BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BURBANK RECYCLING, INC. 500 South Flower Street Burbank, CA. 91502, Employer.	Dockets 10-R4D3-0562 and 0563 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board ("Board"), acting pursuant to authority vested in it by the California Labor Code ordered reconsideration of the Decision of the Administrative Law Judge in the above-entitled matter on its own motion. After considering the matter, the Board renders the following Decision After Reconsideration:

JURISDICTION

Burbank Recycling, Inc. ("Employer") is engaged in the business of recycling (plastics, glass, etc.). On July 29, 2009, while working for Employer, Elizandro Moscoso ("Moscoso") suffered a partial amputation of his right index finger. Employer did not report the injury to the Division of Occupational Safety and Health ("Division"). The Burbank Fire Department reported the injury. As a result of the report of injury, the Division commenced an accident inspection on August 5, 2009. On January 28, 2010, the Division cited employer for violating workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1] Citation 1 alleged a regulatory violation of section 342(a) [failure to report a serious work-related injury]. Citation 2 alleged a serious violation of section 4070(a) [unguarded V-belt pulley].

Employer filed a timely appeal of the section 342(a) citation on the ground that it did not have knowledge of the serious nature of the injury despite a diligent inquiry. 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 issued a Decision on November 24, 2010 ("Decision"). The Decision found that Employer violated section 342(a); however, the Decision

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

reduced the citation to a Notice in Lieu under Labor Code section 6317. The Parties stipulated to the section 4070(a) penalty subject to the modifications addressed in the Decision. The Board took this matter under reconsideration on its own motion.

ISSUES

1) **Does the evidence in the record show that Employer made a diligent inquiry to determine the nature and extent of its employee's injury?**

2) **Did the ALJ abuse her discretion in reducing Citation 1, Item 1 to a Notice In Lieu of Citation?**

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issues presented:

On July 29, 2009, Moscoso worked for Employer, a secondary employer[2], at its recycling facility in Burbank, California. While working for Employer, Moscoso caught his fingers in a moving V-belt in a motor that runs one of the conveyor belts at Employer's facility. Moscosco suffered a reportable partial amputation of his right index finger. (*See,* Exhibit 4.) He also suffered additional injuries to the middle and ring fingers on his right hand, including lacerations and a fracture.

Following the accident, there was a great deal of blood and Employer called paramedics to render aid. Paramedics from the Burbank Fire Department responded. They subsequently took Moscoso to St. Joseph's Medical Center. The Burbank Fire Department reported Moscoso's injury to the Division.

While Moscoso was at the medical center, Carmen Arroyo ("Arroyo"), Employer's Human Resources and Safety Manager, testified that Employer contacted Ideal Staffing to advise them that Moscoso had been injured, and to enlist their aid to determine the extent of his injuries. Arroyo testified that both she and representatives from Ideal Staffing called the medical center to get additional information regarding the extent of Moscoso's injuries, but neither succeeded at that time.

Later the same day, Moscoso returned to Employer's work site with his fingers heavily bandaged. When he returned to Employer's facility, Arroyo questioned him regarding the nature and extent of his injuries. In response, he

[2] Ideal Staffing was Moscoso's primary employer.

said he injured three fingers on his hand when he grabbed onto a moving belt while it was being tested during a maintenance and repair job. Moscoso stated that he could not tell exactly what his injuries were because there was "so much blood" and everything happened so fast. Moscosco provided Arroyo medical documentation and release instructions from the hospital. (Exhibits 3 and 3-A.) He was subsequently sent home.

The medical documentation that Moscoso provided to Arroyo was primarily in Spanish, but there were also some documents in English. Arroyo, who is fluent in Spanish, reviewed the medical documentation.[3] One of the medical records written in English merely indicated that Moscoso had received a laceration (or "Dx: Finger Lac"). Arroyo stated that another document indicated the tip of Moscosco's finger, on the other side of the nail-bed, had been cut off and trimmed to enable stitching to keep the finger together. Arroyo also observed notations indicating that Moscosco's middle finger had been fractured, with a pin placed in it, and that he lost the nail on his ring finger. In addition, among the documents provided by Moscoso were release instructions entitled "Finger Tip Amputation." That document contained the following instructions:

> You have cut the tip of your finger. When this happens, there is some loss of skin and the wound can't be covered completely with stitches. For the type of wound that you have, the best thing to do is to let the wound to heal on its own, letting the skin grow on the sides. Depending on the size of the wound, this will take from 2 to 6 weeks for the wound to be filled with new skin. You should be getting normal feeling on the new skin of the fingertip once the wound is healed.

After reading all of the aforementioned medical documentation, Arroyo testified that she was confused regarding the nature of the employee's injuries. She believed that Moscoso may have only suffered an index finger laceration, without bone loss, and a fracture that did not require an overnight stay at the hospital.

In an effort to clear up the ambiguity in the medical documentation, Arroyo made further efforts to contact Moscoso's medical providers and the primary employer did the same. They made multiple calls in the next few days. They also filed a worker's compensation claim. However, Arroyo stated that she received no timely information from the medical providers based on the employee's asserted HIPPA and privacy rights, and other delays.

The Division commenced its investigation in this matter on August 5, 2009, based on the report from the Burbank Fire Department.

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[3] As part of the record in this matter, a Certified Spanish Interpreter translated pertinent portions of the medical documentation from Spanish to English. (See, Exhibit 3-A.)

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter, including the Division's Answer. In making this decision, the Board has taken no new evidence.

A. Section 342(a) Reporting Requirement.

Section 342(a) provides in pertinent part:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious[4] 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 no 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[.]....

As discussed in Section 342(a), a citation for failure to report a serious injury may be upheld where the Board finds that the Employer knew of the serious injury, or should have known of the serious injury had it engaged in a diligent inquiry. In *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003) the Appeals Board offered the following discussion regarding measuring whether the employer had "constructive knowledge" of an employee's serious injury:

> We find that in addressing the constructive knowledge requirement in section 342(a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical treatment, Employer's efforts to determine the nature of the hospitalization

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[4] Section 330(h) defines a serious injury 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, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

(e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h).

The purpose of the reporting requirement is to allow the Division to quickly respond to injuries or illness on the job. A rapid response is necessary to inspect potentially dangerous conditions close to the time of the accident or illness and to examine any equipment that may have caused an injury or illness, or which may pose a safety or health risk to other employees. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

B. Employer's Failure to Report Pursuant to Section 342(a).

The ALJ found that Arroyo credibly testified that she did not subjectively know that Moscoso had suffered a reportable injury until the Division's inspector arrived to conduct an investigation. Arroyo thought the injury was only an index finger laceration, without bone loss, and a fracture, that did not require an overnight stay at the hospital. Absent compelling evidence to the contrary, we will not disturb credibility findings made by the ALJ who was present at the hearing and able to directly observe and gauge the demeanor of the witness and weigh his or her statement in light of his or her manner on the stand. (*River Ranch Fresh Foods-Salinas, Inc.*, Cal/OSHA App. 01-1977, Decision After Reconsideration (Jul. 21, 2003)). But, the fact that Arroyo did not subjectively know that a reportable injury occurred does not end our inquiry.

Although Arroyo may not have subjectively known that Moscoso's injury was "serious" as that term is defined under section 330(h), there were numerous objective indicators suggesting that the injury was serious that Arroyo, in the exercise of a diligent inquiry, should have recognized: First, Arroyo received a document entitled "Finger Tip Amputation." While we acknowledge the totality of the document makes it unclear whether the amputation involved only soft tissue or some bone, the use of the term "amputation" raised the very real possibility that the injury was per se serious and reportable, because loss of any body part or permanent disfigurement are defined as serious injuries. (Labor Code section 6302(h); section 330(h)). Second, Arroyo knew Moscoso got his hand caught in a V-Belt in a motor, which tends to cause "serious" injury. Third, when Arroyo interviewed Moscosco, he told her that there was "so much blood" he could not ascertain the extent of his injuries.[5] The aforementioned evidence should have led

[5] Generally, once an employer has notice of a sufficient likelihood of the injury being serious, additional inquiry is required. (*Pacific Messenger Records Storage, Inc.*, Cal/OSHA App. 08-2263, Denial Of Petition for Reconsideration (Sept. 8, 2010), *citing J & W Walker Farms*, Cal/OSHA App. 09-1949, Decision After

Arroyo, in the exercise of a diligent inquiry, to conclude that Moscoso suffered a serious injury, and at the very least it should have instilled significant doubt in Arroyo as to whether Moscoso suffered a serious injury. In either case, Employer should have reported the incident.

When an employer has doubts as to whether an injury is serious, we have long thought the employer should resolve any doubt in favor of reporting the event. (*Dubug #7 Inc. dba Wood-Ply Forest Products*, Cal/OSHA App. 92-1329, Decision After Reconsideration (Jun. 26, 1995), citing, *Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979) and *Phil's Food Market, Inc.*, Cal/OSHA App. 78-806, Decision After Reconsideration (Feb. 6, 1979).) After an employer receives objective indicators that suggest the injury in question may have been serious, even if it cannot be definitively resolved prior to expiration of the eight hour reporting deadline contained in section 342(a), the employer should resolve all doubt in favor of making a timely report of the incident to the Division. Here, based on the fact that the Employer received a document with the word "amputation," the record sufficiently demonstrates that Employer had sufficient information on the day of the employee's injury, even though not necessarily definitive, to warrant a report to the Division. The report should have been made no later than eight hours from the time Arroyo met with Moscoso and received his medical documentation.

C. Reduction to a Notice in Lieu.

We now review whether the ALJ properly reduced the section 342(a) citation to a Notice in Lieu of Citation under Labor Code section 6317(a). To amend a citation to a Notice in Lieu, the evidence must show the "violations do not have a direct relationship upon the health or safety of an employee" or the "violations do not have an immediate relationship to the health or safety of an employee and are of a general or regulatory nature." (Labor Code § 6317; *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012)). The ALJ concluded that, "The § 342(a) violation herein did not have a direct or immediate relationship to the health and safety of any employee, and was of a regulatory nature." We conclude that the ALJ erred when she reduced the citation to a Notice in Lieu.

"The circumstances of the workplace determine whether the failure to report bears an immediate relationship to employee health and safety." (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After

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Reconsideration (Nov. 2, 2009).) The required amount of additional inquiry is described in the regulation as a "diligent inquiry." (Section 342(a)). In this matter, Arroyo did make further inquiries to determine the extent of Moscoso's injuries, including phone calls to the primary employer, medical providers, and the workers' compensation carrier. But, she received no timely cooperation from these entities. While such efforts are noteworthy, the efforts are not sufficient to discharge the section 342(a) citation, since Arroyo and Employer already had sufficient information in their possession to warrant a report to the Division as soon as Arroyo received documentation indicating that Moscoso suffered an "amputation."

Reconsideration (Nov. 29, 2012)). Here, following its investigation of the Employer, the Division cited Employer for a violation of section 4070(a) [unguarded V-belt pulley] and section 432(a) [failure to report a serious injury]. Employer and the Division stipulated to the section 4070(a) citation. Based on the facts underlying the section 4070(a) citation, there was potentially some ongoing exposure of an employee to a workplace hazard during the period between Moscoso's injury and the Division's investigation; Employer presented no evidence to the contrary. (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012)). As such, the Employer did not show the aforementioned violations, including the section 342(a) violation, bore no immediate relationship to health or safety of an employee. (*Id.*)

Based on the foregoing, we find that the Division established a violation of section 342(a), and we conclude that since the Employer failed to report the injury the penalty of $5,000 is reasonable in this case. (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012)).

ART CARTER, Chairman

ED LOWRY, Board Member

JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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