

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

In the Matter of the Appeal
of:

**ALLEGIANCE BUSINESS CORPORATION
DBA HI TECH PRECISION**
1516-A W Industrial Park St.
Covina, CA 91722

Employer

DOCKETS 13-R6D2-1771
and 1772

DECISION

Background and Jurisdictional Information

Allegiance Business Corporation dba Hi Tech Precision (Employer) is a machine shop. Beginning January 15, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Leticia Reyes, conducted an accident inspection at a place of employment maintained by Employer at 1516 B West Industrial Park Street, Covina, California (the site). On May 16, 2013, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹:

<u>Cit/ Item</u>	<u>Alleged Violation</u>	<u>Type</u>	<u>Penalty</u>
1-1	342(a) [failure to report serious injury]	Regulatory	\$5,000
1-2	461(a) [no air tank permit]	Regulatory	\$175
1-3	3203(a) [no written Illness and Injury Prevention Program]	General	\$260

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

1-4	2340.17(a) [unguarded energized circuit breaker panels]	General	\$175
1-5	2340.22(a) [purpose of circuit breakers not identified]	General	\$175
1-6	4070(a) [unguarded belt and pulley drive]	General	\$175
2-1	4002(a) [unguarded pinch points/sheer points]	Serious	\$10,800

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, the abatement requirements and the reasonableness of all proposed penalties. Employer also alleged affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on February 5, 2014. William Knocke, Consultant, represented Employer. Michael Loupé, District Manager, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on February 5, 2014.

Law and Motion

On February 4, 2014, for the purpose of settlement, the following motions were made (via email sent to Presiding Administrative Law Judge Ursula Clemons prior to hearing), without objection:

1. The Division moved to settle all violations except Citation 1, Item 1; as follows:
 - a. Increase the good faith adjustment for Citation 1, Items 2, 3, 4, and 6, resulting in penalties of \$100, \$200, \$100 and \$100 respectively;
 - b. Reduce the penalty for Citation 1, Item 5, to \$0 under § 336(k) as it addressed the same hazard as Citation 1, Item 4;
 - c. Reduce the penalty for Citation 2 to \$5,400 based on a determination that the violation was not accident-related. The Division determined that, due to conflicts, the evidence was insufficient to connect the injury with the exposure to the violation.

2. Employer moved to pay all penalties over 18 months if the above motions were granted.

Employer represented, and the Division stipulated, that Employer's financial situation was such that 18 months time was needed to pay the penalties and that an 18-month payment plan would facilitate settlement.

The Division and Employer further stipulated to the following regarding Citation 1, Items 2 through 6 and Citation 2:

The parties stipulate that the terms and conditions set forth in the above-described agreement are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by Employer.

The parties further stipulate that neither Employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

The parties further stipulate that Employer has entered into this agreement in order to avoid protracted litigation and costs associated thereto.

Good cause being found, Presiding Administrative Law Judge Ursula Clemons granted the motions and accepted the stipulation. Citation 1, Item 1 remained at issue.

At the hearing, Employer moved, without objection, to withdraw abatement as one of the grounds for its appeal. The motion was granted.

Docket 13-R6D2-1771

Citation 1, Item 1, Regulatory, § 342(a)

Summary of Evidence

The Division cited Employer for failing to report a serious injury.

During the hearing, the parties entered into the following stipulations regarding Citation 1, Item 1:

1. An accident occurred at the site on December 6, 2011 at about 1:45 p.m. to Employer's employee, Alberto Pandurini (Pandurini), while he was working a machine as part of his job duties as a machinist.
2. As a result of the accident, Pandurini received a laceration to his left ring finger and nail bed. Employer does not stipulate that there was bone loss. The Division does not stipulate that there was no bone loss.
3. Pandurini received treatment from a medical doctor on December 6, 2011.
4. As part of the treatment, the Doctor shaved off a portion of the tip of Pandurini's left ring finger. Exhibit A is a copy of the doctor's report of Pandurini's procedure performed at the Downey Surgical Center.
5. As a result of the accident, Pandurini was not hospitalized as an inpatient for over 24 hours.
6. Employer had five employees on the date of the accident.
7. Employer did not report the injury to the Division.
8. Associate Safety Engineer Leticia Reyes (Reyes) investigated the accident.
9. Reyes began her investigation on January 15, 2013.
10. Pandurini worked as a machinist for Employer. After the accident, he received prompt and appropriate medical care and rehabilitation. He has returned to work for Employer. His left ring finger has no loss of use. He is now able to do the same things that he did before the accident.

Testimony of Leticia Reyes

Associate Safety Engineer Leticia Reyes (Reyes) testified that she began her inspection of Employer based upon a notice she received of an unreported amputation to Alberto Pandurini (Pandurini). On January 15, 2013, Reyes conducted an opening conference with Curtis McPherson (McPherson) and Susan McPherson (S. McPherson). McPherson identified himself at the opening conference as the Owner and President. S. McPherson identified herself at the opening conference as Vice-President².

At the opening conference, McPherson told her that Pandurini had injured his left ring finger, but there was no bone loss. He said that the bone had been shaved to adjust the skin. S. McPherson told Reyes that she had received the doctor's report, but she had not read it. (Exhibit 6)

² At hearing, S. McPherson testified that she was Employer's President.

Reyes returned the next day, January 16, 2013, and took a photograph of Pandurini with both palms together with his left hand towards the camera. (Exhibit 6). The photograph shows that his left ring finger is visibly shorter than his right ring finger.

Reyes received documents from Employer pursuant to Reyes's written document request. Employer submitted the medical records that are marked as Exhibit 5. The first page is the Workers' Compensation Claim Form (DWC 1), signed by S. McPherson. It describes the injury as "Cut off left ring finger nail bed plus part of skin and finger." A post-it note from S. McPherson states, "I told you we did not file this report, but as I went thru the files I found that our ins agent interviewed me, filled this out and filed it...This was filled out the day of the accident."

Exhibit 5, page 2 is the Employer's First Report of Injury (Form 5020), dated December 6, 2011, and stating that it was completed by Susan McPherson. Box 19 describes the injury as "left finger(s) (not thumb) severance. Exhibit 5, page 3 is a claim form acknowledgement signed by Pandurini and S. McPherson. Exhibit 6, pages 4 and 5, are Employer's Internal Accident Investigation Form.

Reyes further testified that she requested and obtained Pandurini's medical records after receiving permission from Pandurini. (Exhibit 2). He was treated by Dr. Jacqueline Lezine-Hanna (Dr. Hanna). The records included her report of the procedure in which she stated that she shortened the distal phalanx. (Exhibit 2, p. 7-8 and Exhibit A). She described the injury as a "left ring finger amputation" in medical records dated January 3, 2011³ (Exhibit 2, p. 2), December 13, 2011 (Exhibit 2, p. 3), January 17, 2012 (Exhibit 2, p. 4), February 7, 2012 (Exhibit 2, p. 5), June 12, 2012 (Exhibit 2, p. 6), December 6, 2011 (Exhibit 2, p. 7, 8), December 7, 2011 (Exhibit 2, p. 10) and July 11, 2012 (Exhibit 2, p. 13).

Dr. Hanna states in her report of December 7, 2011, "I reviewed the X-rays myself." The X-rays showed a left ring finger distal tip amputation with soft tissue loss.

Based on the above, Reyes issued Citation 1, Item 1 for a regulatory violation of § 342(a). Referring to the Proposed Penalty Worksheet (Exhibit 1, last page) Reyes testified that she proposed a penalty of \$5,000 because that amount was required by legislation. No reductions are available.

³ She probably meant January 3, 2012 since the accident occurred in December 2011.

Testimony of Susan McPherson

Susan McPherson (S. McPherson) testified that she drove Pandurini to Irwindale Industrial Clinic on the day of the accident. She drove back to the site, leaving Pandurini at the clinic.

S. McPherson testified that she contacted Employer's workers' compensation carrier (The Hartford) by telephone within an hour of the accident. They helped her fill out the Employer's First Report of Injury, Form 5020 (Exhibit 5, page 2). S. McPherson testified that she wrote the phrase "left finger(s) (not thumb) severance" on Box 19, Form 5020, Employer's First Report of Serious Injury in describing the injury to Pandurini. (Exhibit 5, page 2) She testified that the word "severance" was not her word. "The word "severance" was given to her by the insurance agent.

S. McPherson testified that her husband took Pandurini from the Irwindale Medical Clinic to the Western Hand and Orthopedics Center later that day⁴.

Pandurini was eligible to return to work on January 2, 2012, but did not return until January 4, 2012 because of a respiratory issue.

S. McPherson he did not believe that Pandurini lost a body member or had a serious degree of permanent disfigurement. She did not remember when she first found out that the bone had been shaved. She knew it before the opening conference, but she believed that the bone loss was optional, meaning that Pandurini had the choice or option as to whether the bone would be shaved⁵.

Testimony of Alberto Pandurini

Alberto Pandurini (Pandurini) testified that he recalled the day of the accident. The first doctor he saw at the Irwindale Medical Clinic told him that he could fix the injury in the clinic, but that he would rather send Pandurini to a hand specialist. The doctor was not sure how it would look because there was not enough meat on his finger. The doctor did not specifically say that he

⁴ McPherson testified that he drove Pandurini from the Irwindale Medical Center to the Downey Surgical Center.

⁵ Her belief was based on information from Pandurini. The doctor at the Irwindale Medical Clinic was willing to treat Pandurini without shaving the bone. The hand specialist doctor from the Downey Surgical Center shaved the bone. Pandurini chose to have the specialist treat his finger.

could treat the injury without causing Pandurini to suffer any further bone loss beyond what bone may have already been lost in the accident.

Pandurini chose to go to Downey Surgical Center. Dr. Hanna told him she thought the best way to treat him would be to shave the bone and put skin over the finger. Pandurini agreed, and it was done.

Findings and Reasons for Decision

Employer's employee suffered a serious work-related injury.

Employer did not report the injury to the Division. The Division established a violation of § 342(a).

Imposition of a penalty would not be a miscarriage of justice. The proposed \$5,000 penalty is warranted.

The Division cited Employer for failing to report a serious injury to the Division in violation of § 342(a)⁶. Section 342(a) reads as follows:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

In all matters on appeal, the Division has the burden of proving a violation by a preponderance of the evidence⁷, including the applicability of

⁶ The factual allegations of Citation 1, Item 1 read as follows: The employer did not report a Serious Injury which occurred on December 6, 2011 to the nearest District Office of the Division of Occupational Safety and Health.

⁷“Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After

the safety order. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Employer disputed whether Pandurini's injuries, which resulted in a partial amputation of the tip of the left ring finger were serious, and, therefore, reportable. The term "serious injury" is defined in Labor Code § 6203(h), which provides as follows:

"Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement.

Section 330(h) also has a definition of the term "serious injury." The Appeals Board has held that the definitions are the same. (*California Highway Patrol*, Cal/OSHA App. 03-3762, Decision After Reconsideration (Aug. 16, 2012).)

The injury is documented by a photograph that shows Pandurini's hands placed together. (Exhibit 4) Pandurini's left ring finger is visibly shorter than his right ring finger. The injury is further documented by the records received from Employer (Exhibit 5 – Workers' Compensation Claim Form, Employer's First Report of Injury, Internal Accident Investigation Form) and the medical records from Dr. Hanna (Exhibit 2). The documents in Exhibit 5, received from Employer describe the injury as "cut off left ring finger nail bed plus part of skin and finger"⁸, and "left finger (s) (not thumb) severance."⁹

Dr. Hanna's report of the operation (Exhibit 2, p. 7, 8, and Exhibit A) states that she "shortened the left ring finger distal phalanx¹⁰." Dr. Hanna described the injury as a "left ring finger amputation."¹¹ Her December 7, 2011 report, states that she personally reviewed X-rays of Pandurini's left hand, which showed a left ring finger distal amputation with soft tissue loss and exposed distal phalanx. (Exhibit 2, page 10)

Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483, review denied.)

⁸ Exhibit 5, page 1, DWC 1, Workers' Compensation Claim Form

⁹ Exhibit 5, page 2, Form 5020, Employer's First Report of Injury

¹⁰ A phalanx is any of the bones in a finger or toe. *Webster's "Encyclopedic Unabridged Dictionary of the English Language"* (1989),p. 1079, meaning 6, referring to anatomy

¹¹ Exhibit 2, pages 2, 3, 4, 5, 6, 10, 13.

A shortening of the phalanx creates bone loss, since a phalanx is a bone. Appeals Board decisions have recognized that partial amputation of a fingertip constitutes a serious injury. (*Southern California Edison*, Cal/OSHA App. 06-2062, Denial of Petition for Reconsideration (June 20, 2008); *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 2, 2007); *Ferro Union, Inc.*, Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000).)

Based upon Appeals Board precedent, the stipulation that Dr. Hanna shaved a portion of the tip of Pandurini's finger, the medical documentation, and the observation of the current shortened condition of the finger (Exhibit 4), it is found that Pandurini suffered a serious injury that was reportable. It was stipulated that Employer did not report the injury to the nearest District Office of the Division.

Therefore, the Division established a violation of § 342(a) by a preponderance of the evidence.

The Division classified the violation as regulatory. A regulatory violation is defined in § 334(a) as follows:

[A] violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

Failure to report an injury falls squarely within the definition of a regulatory violation. Therefore, the violation was properly classified as regulatory.

The Reasonableness of the Penalty

Employer appealed the reasonableness of the penalty. The Director's regulations require the Division to assess a \$5,000 penalty for a violation of § 342(a). Section 336(a) states as follows: For Failure to Report Serious Injury or Illness, or Death of an Employee—Any employer who fails to timely report an employee's injury, illness, or death, in violation of § 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of \$5,000.

Although the Division is required to assess a \$5,000 penalty, the Appeals Board has the power to approve, modify, or vacate the penalty. (Labor Code § 6602) Penalties calculated in accordance with the penalty setting regulations¹² are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) In recent Decisions After Reconsideration, the Board held that the Legislature intended to impose a \$5,000 penalty in all cases when a serious injury was not reported, unless it would result in a miscarriage of justice. (*Allied Sales and Distribution*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012); *SDCCD—Continuing Ed N C Center*, Cal/App. 11-1296, Decision After Reconsideration (Dec. 4, 2012).)

Employer argued that imposing a penalty would be a miscarriage of justice. Employer pointed out that the loss was small, removal of the bone was optional, Employer provided prompt and appropriate medical care, that the injured employee has regained full use of his ring finger, and that Employer did not have Pandurini's medical records. Employer has the burden of proof on this issue since it is an affirmative defense. (*Ernest W. Hahn, Inc.*, Cal/OSHA App. 77-576, Decision After Reconsideration (Jan. 25, 1984); *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sep. 27, 1990).)

Employer did not meet its burden of proof. The Board has found that a miscarriage of justice occurs when an employer may not have been able to understand the basis for the charge alleged in the citation or to determine the accuracy of the citation. (See *Ferma Corporation*, Cal/OSHA App. 74-917, Decision After Reconsideration (Nov. 12, 1975) at p.2.) That is not the case here. To the contrary, the evidence established that Employer fully understood the basis for the citation and the accuracy of the citation.

Employer argued that imposition of the full penalty was unfair because Employer did not have the medical records. S. McPherson did not read the medical report that she had. Employer had a duty to obtain and read the medical reports and determine if the injury was reportable. (see *Daily Breeze*, Cal/OSHA App. 99-3429 et. al., Decision After Reconsideration (Apr. 12, 2002).) Ignorance is no excuse. (*Nick's Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (June 8, 2007).)

A major reason for the § 342(a) reporting requirement is to allow the Division to respond quickly and to examine any condition, machinery, or equipment which might have caused an accident. (*Weltech Incorporated*, Cal/OSHA App. 90-784, Decision After Reconsideration (Aug. 22, 1991);

¹² §§ 333-336

Alpha Beta Company, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979).) Employer's failure to report in this case frustrated this purpose. The Division was delayed in its inspection of the machine involved in the injury. There were multiple citable conditions other than the failure to report¹³ that remained unabated until the inspecting officer arrived over one year later. Thus, the failure to report had an effect on employee health and safety. (*Allied Sales and Distribution*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).) Under these circumstances, it cannot be found that imposing a penalty would constitute a miscarriage of justice.

Accordingly, the \$5,000 penalty is warranted and is affirmed. Due to Employer's stipulated poor financial condition, Employer may pay the penalty in 18 installments.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: February 21, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

¹³ Citation 1, Items 2 through 6 and Citation 2

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

ALLEGIANCE BUSINESS CORPORATION DBA HI TECH PRECISION
Dockets 13-R6D2-1771 and 1772

Abbreviation Key: Reg=Regulatory
G=General W=Willful
S=Serious R=Repeat
Er=Employer DOSH=Division

IMIS No. 314761487

DOCKET	C	I	T	I	SECTION	T	Y	P	E	MODIFICATION OR WITHDRAWAL	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R6D2-1771	1	1			342(a)	Reg				ALJ affirmed violation	X		\$5,000	\$5,000	\$5,000
		2			461(a)	Reg				DOSH reduced penalty	X		175	100	100
		3			3203(a)	G				DOSH reduced penalty	X		260	200	200
		4			2340.17(a)	G				DOSH reduced penalty	X		175	100	100
		5			2340.22(a)	G				DOSH reduced penalty	X		175	0	0
		6			4070(a)	G				DOSH reduced penalty	X		175	100	100
13-R6D2-1772	2	1			4002(a)	S				DOSH reduced penalty	X		10,800	5,400	5,400
Sub-Total													\$16,760	\$10,900	\$10,900

Total Amount Due* **\$10,900**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:
Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*** Total shown is payable in 17 monthly installments of \$605.55 beginning April 1, 2014, and a final installment of \$605.65. Failure to make an installment by the third day of the month shall cause the remaining balance to become payable immediately without further order.** Nothing in the Order or this Summary Table shall preclude Employer from seeking a different payment plan from the DIR Accounting Office. Please call (415) 703-4291 if you have any questions.

ALJ: DR/ml
POS: 02/21/14