

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

In the Matter of the Appeal of:

GRACIANA TORTILLA FACTORY INC.
21300 Victory Boulevard, 3rd Floor
Woodland Hills, CA 91367

Employer

Docket. 15-R4D3-9010

**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 Graciana Tortilla Factory Inc. (Employer).

JURISDICTION

Commencing on July 16, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 3, 2014, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

The citations were delivered to Employer on November 4, 2014.²

Employer's attorney appealed the citations by facsimile on December 5, 2014.

The Board responded to Employer's attorney by letter on December 22, 2014, informing Employer that its appeal appeared to be late and further that if Employer wanted to have the appeal period extended it needed to file with the Board and Division a statement and declaration established that the appeal was late for good cause. No response to the Board's December 22, 2014 letter was received.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

² "USPS Tracking" information; signed certified mail return receipt.

On January 29, 2015, the Board's Executive Officer issued an Order Dismissing Appeal (Order), stating that no response from Employer providing a statement and declaration establishing good cause had been received.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUE

Does Employer's petition establish good cause for the late appeals?

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 contends that the evidence does not justify the findings of fact.

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 a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Labor Code section 6601 requires cited employers to file their appeals within 15 working days of receipt of the citation(s) they wish to appeal. Labor Code section 6601 further provides that if the employer "fails to notify the appeals board that [employer] intends to contest the citation or notice of proposed penalty . . . the citation or notice of proposed penalty shall be deemed a final order of the appeals board and not subject to review by any court or agency." The record here establishes that Employer received the citations by certified mail on November 4, 2014. The fifteenth working day after November

4th was November 26, 2014. Thus Employer's appeals had to be commenced on or before November 26th, but were in fact filed late on December 5, 2014.

Labor Code section 6601 also provides: "The 15-day period may be extended by the appeals board for good cause." The issue here is whether Employer has established good cause for its late appeal.

The record shows that before the citations were issued the Division informed Employer that it intended to issue a citation or citations classified as "serious" by sending to Employer a notice of intent to classify a citation as serious. The Division is required to do so by Labor Code section 6432, subdivision (b). It further appears that Employer responded to the Division's notice. Since the Division issued two of the three citations as "serious" despite Employer's response, the Division was not persuaded by Employer that the circumstances were such as to warrant a lower classification.

One important fact here is that the exchange of information between the parties regarding the intent to issue serious citations took place *before* the citations were issued. Another is that the parties' communications regarding the intent to issue citations classified as serious did not involve the Board but rather were between themselves only.³

Employer's petition states that it "is based upon the same facts and statements set forth in [Employer's] response To Notice Of Intent To Classify Citation As Serious, dated October 30, 2014[.]" (Capitals in original.) We understand Employer to be referring to the notice of intent discussed above, sent to it by the Division before the Division issued the citations to Employer. Employer concludes its petition by stating "that the evidence developed to date, as reflected in the signed statements provided in support of the appeals of each of the citations, clearly establishes that the findings of fact made by the Board were not justified or warranted."

Employer effectively argues that its response to the Division's notice of intent to issue serious citations was its appeal or should be deemed such. We do not agree. First, Employer could not appeal citations which had not yet been issued.⁴ Second, the information is provided to the Division was in response to the Division's notice that it was considering issuing one or more citations to be classified as "serious," notice required by statute. Third, that communication took place between Employer and the Division and did not

³ It is later in the appeals process, should an appeal be filed and proceed that far, when the Division's compliance with Labor Code section 6432, subdivision (b) may become an issue. See Labor Code section 6432, subdivisions (a) through (d).

⁴ The circumstances here (response to notice of intent) distinguish this matter from *Harris & Ruth Painting Contracting Inc.*, Cal/OSHA App. 86-9024, Grant of Petition for Reconsideration (Nov. 17, 1985), where the employer sent the Division, instead of the Board, a detailed explanation of why citations were not well founded.

involve the Board, whereas appeals *per se* must be filed with the Board. (Lab. Code § 6600.)

Misunderstanding the appeal process is not good cause for a late appeal. (*Mohammed Arshad dba A & Z Auto Body Shop*, Cal/OSHA App. 11-9204, Decision After Reconsideration (Jan. 20, 2012).) Employer contends its response to the notice of intent to issue a serious citation, which is issued before any citation and which by its terms, indicates the possibility that a citation will issue in the future, was its appeal. Obviously this could not be correct, since no citations had yet been issued. When the Division later issued citations to Employer, the citations were part of what we have termed a “citation package” which includes several pages of written material explaining, among other things, the cited employer’s legal rights and obligations regarding an appeal. (*Sculpt Gardens, Inc.*, Cal/OSHA App. 11-9108, Denial of Petition for Reconsideration (Sep. 14, 2011), fn. 2, citing *Equity Windows and Siding, Inc.*, Cal/OSHA App. 11-9061, Denial of Petition for Reconsideration (Jun. 2, 2011).) The information in the citation package is legally sufficient to inform a cited employer of its appeal rights and the steps it must take to take advantage of those rights. (*Meineke*, Cal/OSHA App. 08-9234, Denial of Petition for Reconsideration (Aug. 19, 2008).)

We require employers to handle their appeals with the degree of care a reasonably prudent person would use in dealing with his most important legal affairs. (*Oltman’s Construction Co.*, Cal/OSHA App. 08-9435, Denial of Petition for Reconsideration (Feb. 2, 2009), citing *Ray Cammack Shows, Inc.*, Cal/OSHA App. 02-9240, Denial of Petition for Reconsideration (Apr. 30, 2003).) Failing to read the information accompanying the citation with sufficient care to notice that additional steps were required to appeal those citations does not rise to the level of diligence which meets that standard of care.

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 23, 2015