Employer initiated its appeal by telephone call to the Board on September 26, 2013. Employer's appeal was limited to only Citation 2, Item 1.

On October 15, 2013 the Board wrote both parties. Its letter to the Division requested proof of service of the citations on Employer. Its letter to Employer stated that the appeal appeared to have been filed late and informed Employer that it must provide a statement under penalty of perjury demonstrating the appeal was late for good cause.

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

The Division provided proof that the citations were received and acknowledged by Employer on August 29, 2013. Employer provided a sworn declaration setting forth the reasons for the late appeal, which admitted that the citations were received on August 29, 2013. The Division responded to Employer's proffer of good cause, and Employer then filed a reply.

On January 28, 2014 an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave to File Late Appeal (Order) (later amended on February 14 and February 27, 2014 to correct clerical errors).

Employer timely filed a petition for reconsideration.

The Division answered the petition.

### **ISSUE**

Did Employer establish 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 maintains the Order was procured by fraud, the evidence does not justify the findings of fact, and the findings of fact do not support the Order.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. We have taken no new evidence. Based on our independent review of the record, we find that the Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Labor Code section 6601 requires a cited employer to commence its appeal within 15 working days of receiving the citation(s) at issue. For good cause shown the Board may extend the appeal period. (Lab. Code § 6601.) The citations having been received on August 29, 2013, September 20, 2013 was the last day to appeal.<sup>2</sup> Employer telephoned the Board to initiate its appeal on September 26, 2013, which was late.<sup>3</sup>

Employer's October 25, 2013 reply to the Board's October 15, 2013 letter sought to establish good cause for the late appeal by virtue of the declaration by Michael Flynn, which stated, in pertinent part: "4. At the conclusion of the meeting on July 24, 2013, it was indicated by the inspector that citations would be issued, but no indication was given when they would actually be issued. I [declarant] did provide the inspector with my contact information. [¶] 5. Apparently, the inspector issued the citations approximately a month later and mailed them directly to the job site rather than to my attention. [¶] 6. Upon receipt at the job site by the project's receptionist on August 29, 2013, they were given to Mr. Michele Garasso, an Italian national and Impregilo employee, who is the joint venture's business manager. English is Mr. Garasso's second language. [¶] 7. Mr. Garasso left shortly thereafter on a two week trip to Italy to visit his family and it was not until after his return were [sic] the citations reviewed and subsequently forwarded."

The Division's response to Employer's good cause statement includes copies of two business cards given to the inspector during the inspection. Mr. Flynn's card is not among them and the San Francisco, California, address on both cards is the address to which the citations were sent.

After considering the foregoing the ALJ decided Employer did not establish good cause for the late appeal. After reviewing the record, the petition for reconsideration, and the Division's answer, we agree.

The "Citation and Notice of Penalty" issued by the Division in this matter are legally sufficient to inform the cited employer of its legal rights and obligations with respect to an appeal. (*Northwood Design Partners, Inc.*, Cal/OSHA App. 13-9021, Denial of Petition for Reconsideration (May 24, 2013, amended May 31, 2013), citing *Murray Company v. Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4<sup>th</sup> 43.)

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<sup>2</sup> The Order, at page 3, footnote 3, incorrectly states that the Division provided proof the citations were served on September 3, 2013. The certified mail receipt is signed and dated August 29, 2013, and the Postal Service's "track and confirm" document is consistent. Board regulation § 359 allows appeals to be initiated by telephoning the Board, in which case further steps are required to perfect the appeal. (See § 359.1.)

The inability to understand English is not good cause for a late appeal. (*Wooriman Corporation*, Cal/OSHA App. 11-9040, Denial of Petition for Reconsideration (Apr. 11, 2011); *19<sup>th</sup> Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).) The record shows that the manager who was given the citations for handling possesses some degree of English proficiency albeit as a second language. Thus, a language barrier is not shown to exist even if the inability to understand English were good cause for a late appeal.

The manager in question did not deal with the citations upon receiving them, and admittedly “left shortly thereafter on a two week vacation[.]” (Flynn declaration, *supra*.) Waiting to deal with or respond to citations until one returns to the office from an absence is not good cause for late appeal. (*Pro Services*, Cal/OSHA App. 93-9018, Denial of Petition for Reconsideration (Jul. 28, 1993); *California Expanded Metal Products Co.*, Cal/OSHA App. 99-9010, Denial of Petition for Reconsideration (May 12, 1999).) Employers are to deal with their appeals of citations as a reasonable person would handle its most important legal affairs. (*Ray Cammack Shows, Inc.*, Cal/OSHA App. 02-9240, Denial of Petition for Reconsideration (Apr. 30, 2003).)

When as here a citation is served by certified mail and signed for by an employer’s employee or agent, the notification requirements of the Labor Code are satisfied; the citation need not be addressed to a specific individual or corporate officer. (*C & R Transfer, Inc.*, Cal/OSHA App. 97-9051, Denial of Petition for Reconsideration (Jul. 16, 1997).) An employer’s failure to handle the citation after it is appropriately served so as to appeal untimely is not good cause for a late appeal. (*California Expanded Metal Products Co.*, *supra*.)

Employer’s petition for reconsideration includes an additional affidavit by Flynn. There Flynn states that he gave the inspector his business card and asked that the citations be sent directly to him. Both the Division’s response to Employer’s showing of good cause and its answer to the petition for reconsideration include the inspector’s statement that Employer’s San Francisco address was the only address discussed for service of the citations. Nor does the record make clear what Flynn’s business address is or was at the time. One of his declarations was subscribed in Montana; the other in Tennessee; and his business card is not in the record.

In view of the evidence and the precedents regarding service of citations noted above, we do not find that the ALJ abused her discretion refusing to grant Employer leave to file a late appeal.

**DECISION**

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

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: APRIL 30, 2014