BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: KITAGAWA & SONS, INC. dba Golden Acre Farms 1111 Tahquitz Canyon Way, Suite 110 Palm Springs, CA 92262 Employer	Docket Nos. 03-R3D3-9446 and 9447 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Kitagawa & Sons, Inc. dba Golden Acre Farms (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between June 4, 2002 and October 3, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at SW of Avenue 62 and Highway 86, Thermal, California (the site).

On October 4, 2002, the Division issued two citations to Employer alleging a serious violation of section 3441(b) [no operator stationed at control of self-propelled equipment while equipment is moving] and a general violation of section 3457(c)(2)(A) [toilet and handwashing facilities] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1] The Division proposed civil penalties totaling $9,185 for the violations.

BACKGROUND FACTS

On October 9, 2002, the Board received a telephone call from Patrice Pearce, Paralegal, of the Law Office of Fitzgerald & Mule, LLP, Employer's representative, indicating its intention to appeal the issued citations.

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

On October 17, 2002, the Board sent Ms. Pearce a letter stating in relevant part that:

> The Occupational Safety and Health Appeal Board received your telephone call on October 9, 2002, indicating your intention to appeal the citation(s), notification(s), or order(s) issued by the Division of Occupational Safety and Health. October 9, 2002, is hereby acknowledged as the date of your appeal for purposes of determining whether it was timely filed.
>
> Enclosed is an Appeal form which must be completed, postmarked and mailed or hand delivered to this office no later than October 31, 2002, in order to perfect your appeal. ....
>
> <u>If you do not return the completed Appeal form(s) and the appealed citation(s) by October 31, 2002, your appeal will be dismissed</u>.

On March 3, 2003, the Board sent a letter to Employer's representative indicating that the appeal forms were not returned in the time allowed by law, and notified the representative that the appeal file was being closed. The letter also provided that, if Employer sought to have the appeal re-opened, it must show cause in writing within 15 days why the appeal forms were not returned in a timely manner.

On March 19, 2003, the Board received a declaration from Employer's attorney in support of its request to reopen the appeals. The declaration stated that the appeals were handled by a paralegal in the attorney's office and that the usual practice in the office was to have "the paralegal call the Appeals Board, receive appeal forms in response and process the forms." The declaration further stated that " [i]n and around October 2002, the paralegal filed several appeal forms to the Appeals Board on behalf of Kitigawa, all with similar language and all in response to similar citations. Many of the appeals involved the exact same defenses and nearly identical citations." Employer's attorney also included with his declaration completed appeal forms for the two subject citations.

On February 27, 2004, the Board issued an Order Closing Appeal finding that, although the appeal forms were eventually filed, there was no good cause established for the delay in submitting them, and thus, the appeals remained closed.

On March 16, 2004, Employer's attorney filed a petition for reconsideration. On April 20, 2004, the Division filed an answer in opposition to Employer's petition for reconsideration.

On May 3, 2004, the Board issued an Order Taking Petition for Reconsideration Under Submission. On May 26, 2004, after seeking leave to

file a response to the Division's answer, Employer's attorney filed a reply to the Division's answer.

ISSUE

Does good cause exist for Employer's failure to timely perfect its appeal?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Board is not persuaded that good cause exists for re-opening the closed appeal in this case.

Section 359(a) of the Appeals Board's regulations states:

(a) Except as provided in Section 361.1(b), an appeal shall be deemed filed on the date a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal.

Section 359.1 states:

(a) A completed appeal form shall be filed for each contested Division action.
(b) If an appeal is initiated by other than an appeal form, a completed appeal form shall be filed with the Appeals Board within 10 days of acknowledgement by the Appeals Board of the desire to appeal. Failure to file a completed appeal form may result in dismissal of the appeal.
(c) The Appeals Board shall furnish appeal forms upon request and shall provide them to the district offices of the Division.
(d) Upon receipt of a timely completed appeal form, the Appeals Board shall assign a docket number and deliver or mail a copy of the docketed appeal to each party.

In this case, the Board finds that good cause does not exist for failing to file a completed appeal form until March 18, 2003.

Employer's attorney contends that Employer "should not be made to suffer any prejudice" because the delay in returning the appeal forms was beyond its control. Employer's attorney places the blame squarely on a paralegal who they say represented to Employer's counsel on October 9, 2002, that the appeal forms had been sent to the Board. Employer's attorney

represents that the paralegal was terminated on October 14, 2002 and that her current whereabouts are unknown.

Employer's counsel contends that the paralegal's representation was reasonably relied upon and reliance on the representation constitutes excusable neglect citing Code of Civil Procedure section 473(b). Code of Civil Procedure section 473(b) provides that a "court may, ..., relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect." By its terms, however, Code of Civil Procedure section 473(b) is applicable to *the courts* and Employer has cited no authority for its application to administrative agencies or to this Board. On the contrary, the Board has adopted a standard for granting relief for failure to timely file and perfect appeals regarding Board proceedings which is based upon a showing of good cause. (Sections 359(b), 359.1(a)-(b); *Circle K Ranch,* Cal/OSHA App. 03-9438, Denial of Petition for Reconsideration (Apr. 23, 2004), *Avexco, Inc.*, Cal/OSHA App. 01-9210, Denial of Petition for Reconsideration (Mar. 26, 2002).)

This Board stated in *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration, (Nov. 20, 2001) at page 3 that:

> [a]ppeals to the Board should be pursued by the appealing party with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs. It is incumbent upon an appealing party to become familiar with the appeal process and requirements in order to further its interests in an orderly disposition of the appeal by the Board, affording due process to all of the parties, and avoiding undue prejudice to the Division and any third party to the appeal.

In this case, a paralegal was terminated five days after she allegedly told her boss that she had mailed in the appeal forms. The Board does not have a declaration from the paralegal that she mailed the appeal forms and the Board's file does not contain any documentation such as a proof of service that she mailed appeal forms to the Board. It appears to the Board that prudence would dictate that files being worked on by the paralegal should have been monitored by an attorney and that proper monitoring would have disclosed that there was no proof that the appeal forms had been timely sent to the Board. The Board also notes that the paralegal was "terminated" and did not unexpectedly quit, nor was she a victim of some tragic illness or accident. It would be inconsistent with the dictates of *Timothy J. Kock, supra*, if the Board were to prolong the Division's and the public's interest in a prompt progression of the appeal process by allowing a party to delegate its responsibility to perfect an appeal to a legal representative, have the legal representative delegate the responsibility to a paralegal, and then claim excusable neglect for failing to file

appeal forms after there appears to have been a lack of oversight of the case file.

It appears to the Board that prudence would dictate that Employer ask its representative for a copy of the appeal or some other indicia that the party they delegated the responsibility of pursuing the appeal was doing just that. Further, it would seem prudent that an attorney who delegates responsibility of a legal matter to a non-attorney would regularly review the file to make sure the assigned tasks with deadlines were performed timely. The Board believes that public policy would not be served by re-opening the closed appeal in question.

DECISION AFTER RECONSIDERATION

The Board affirms its Order Closing Appeal dated February 27, 2004.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 27, 2004