BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: SHIHO SEKI dba MAGICAL ADVENTURE BALLOON RIDES P. O. Box 891951 Temecula, CA 92589-1951 Employer	Docket No. 11-R3D3-0477 **DENIAL OF PETITION FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Shiho Seki doing business as (dba) Magical Adventure Balloon Rides (Employer).

JURISDICTION

Commencing on July 30, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On January 21, 2011 the Division issued one citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, Title 8.[1]

Employer timely appealed.

Pursuant to that appeal, administrative proceedings were held before and Administrative Law Judge (ALJ) of the Board. At the hearing which was held in this matter, the parties submitted a proposed stipulation, which was rejected by the ALJ for unspecified reasons.[2] After rejection of the proposed settlement, an evidentiary hearing was held. Following that hearing the ALJ issued a Decision on June 15, 2011, sustaining the citation, denying Employer's appeal, and imposing a civil penalty of $2,400.

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[1] References are to California Code of Regulations, title 8 unless specified otherwise.

[2] Employer's Petition (p. 13) notes that the portion of the hearing when the stipulation was presented was not recorded due to equipment problems.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

ISSUES

Whether the ALJ erred in rejecting the parties' stipulation.

Whether the worker involved in the incident giving rise to the citation was Employer's employee.

Whether the civil penalty imposed was excessive.

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

Employer's petition contends the ALJ acted in excess of her powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on substantial evidence in the record as a whole and appropriate under the circumstances.

We will briefly summarize the circumstances giving rise to the citation and then individually address each issue Employer raised in its petition.

Employer operates a hot air ballooning business in southern California, among other locations. It contends that the individuals who work for it, ground crews and air crews, are independent contractors and thus not

employees under the California Occupational Safety and Health Act, Labor Code section 6300 and following. One of those individuals was seriously injured while attempting to refill a propane fuel tank used in balloon flights at a third-party facility.[3] Employer reported that injury about 34 hours after it occurred, which was not timely. The Division thereafter issued the subject citation alleging a violation of section 342(a), which provides:

> (a) 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.
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> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Employer did not contend it was unaware of the accident when it occurred or was excusably delayed from reporting it. The Decision found Employer had violated section 342(a), and imposed a civil penalty.

1. Whether the ALJ erred in rejecting the parties' stipulation.

According to Employer's petition, the parties prepared and submitted to the ALJ a detailed stipulation to resolve the matter. The ALJ rejected the proposed stipulation and required the parties to proceed to hearing. The Decision does not mention that occurrence, although it does contain a set of stipulations, apparently derived from those submitted by the parties. The record also contains a document styled "Stipulation of Settlement" executed by both Employer and the Division, and the petition repeats its contents. (Petition for Reconsideration, pp. 11-13.)[4] Included among the stipulations were the following items:

"9. The employer had approximately 2 employees under their (sic) control at the time of the accident."

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[3] The parties did not dispute the existence of a serious injury, or that the injury was reportable. See Labor Code sections 6302(h) [defining "serious injury"]; and 6309(b) [requirement to report serious injury].

[4] The Decision contains many of those stipulations, though the parties' "Stipulation of Settlement" was more extensive.

"15. Both representatives believe that a substantial lesser civil penalty is appropriate."

"16. The employer requests a 24 month interest free payment plan on any civil penalty exceeding $500."

Given the gap in the record, it is not known why the ALJ declined to accept its terms. Employer cites several California cases for the proposition that the state's policy is to encourage settlements. And, as the petition points out, the terms of the settlement do not appear to violate law, regulation or policy. Further, it appears that refusing to accept the settlement could be inconsistent with both Board precedent (e.g., *Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 09-2351, Denial of Petition for Reconsideration (Jun. 1, 2010)) and U.S. Supreme Court authority (*Cuyahoga Valley Railway Co.* v. *United Transportation Union* (1985) 474 U.S. 3, 6.)

On the other hand it also may have been that the ALJ believed that there was not good cause for the stipulated settlement. Alternatively, the ALJ may have thought that while the stipulation was acceptable as far as it went, it necessarily left unresolved the issue of what amount of penalty was appropriate under the circumstances, and therefore the best way to decide that question was to have a hearing. Therefore, it cannot be said with any certainty that it was error to reject the stipulation and require a hearing.

Even if it may have been error for the ALJ to decline to accept the parties' stipulation, such error was not prejudicial. A judgment may not be reversed on appeal unless there is prejudicial error; generally an error is not prejudicial unless it is reasonably probable that a result more favorable to the appealing party would have been reached. (See *Soule* v. *General Motors Corp.* (1994) 8 Cal.4th 548, 574.) Had the ALJ accepted the stipulation, the violation would have been established, as it was after the hearing. And there is no reason to believe the ALJ would have assessed a different penalty since the same facts would have been and were used to determine the penalty. Moreover, the parties' stipulations regarding the penalty amount are not binding on the ALJ. (See *Bakersfield Central Metal, Inc.*, Cal/OSHA App. 2010-2140, Denial of Petition for Reconsideration (Mar. 21, 2011) [in view of stipulated facts and Board precedents, penalty for § 342(a) violation within sound discretion of ALJ]; Luu's Brothers Corp. dba A & A Supermarket, Cal/OSHA App. 07-5156, Denial of Petition for Reconsideration (Feb. 23, 2009).) Thus, it may properly be assumed the ALJ would have reached the same penalty determination without the hearing, particularly since the submitted stipulations were before the ALJ. Therefore, reconsideration should be denied on this claim. Moreover, the penalty the ALJ assessed for the violation was within the range of the sound exercise of her discretion, and will not be disturbed on the basis of a petition for reconsideration on the present record. (*Bakersfield Central Metal,*

supra; *Warwick California Corp. dba Warwick S.F. Hotel*, Cal/OSHA App. 09-0894, Denial of Petition for Reconsideration (Dec. 6, 2010).)

2. Whether Injured Worker Was an Employee or Independent Contractor.

As both the Decision and Employer's petition point out, the Board adopted a six-part test established by the California Supreme Court to determine whether an individual is an employee or independent contractor. (*McDonald's Van Ness*, Cal/OSHA App. 00-1621, Decision After Reconsideration (Sep. 26, 2001), adopting test in *S.B. Borello & Sons, Inc.* v. *Department of Industrial Relations* (1989) 48 Cal.3d 356.) Employer argues that applying the *Borello* test here leads to the conclusion that the worker in question was an independent contractor. The ALJ applied the same six-factor test and reached the opposite conclusion.

Borello provides that the most important factor in determining the type of employment relationship is (1) the right to control the manner and means of accomplishing the desired result. And the Court also recognized that given "the infinite variety of service arrangements," the following "secondary indicia" may also be considered: (2) the alleged employee's opportunity for profit or loss depending on his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.

Other California case law also holds that such right to control others is pertinent to determining whether the person having such control is an employer under the Act. (*Sully-Miller Contracting Company* v. *California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 693.) The employer need not exercise those rights; having them is sufficient. (*Id.*) The court in *Sully-Miller* recognized that the OSH Act adopted the definition of "employer" used in the Workers' Compensation Act (Labor Code section 3300 et seq.), and held the intent was to use the same definition in both statutes. (*Id.*) As another court held, "The very strongest evidence of an employer's control of his employee is his right to discharge him at will without cause. [Citation.]" (*Greenway* v. *Workers' Compensation Appeals Bd.* (1969) 269 Cal.App.2d 49, 55.)

It is also noteworthy that the Supreme Court stated early in the *Borello* opinion that, "The label placed by the parties on their relationship is not dispositive; and subterfuges are not countenanced." (*Borello, supra* at p. 349; citations omitted.)

With the foregoing authorities in mind, we examine the facts of this matter.

As to the first element (control), Employer controlled the work. The injured worker was called when there was a balloon flight for which his work as a ground crew member was required, and although he could decline the assignment, Employer was the source of the work. Also, as the petition points out, the tasks necessary to prepare a balloon for flight are detailed and involved, and the worker received training in those tasks. It appears the tasks must be performed properly for flight safety purposes; thus, Employer's argument that the worker could elect to accomplish the tasks by any means seems specious.

As noted above, "the strongest evidence of an employer's control of his employee is his right to discharge him at will without cause." (*Greenway*, supra.) Although the agreement between Employer and the employee was silent as to the right to terminate, it includes the following statement: "Most of all, this position requires dependability and punctuality as our flight times are only allowed within a narrow frame just after sunrise and just before sunset." We infer that if the worker here were to fail "punctual[ly]" to fulfill his assignments as a ground crew member, he would be terminated. Thus, Employer implicitly reserved the right to terminate the worker, and thus retained this crucial element of control. (See *Dore* v. *Arnold Worldwide, Inc.* (2006) 39 Cal.th 384, 389.)

The *Borello* test's second element (worker's opportunity for profit and loss) also cuts against Employer. The two "opportunities" to profit the worker has are, first, to accept assignments, and second, the possibility that customers will tip the various crew members. Crew members receive an hourly wage; tips are supplemental, and not subject to Employer's control. (Labor Code section 351.) As with food service workers, the possibility of having one's earnings supplemented by customer tips does not change the employment arrangement, or make someone an independent contractor. (See *Lu* V. *Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 601.)

The worker was required to purchase his own work equipment such as safety shoes and gloves. (*Borello* test, Element 3.) This element, alone of the 6, suggests an independent contractor arrangement. It is possible, however, that the workers are required to provide their own equipment in order to bolster the argument that they are independent contractors, as well as to save costs.

The ground crew tasks require training in order to accomplish properly but not licensure or certification. (*Borello* test, Element 4.) The tasks appear to involve primarily physical labor, which was a factor cited by the federal court case referenced in *Borello* as cutting against a finding of special skill, and

therefore against independent contractor status. Moreover, those tasks were capable of being properly performed by the 17 year old worker in question with less than a week's training. By way of contrast, the balloon pilot is required to have a Federal Aviation Administration pilot certificate, which does require possession and demonstration of appropriate special skills to obtain.

It is not clear from the record how permanent the relationship between the injured worker and Employer is or will be. The worker testified at the hearing that he was still working for Employer at that time; however the relationship may be defined. Therefore, this factor is neutral on the issue of employment status.

Lastly, the ground crew performs tasks which are integral to Employer's business. The balloon equipment must be transported to the launch site, prepared for and actually launched, and later retrieved and disassembled at the landing point, the tanks refueled, and so on. Someone has to accomplish all those various tasks. Thus, Employer must have personnel perform them.

Applying the *Borello* test, therefore, shows that the worker was an employee, not an independent contractor as Employer contends.

Employer made the additional argument that it is a widespread balloon operator industry practice to use independent contractors rather than employees for crew personnel. Two concepts militate against accepting that argument. First, the Board has often stated that industry practice is not a defense against a violation of a safety order. (*E.g.*, *Webcor Construction, LP*, Cal/OSHA App. 07-5150, Denial of Petition for Reconsideration (Jun. 24, 2009) ["It is well settled that industry practice cannot supplant the mandates of safety orders." (citation omitted)].) Second, such industry practice must be viewed in the context of the court's statement in *Borello* quoted above: "The label placed by the parties on their relationship is not dispositive; and subterfuges are not countenanced." (*Borello, supra* at p. 349; citations omitted.)

We therefore hold that the worker in question was an employee, as defined in the Occupational Safety and Health Act, at Labor Code section 6304.1, and Employer was his "employer" at that term is defined in Labor Code section 6304. It follows that the Division had jurisdiction to cite Employer for the violation of section 342(a).

3. Whether the Civil Penalty Was Excessive Under the Circumstances.

The ALJ assessed a $2,400 penalty for a late reporting violation of section 342(a). Employer argues this was excessive in light of the facts and the $750 penalty imposed in *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006).

Employer further argues that the parties stipulated that "Both representatives believe a substantial lesser civil penalty is appropriate."

Callaway, supra, involved a late report of a serious injury to an employee. The Board imposed a $750 penalty given the facts. In later cases, "The Board has refined its approach to what level of penalty is appropriate[.]" (*Grand Hyatt San Francisco,* Cal/OSHA App. 09-2186, Denial of Petition for Reconsideration (Jun. 28, 2011); *Melmarc Products,* Cal/OSHA App. 09-2878, Decision After Reconsideration (May 12, 2010); *Methodist Hospital of So. CA,* Cal/OSHA App. 10-1868, Decision After Reconsideration (Mar. 30, 2011).)

The parties' stipulation regarding a section 342(a) penalty is not binding on an ALJ or the Board. (*Warwick California Corp. dba Warwick S.F. Hotel,* Cal/OSHA App. 09-0894, Denial of Petition for Reconsideration (Dec. 6, 2010), citing *Superior Lithographics, Inc.,* Cal/OSHA App. 07-1879, Denial of Petition for Reconsideration (Aug. 12, 2009).)

Further, the penalty assessed in this matter was within the range of the ALJ's reasonable discretion. The Board has vested its ALJs with discretion to assess penalties for a section 342(a) violation. (*The Village at Childhelp West,* Cal/OSHA App. 05-4267, Denial of Petition for Reconsideration (Nov. 10, 2008).) We review a penalty amount under an abuse of discretion standard. (*Alpine Concrete & Pumping, Inc.,* Cal/OSHA App. 10-0412, Denial of Petition for Reconsideration (Jul. 26, 2011); *Nick's Lighthouse,* Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).) No abuse of discretion appears here. Moreover, the penalty was reduced by more than half, a decrease which is inconsistent with Employer's argument that there was not a "substantial" reduction.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman

ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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