

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

In the Matter of the Appeal of:

FACUNDO CARRILLO  
dba HAPPY'S AUTOBODY & PAINT SHOP  
433 Chapala Street  
Santa Barbara, CA 93103

Employer

Docket No. 2013-R6D5-9065

**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 Facundo Carrillo doing business as (dba) Happy's Autobody & Paint Shop (Employer).

**JURISDICTION**

On November 30, 2012, the Division of Occupational Safety and Health (Division) issued three citations to Employer alleging violations of applicable workplace health and safety standards codified in California Code of Regulations, Title 8.<sup>1</sup>

On December 3, 2012, the citations were delivered to Employer by certified mail and received and acknowledged by one of Employer's employees.

Labor Code sections 6600 and 6601 provide that an employer must appeal a citation or citations within 15 working days of receiving them.

Employer mailed appeal forms to the Board indicating its intention to appeal Citation 2 and Citation 3 on January 16, 2013.

Board staff informed the parties by letter dated January 29, 2013 that its appeals appeared to be late. The Board further informed Employer that it had the opportunity to show good cause for the late appeal, and requested the Division provide the Board with proof of when the citations were received by Employer.

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

Both parties responded to the Board's requests. Employer submitted a statement explaining the timing of its appeals, and the Division provided documentation showing the date the citations were delivered to and received by Employer.

On June 6, 2013 an Administrative Law Judge (ALJ) of the Board issued an Order Denying Leave to File Late Appeal (Order) which considered the statements Employer made in support of its claim of good cause.

Employer timely filed a petition for reconsideration of the Order.

The Division did not answer the petition.

### **ISSUE(S)**

Did Employer present facts showing there was good cause for its 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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) Construed in the light most favorable to Employer, however, the petition made be deemed to assert that the evidence does not justify the findings of fact and/or that the findings of fact do not support the Order. We consider Employer's petition in that light.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Order was based on substantial evidence in the record as a whole and appropriate under the circumstances.

Employer filed its appeals well after expiration of the statutory 15-working day appeal period. Having received the citations on December 3, 2012, the last day to appeal was December 24, 2012. Employer's appeal was initiated on January 16, 2013, 23 days late.

Labor Code section 6601 provides that if a cited employer fails to notify the Board within 15 working days from receipt of a citation that it wishes to appeal, the citation is deemed a final order of the Board and is not subject to review. Section 6601 further provides that the Board may extend the appeal period for good cause.

The authority to determine good cause for a late appeal rests with the Board, regardless of whether the Division opposes an employer's request or claim of good cause. (*James M. Houillion*, Cal/OSHA App. 96-9080, Decision After Reconsideration (Oct. 8, 1996).)

In this matter Employer filed a proof of abatement and other documents related to the alleged violations with the Division, and appears to have believed then and to still contend that doing so was sufficient to appeal. To the contrary, the Labor Code provides appeals are to be filed with the Board. (Lab. Code §§ 6600, 6601.) Further, the documents delivered to Employer with the citations also inform employers that appeals are to be filed with the Board, and those documents have been held to be legally sufficient to put employers on notice of their legal rights and obligations. (*Murray Company v. California Occupational Safety and Health Appeals Bd.* (2009) 180 Cal.App.4<sup>th</sup> 43.)

To the extent Employer misunderstood its obligations and the appeal process itself, that is not good cause for a late appeal. (*Murray Company, supra*; *Ukiah Ford-Lincoln-Mercury*, Cal/OSHA App. 06-2556, Decision After Reconsideration (Jun. 15, 2011) [misunderstanding appeal process not good cause for late appeal].)

We note also that Employer's petition for reconsideration admits the violation alleged in Citation 3. And although the petition disputes the facts involved in Citation 2, doing so is inappropriate under these circumstances and this stage of the proceeding.<sup>2</sup> (*Kenyon Plastering Inc.*, Cal/OSHA App. 10-2710, Denial of Petition for Reconsideration (Aug. 12, 2012).)

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<sup>2</sup> Employer did not appeal Citation 1.

The Board has on rare occasions granted leave to file a late appeal when the cited employer has indicated an intent to appeal but misdirected its appeal documents to the Division. (*Harris & Ruth Painting Contracting, Inc.*, Cal/OSHA App. 86-9024, Grant of Petition for Reconsideration (Nov. 17, 1986).) In *Harris & Ruth, supra*, the employer sent detailed information to the Division explaining why it was not in violation as alleged. When Harris & Ruth later filed appeal forms with the Board, we held that given the detailed explanation of why the alleged violations had not occurred it was plain that employer intended to contest those allegations. In this matter, however, Employer merely certified to the Division that it had abated the alleged violations, and did not dispute them as had Harris & Ruth. Therefore, our holding in *Harris & Ruth, supra*, does not apply here.

### **DECISION**

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: August 16, 2013