

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

UNITED PARCEL SERVICE
3331 Industrial Drive
Santa Rosa, CA 95403

Employer

Docket No. 10-R1D5-0063

**DECISION AFTER
RECONSIDERATION
AND ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to the authority vested in it by the California Labor Code, and having taken this matter under reconsideration on its own motion, now issues this decision after reconsideration.¹

JURISDICTION

The Division of Occupational Safety and Health (the Division) issued a citation to United Parcel Service (Employer) on February 3, 2009 alleging a violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.² The citation was served on Employer on May 29, 2009.

On July 22, 2009, Employer wrote to the Board to indicate its intent to appeal the citation. On January 20, 2010, an Administrative Law Judge for the Board issued an Order Granting Leave to File Late Appeals. The Board took this matter under reconsideration on its own motion on February 9, 2010. The Division filed an answer to the Board's Order of Reconsideration on March 15, 2010.

ISSUE

Was there a sufficient basis on which to issue the Order Granting Leave to File Late Appeals?

¹ Board Chairwoman Candice Traeger recused herself and took no part in the discussions or decision involved in this proceeding.

² Unless otherwise specified all section references are to Title 8, California Code of Regulations.

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

In the Order Granting Leave to File Late Appeals, the ALJ noted that, after receiving Employer's intent to appeal letter, the Board sent Employer's original representative a letter explaining that the Board was unable to process the appeal because it appeared to be late. The letter was sent August 6, 2009. The day prior, the Board received a faxed letter from a new representative for Employer indicating that all correspondence should be directed to her. Hard copy of the letter was received by the Board on August 6, 2009, the same day the Board sent its letter to the original representative. The ALJ opined that the Board's letter should have gone to the new representative as opposed to the original representative.

The ALJ's Order further analogized this case to Board precedent in which good cause was found for the employers' late appeals. (*Starlite Welding, Inc.*, Cal/OSHA App. 93-9094, Decision After Reconsideration (Feb. 17, 1994); *Harris & Ruth Painting Contracting, Inc.*, Cal/OSHA App. 86-9024, Grant of Petition for Reconsideration and Order (Nov. 17, 1986).) In these cases, the employers inadvertently, but timely, directed their documents to the wrong agency. In each case, the Board found the employer demonstrated a good faith effort to timely appeal their citations and good cause for the late filing of its appeal.

The finding of good cause in these cases is critical. Such a finding is a mandatory prerequisite to allowing a late filing as it is the only basis on which the filing period may be extended under the Board's statutory authority. Labor Code section 6601. Once a finding is made that good cause has not been established, a late filing may not be allowed. *Id.*; see, *George Jue Mfg. dba Paramount Metals*, NDN, Denial of Petition for Reconsideration (Nov. 17, 1980). In the present matter, the ALJ allowed the late filing despite finding Employer failed to demonstrate good cause. This was error.

We further find the reliance on the cases referenced in the Order to be misplaced, because they are factually distinct. Here, there is no evidence that Employer timely filed its appeal with a separate agency. The record simply reflects that Employer's appeal was filed approximately 34 days late and Employer has yet to provide a reason for the delay. Second, in *Starlite Welding, supra*, the employer's prompt response to each communication from the Board was found to support the Board's conclusion that the employer demonstrated good faith when attempting to file its appeal. Here, neither Employer nor its representative responded to the Board's letter indicating it was unable to process Employer's appeal and Employer's representative did not respond to the Board's Order of Reconsideration.

There is a second consideration in this matter, however, which we now address. Employer's representative notified the Board of its representation on August 5, 2009. The Board sent its letter indicating it was unable to process Employer's appeal to Employer's original representative on August 6, 2009. Pursuant to the Board's rule of practice and procedure, Title 8, section 355(c), when a party is represented, service is to be on the representative. The timing of the Board's notice that Employer was newly represented and the mailing of the Board's letter to the original representative presents a relatively unique factual situation. It is unclear in this case that the new representative's fax had been duly processed at the time the Board sent its letter to Employer's original representative. And, the Board has stated that it is incumbent upon an employer to make diligent inquiry into the status of its appeal (*Ameripride Uniform*, Cal/OSHA App. 04-106, Decision After Reconsideration (April 3, 2008).) Given the timing of the communications at issue here, the Board asserts that Employer should have communicated with its representative about the Board's letter.

Nonetheless, in the interest of due process, the Board finds the best course is to remand this matter so that Employer's representative is served and afforded an opportunity to show good cause for the late filing of Employer's appeal.

DECISION AFTER RECONSIDERATION

The Order Granting Leave to File Late Appeals is vacated. This matter is remanded to the ALJ with instructions to serve the parties with a letter informing Employer of the need to demonstrate good cause before the late filing of its appeal may be permitted. Based on Employer's response, the ALJ may then determine if good cause has been shown and rule accordingly.

ART CARTER, Member
MICHAEL WIMBERLY, Deputy Member³

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 12, 2010

³ Deputized by Chairwoman Traeger to constitute a quorum of the Board in light of her recusal.