

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

In the Matter of the Appeal of:

**CENTRAL VALLEY CONTRACTING**  
11410 Harrington Street  
Bakersfield, CA 93311

Employer

Docket No. 05-R4D3-2351

**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 this matter under reconsideration on its own motion, renders the following decision after reconsideration.

**JURISDICTION**

Central Valley Contracting (Employer) is a farm labor contractor. On January 28, 2005, the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at Twisselman Road and ¼ mile east of the Aqueduct, Lost Hills, California. On June 29, 2005, the Division cited Employer for a violation of section 342(a), Title 8, California Code of Regulations,<sup>1</sup> which requires employers to report serious injuries, as defined in Labor Code section 6302(h).

Employer filed a timely appeal contesting the alleged violation and the proposed penalty.

On September 19, 2006, this matter was heard by an Administrative Law Judge (ALJ) for the Board. The case was submitted by the parties on November 8, 2006 and the ALJ rendered her decision on December 6, 2006. In the decision, the ALJ upheld the violation and assessed a \$5,000 penalty. The decision to assess the \$5,000 penalty was based, in part, on the ALJ's finding

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<sup>1</sup> Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

that Employer purposefully misrepresented a document it submitted into evidence.

The Board ordered reconsideration of this matter on its own motion to address whether the Board should assess a penalty greater than \$5,000 if the record shows that the party requesting a reduced penalty purposefully misrepresented evidence at the hearing. The Division filed an answer to the Board's Order on February 8, 2007.

### **EVIDENCE**

On December 10, 2004, a representative of the Kern County Fire Department informed the Division that one of Employer's workers broke his leg. The call was recorded by the Division "duty person" on a Cal/OSHA form 36 Accident Report, which was accepted into evidence as Exhibit 3. The injured employee was hospitalized until December 14, 2004.

At the hearing, the Division inspector testified credibly that he searched the Division's records in the Van Nuys office and could not find a Cal/OSHA form 36 report of the accident from Employer for the month of December 2004. Subsequently, he spoke to Jerry Walker, the custodian of records in the Division's Fresno District Office, who informed him there was no record that Employer reported the injury accident to that office.

In contrast, Santiago Martin, Jr., testified for Employer and represented that he reported the accident by fax to the Fresno Cal/OSHA office approximately "4 to 5 hours" after the accident occurred. Martin identified a cover sheet and page with information about the injury as the documents he faxed to the Fresno Cal/OSHA office, which were marked as Exhibit A. The second page contained the pertinent information regarding the injury and there is a type written date of "12/10/04," the date of the accident, on the page. Neither page has a fax "time-date stamp" on it.

The ALJ's decision observed that the fax cover letter Martin represented was sent to the Division within hours of the accident contained a Board docket number for the appeal. The ALJ noted that a docket number is not assigned until after a citation issues and an employer files an appeal with the Board. In this case, Employer appealed the citation approximately six months after the accident occurred, which is the first time it would have received a docket number.

The ALJ found that Employer's reliance on Exhibit A to demonstrate it reported the injury was without merit. She further observed that Employer presented no additional evidence to demonstrate that it reported the injury beyond Martin's testimony, which she discredited in light of his dishonesty. In

turn, she credited the Division's testimony and evidence, and found that Employer did not report the injury.

In exercising her discretion to assess the proper penalty for the violation, the ALJ concluded that the \$5,000 penalty proposed by the Division was proper in light of Employer's deceit. The ALJ found that such conduct must be discouraged.

### **ISSUE**

Should the Board assess a penalty greater than the \$5,000 proposed penalty amount if the record shows that the party requesting California Labor Code section 6602 relief purposefully misrepresented evidence at the hearing?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

In addressing the referenced issue, we adopt the ALJ's decision below and incorporate it into our Decision after Reconsideration. We specifically adopt her findings that: a serious reportable injury occurred; Employer failed to report the injury as required by Labor Code section 6409.1; and Employer attempted to conceal its error by purposefully misrepresenting Exhibit A to be its report to the Division.

We now consider whether the Board should increase the \$5,000 penalty assessed in response to Employer's reprehensible conduct.

The Division here proposed a \$5,000 penalty in accordance with section 336(a)(6) of its penalty setting regulations, which provides:

For Failure to Report Serious Injury or Illness, or Death of an Employee -- Any employer who fails to timely report an employee's injury or illness, or death, in violation of section 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of \$5,000.

The Appeals Board is not bound by Director's Regulation. Our authority to assess penalties derives from Labor Code section 6602. This section requires the Board to issue a decision "affirming, modifying or vacating the division's citation, order or proposed penalty, or directing other appropriate

relief” when an Employer appeals a citation.<sup>2</sup> We fulfill our mandate by looking at the entire record in each case to determine what penalty amount is appropriate to satisfy the purposes of the Occupational Safety and Health Act (the Act). *Bill Callaway & Greg Lay, dba Williams Redi Mix*, Cal OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006) “One of the Board’s functions is to exercise independent discretionary authority to adopt, modify, or set aside the penalties proposed by the Division.” *Bill Callaway, supra*; See also, *Candlerock Restaurant*, Cal/OSHA App. 74-0010, Decision After Reconsideration (June 5, 1974).

In accord with our statutory instruction, the Board, directly and through its ALJs, has reduced penalties proposed by the Division for section 342(a) violations (see, e.g., *Bill Callaway, supra*; *Safeway #951*, Cal/OSHA App. 05-1410, Decision After Reconsideration (July 06, 2007), but has yet to exercise its authority to increase such a penalty. We do so now.

Here, the Board has no information before it to suggest that the circumstances surrounding the violation itself warrant an increased penalty. Rather, we consider only whether Employer’s post-violation conduct, specifically its duplicity at the hearing, impels a higher penalty in order to encourage future compliance. Accordingly, we address only the Board’s ability to increase a section 342(a) penalty beyond that proposed by the Division based on conduct occurring after the violation.

Board precedent holds that we have broad discretion to assess the proper penalty. In *Liberty Vinyl Corporation*, Cal/OSHA App. 78-1276, Decision After Reconsideration (September 24, 1980), we stated, “[t]here being no restriction upon how the Appeals Board may affirm, modify, vacate or direct other relief in considering penalties de novo, it is consistent and reasonable to conclude that the Board has full discretion in establishing the final monetary penalty necessary to encourage elimination of safety and health hazards, provided that such discretion is consistent with the Act.” We affirmed this position in *Stockton Tri Industries, Inc.* Cal/OSHA App. 02-4946 Decision After Reconsideration (March 27, 2006).

In *Callaway, supra*, we held that facts which do not address the existence of the violation may be relevant to the reasonableness of the proposed penalty. Consistent with this position, in *Stockton Tri, supra*, we reaffirmed that an employer’s ability to pay the proposed penalty amount is a permissible factor to consider when determining the proper penalty to assess when a financial hardship claim is made. When we evaluate an employer’s ability to pay a

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<sup>2</sup> Similarly, section 6620 states, upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may “affirm, rescind, alter or amend the order or decision made and filed by the appeals board or hearing officer . . .”

penalty in response to a financial hardship claim, we examine the employer's financial strength as it exists at, or up to, the time of hearing; we are considering circumstances often remote in time from when the violation occurred and not directly related to the violative conduct. See, *Sheffield Furniture Corporation*, Cal/OSHA App. 00-1322, Decision After Reconsideration (June 8, 2006); *Stockton Tri*, *supra*; *Arcade Meats and Deli*, Cal/OSHA App. 76-320, Decision After Reconsideration (April 7, 1978).

In similar fashion, we find that consideration of an employer's conduct at hearing, or in preparation for hearing, may be appropriate to assessing the proper penalty. Both Board precedent and the Labor Code state that an employer's good faith is relevant to penalty assessment,<sup>3</sup> and we find that its correlative, dishonesty and deceit, is equally compelling.

Where an employer demonstrates good faith, a lesser penalty amount may serve to "encourage elimination of safety and health hazards," which we have held to be a primary goal of monetary penalties imposed under the Act. *Callaway*, *supra*; *Liberty Vinyl*, *supra*. We now hold that a greater penalty is similarly justified when an employer engages in malfeasance.

Employer's duplicity in these appeal proceedings is evident from its misrepresentation of evidence. Such conduct reflects Employer's unwillingness to accept responsibility for its actions; rather than demonstrate the steps undertaken to prevent a recurrence of the reporting failure or provide similar mitigating information, Employer instead chose to lie. Employer's behavior does not inspire confidence and convinces us that a higher penalty is needed to induce future conformity with section 342(a). We will not allow Employer to complete these proceedings with the idea that "it got away with it."

Labor Code section 6427 states a maximum penalty of \$7,000 for non-serious violations of the safety orders. We deem this to be the appropriate penalty in this action.

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<sup>3</sup> Labor Code section 6319(c)(3) specifies that the Division must consider an employer's good faith when calculating the proposed penalty. In *Callaway*, *supra*, we identified various factors that affect penalty assessment for section 342(a) violations, many of which address an employer's good faith regarding occupational safety and health prior to and following the injury (e.g., the quality of its safety program, employer's knowledge of the duty to report, the care taken of the injured employee following the accident). Moreover, Board rule section 381 specifies various actions the Board may undertake where a party is guilty of misconduct during a hearing.

## **DECISION AFTER RECONSIDERATION**

For the reasons previously articulated, the Board affirms the ALJ's decision, but imposes a revised civil penalty of \$7,000.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Board Member  
ART CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: June 1, 2009