

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

In the Matter of the Appeal of:

CONCORD FARMS, INC.
4005 Whipple Road
Union City, CA 94587

Employer

Inspection No.
1647115

**DECISION AFTER
RECONSIDERATION AND
ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it, renders the following decision after reconsideration.

Jurisdiction

On June 23, 2023, after the investigation of a workplace shooting, the Division of Occupational Safety and Health (the Division) issued four citations, alleging 19 violations, to Employer. The citations were served a few days later.

Pursuant to California Code of Regulations, title 8, section 359, and Labor Code sections 6600 and 6602, Employer was required to file an appeal or notify the Appeals Board of its intent to file an appeal within 15 working days of receipt of the citations. No appeal, however, was filed by Employer's counsel until August 14, 2024, nearly 14 months later.

After obtaining information from the Division indicating that the citations were delivered via certified mail on June 26, 2023, nearly 14 months before the appeal was filed, the Appeals Board served on Employer a Notice of Untimely Appeal. Section 359 and Labor Code section 6601 allow an employer to submit a written statement that contains sufficient facts to show or establish a reasonable basis for the late filing.

Abbey Tung's Declaration in Support of Late Appeal:

On September 9, 2024, Employer's Corporate Secretary and General Manager, Abbey Tung (Tung), filed a Declaration in Response to the Notice of Untimely Appeal (Declaration). Tung's Declaration asserts that Employer originally retained the law firm of Littler Mendelson, P.C. (Littler) to file its appeals of the citations. (Tung Decl., ¶ 6.) Tung states that she instructed the attorney assigned to Employer's case, Michael Guasco (Guasco), to file the appeals. (Tung Decl., ¶¶ 6-7.) Guasco, however, apparently did not file the appeals.

Tung states that, thereafter, she had multiple communications with Guasco about the status of her appeal. Tung asserts that Guasco repeatedly informed her that the appeal had been filed and was pending, and that he was trying to arrange for an "appeal conference" with the

Division's attorney. (Tung Decl., ¶ 8.) Tung's assertion that she believed an appeal had been filed was reinforced by several emails she attached to her Declaration. (Tung Decl., ¶¶ 8-9, Exhibits A-B.) Tung's Declaration also asserts that she was particularly reliant on Guasco's representations because she had been diagnosed with, and was undergoing treatment for, cancer during the relevant time periods. (Tung Decl., ¶ 5.)

Tung's Declaration states that she visited Guasco to discuss another case in February 2024 and asked him about the status of the appeal. He informed her that he set it on his calendar to ping the Division's counsel every couple of weeks but that the Division's counsel had not gotten back to him. (Tung Decl., ¶ 10.)

Tung states that she only recently learned that Guasco had not filed an appeal on Employer's behalf after she retained new counsel, Boies Schiller Flexner LLP (Boies) and Benjamin Kim, to handle civil litigation relating to the shooting. She said that Kim determined that Guasco had not filed an appeal. (Tung Decl., ¶¶ 10-13.) An appeal was initiated shortly thereafter.

Division's Opposition:

The Division filed an Opposition to Employer's Declaration (Opposition). The Division asserts that Guasco left Littler in April 2024 and another Littler attorney, Alka Ramchandani-Raj (Raj), took over the case. (Division's Opposition, p. 2.)

The Division notes that Raj learned the appeal had not been filed on or about June 17, 2024, when she requested a copy of the Division's inspection file. In response to Raj's request, the Division sent Littler a letter noting that it would not produce its file because no appeal was pending. (Division's Opposition, p. 2.) Raj, however, did not initiate Employer's appeal at that time. Employer's appeal was not filed until August 14, 2024, approximately 14 months after Employer's receipt of the citations (and approximately two months after the Division notified Raj that no appeal had been filed). (Division's Opposition, pp. 2-3.)

The Division also observes that approximately one month after Raj was informed that the appeal had never been filed, Employer paid the penalties in full. (Division's Opposition, p. 2.)

Order Denying Late Appeal:

On October 9, 2024, Presiding Administrative Law Judge (PALJ) Kerry Lewis issued an Order Denying Late Appeal (Order). The Order relied on a continuum of Board precedent consistently holding "that an attorney's mishandling of an appeal before the Appeals Board is attributable to the client." (Order, pp. 2-3, citing *Chore Auto Wrecking*, Cal/OSHA App. 09-0605, Denial of Petition for Reconsideration (Jan. 14, 2010); *Wesley Burnett dba Environ*, Cal/OSHA App. 01-491, Denial of Petition for Reconsideration (Sep. 23, 2002); *Kitagawa & Sons, Inc., dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004); *Page E. Taylor dba N&N Concessions*, Cal/OSHA App. 1258337, Denial of Petition After Reconsideration (Dec. 3, 2018).)

In addition, the Order relied on Board precedent holding that the misrepresentations of counsel do not necessarily absolve the client of responsibility for the attorney's mishandling of the appeal. In part, the Order relied on *Edco Waste and Recycling Services*, Cal/OSHA App. 12-0163, Denial of Petition for Reconsideration (Mar. 7, 2013), in which the Board held:

The basis for Employer's ... assertion is that it knew nothing of the failure of its original counsel to represent it properly until after its subject appeals were dismissed. Prior to then, it believed all to be well and moving along in the normal course of events. Employer asserts that it did not know of its initial counsel's failure to properly represent it, and that rather, when it made occasional contact with him to obtain an update on the cases he made assurances that all was well and that settlement attempts were under way.

The Order also observed that Tung's Declaration failed to account for significant periods of time and left many questions unanswered. The Order states that there was "no indication as to when Tung learned that the appeal had not been filed or when Kim was retained[.]" and "no clear explanation for the delay between Littler's knowledge of the problem, Employer's knowledge of the problem, Employer's efforts to remedy the issue, and Kim's eventual filing of the appeal." (Order, p. 2.) The Order states, "Tung's declaration does not explain Raj's involvement and why the appeal was not initiated immediately, either by Raj or by Tung, when it was discovered that Guasco had not filed the appeal." (Order, p. 3.)

Employer's Petition for Reconsideration:

Employer filed a Petition for Reconsideration (Petition) challenging the Order. The Petition repeats many of the assertions set forth in Tung's original Declaration, discussed above. However, the Petition includes a supplemental declaration from Tung. Notably, the contents of the supplemental declaration appear tailored to address several of the concerns raised in the PALJ's Order, explaining why the information addressing those concerns had not been presented earlier.

Tung's supplemental declaration states she was never informed that Guasco left Littler or that he was no longer handling the appeal. (Tung's Supp. Decl., ¶ 2.) Tung alleges that neither Raj, nor anyone else at Littler, informed her that Littler received a letter from the Division stating that no appeal was filed. (Tung's Supp. Decl., ¶ 3.) Tung asserts that she did not learn of the Division's June 27, 2024, letter to Littler until September 10, 2024, when she received the Division's opposition to her request to file a late appeal. (Tung's Supp. Decl., ¶ 3.)

Next, while Tung's supplemental declaration admits that she paid the penalties in July of 2024, she states that she only did so because she believed it was required as part of the pending appeal and to avoid any potential accrual of interest. (Tung's Supp. Decl., ¶ 5.)

Tung's supplemental declaration asserts that Employer hired Boies to handle other civil litigation. She states that her Boies attorney discovered no appeal was filed. She states that the Boies' attorney first informed her that no appeal was filed on August 13, 2024, and she instructed them to file an appeal on Employer's behalf. Employer's appeal was initiated the next day. (Tung's Supp. Decl., ¶ 4.)

Issues

- 1) Was the Order Denying Late Appeal correctly decided?

Findings of Fact

- 1) Employer demonstrated good cause for its late appeal.

Analysis

The Appeals Board may extend the 15-day period to file an appeal on a showing of good cause. (Lab. Code, § 6601; § 359, subd. (d).) Section 359, subdivision (d), defines "good cause" for a late appeal as, "sufficient facts to show or establish a reasonable basis for the late filing." As discussed in the preceding section, Employer asserts that good cause exists based upon misrepresentations from her prior counsel, the failure of prior counsel to share information, and based on Tung's cancer diagnosis and treatment and concomitant enhanced reliance on counsel's assistance.

Here, while we observe that the PALJ's Order correctly cited to Board precedent holding that an attorney's mishandling of an appeal before the Appeals Board is typically attributable to the client and does not constitute good cause, we observe that there are several additional circumstances in this case that warrant careful consideration. First, the investigation of this matter resulted from a fatal shooting on Employer's premises, which gives rise to a strong public policy favoring disposition of matters on their merits. (*RJS Electric*, Cal/OSHA App. 1760736, Decision After Reconsideration (April 23, 2025).) While we express no view on the correctness of the citations, we believe it is important that such matters be considered and scrutinized on their merits to determine if there are lessons that can be learned and applied to prevent future incidents. Second, we note that Tung had been diagnosed with cancer, was receiving treatment, and was particularly reliant on counsel. Third, we are particularly troubled by the extent of allegations against Littler's attorneys, which support a conclusion that Employer was effectually and unknowingly deprived of representation. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 231.) Ultimately, when the various facts and circumstances of this matter are considered in isolation, we agree with the PALJ that those facts and circumstances, taken individually might not necessarily rise to a level that supports finding good cause. However, when the totality of the facts are considered, we find that Employer demonstrated good cause for the late appeal.

Decision

For the reasons stated herein, the Board vacates the ALJ's Order and remands this matter back to hearing operations.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 10/09/2025

