

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

In the Matter of the Appeal of:

M1 CONSTRUCTION, INC.
22543 Ventura Boulevard
Woodland Hills, California 91364

Employer

Dockets. 12-R4D1-0222 and 0223

**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 ordered reconsideration of the Decision of the Administrative Law Judge (ALJ) in the above-entitled matter on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on October 10, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a work site in Culver City, California maintained by M1 Construction, Inc. (Employer). On January 10, 2012, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1, Item 1 alleged a General violation of section 1512(b) [no trained employees with current safety certificates]. At hearing, Employer withdrew its appeal of Citation 1, Item 1, and the penalty of \$350 was established by law. Citation 2, Item 1 alleged a Serious violation of section 1541(b)(1) [failure to determine location of electrical conduits and energized conductors before excavation], with a penalty of \$3150.

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ

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

issued a Decision on September 28, 2012. The Decision denied Employer's appeal, imposing a civil penalty of \$900 for Citation 2, Item 1.

The Board ordered reconsideration on its own motion of Citation 2, Item 1. The Division filed an answer to the petition. Employer did not file an answer.

ISSUE

Was the penalty assessment set forth in the ALJ's decision correct?

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the Division's answer to the Board's order of reconsideration.

The Labor Code at section 6319(c) provides the factors which the director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. The regulations promulgated by the Director can be found at sections 333 through 336.

The proposed penalty worksheet entered as part of the Division's Exhibit 1 indicates that Employer was cited for a serious violation of section 1541(b)(1) and received a gravity based penalty of \$18000. Under section 336(c)(1), the initial base penalty for a serious violation is \$18000. The proposed penalty worksheet also states that the Division afforded Employer the following penalty adjustment factors: 15 percent for good faith, 40 percent for size and 10 percent for history. In Column 15 a 65 percent adjustment factor is applied, which equals an \$11700 deduction from the initial penalty. The adjusted penalty in Column 16 is \$6300.

Column 17 on the worksheet is the 50% abatement credit that Employer received, totaling \$3150, resulting in a proposed total penalty of \$3150. At hearing, Division Safety Engineer Victor Copelan testified that the penalty calculations in the exhibit were calculated in accordance with Division policy and procedures. He explained that the penalty issued was for a serious, non-accident related citation, as intervening factors were also responsible for the accident which led to the employee injury. The ALJ asked Employer if it had any questions regarding the Division's calculations on the proposed penalty worksheet; Employer did not.

The proposed penalty worksheet entered into evidence by the Division Worksheet demonstrates that Employer was allowed a 65 percent adjustment factor in column 15 and the maximum 50 percent abatement credit in column 17. The Division, by introducing the proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, met its burden to show the penalties were calculated correctly. (See, *Guerra's Custom Framing, Inc.*, Cal/OSHA App. 92-810, Decision After Reconsideration (May 30, 1995).) Employer failed to rebut the Division's evidence through cross-examination or introduction of evidence that would demonstrate that the penalty was not calculated correctly.

Therefore, we affirm the result of Decision sustaining the citation but assess a penalty of \$3150 as initially proposed by the Division for Citation 2, Item 1. The total penalty amount for Citations 1 and 2 is \$3500.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 31, 2014