

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

*In the Matter of the Appeal of:*

**COURTNEY, INC.**  
16781 Millikan Avenue  
Irvine, CA 92606

Employer

**DOCKET 14-R3D1-2023**

**DECISION**

**Statement of the Case**

Courtney, Inc. (Employer) is a waterproofing contractor. Between April 10, 2014 and May 27, 2014, the Division of Occupational Safety and Health (herein after referred to as the Division or DOSH), through Associate Safety Engineer Jag Dhillon, conducted a safety inspection at a place of employment maintained by Employer at 3395 Michelson Dr., Irvine, California. On June 2, 2014, the Division cited Employer for violation of Title 8, California Code of Regulations, §342(a), failure to report serious occupational injury to the Division.<sup>1</sup>

Employer filed a timely appeal contesting the existence of the violation and the reasonableness of the proposed penalty.

This matter was heard by Ursula L. Clemons, Presiding Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at West Covina, California on December 17, 2014. George Courtney, President, represented Employer. Brandon Hart, Senior Safety Engineer, represented the Division. The parties presented oral and documentary evidence. The matter was submitted for decision on December 17, 2014.

**Issue**

1. Whether the Orange County Fire Authority's report of the serious injury to the Division satisfied Employer's obligation to report directly to the Division.
2. Whether the proposed penalty is reasonable.

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

## **Findings of Fact**

1. Employer did not report the serious injury to the Division in any form or fashion.
2. The Division reasonably proposed a penalty of \$5,000 pursuant to the Director's policies and procedures and Title 8, CCR, section 336(a)(6).

## **Analysis**

### **1. Employer failed to report the serious injury to the Division. The violation of § 342(a) is established.**

Section 342(a), provides in part, the following:

Every employer shall 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.

In the citation, the Division alleges the following:

The Employer did not report a serious occupational injury that occurred on 3-31-14.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, DAR (June 16, 1983).) The elements of the violation are: (1) Employer shall (or must) report, to the Division of Occupational Safety and Health, (2) any serious injury or illness or death of an employee, (3) occurring in a place of employment or in connection with any employment.

The parties entered the following stipulations into the record:

1. Nathan Beltran was an employee of Courtney, Inc. on March 31, 2014.
2. Nathan Beltran suffered a serious injury that required hospitalization for treatment.
3. The worksite where the accident occurred was located at 3395 Michelson Dr., Irvine, CA 92612.
4. Art Nava was a supervisor on March 31, 2014.
5. The classification of the citation as regulatory is correct.
6. Michelle Montoya is employed by Courtney, Inc.

7. The accident occurred on March 31, 2014 at approximately 10:50 a.m.
8. Nathan Beltran was admitted into Western Medical Center for treatment on March 31, 2014 and discharged on April 4, 2014.<sup>2</sup>
9. The name of the Employer, Courtney, Inc., is correct.
10. George Courtney had knowledge that Nathan Beltran suffered a serious injury and was being hospitalized for treatment on March 31, 2014.
11. Orange County Fire Authority notified the Division of the serious injury on March 31, 2014 at 11:33 a.m.
12. Employer did not make a telephone call to the Division reporting the serious accident/injury.<sup>3</sup>

The parties stipulation sufficiently demonstrates that Employer did not report the injury. In *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (November 29, 2012), the Board considered an Employer's contention that because the fire chief, in charge of the first medical personnel who had responded to the medical emergency call, had informed the employer that he would report the injury and there was thus no reason for employer to report it as well. In *Allied Sales*, the Board held "there is no indication in the Legislative history, the language to section 6409.1(b), or the penalty setting provisions of the Act that reasonable reliance on another's report fulfills the reporting requirement, or has any relevance to setting a penalty." Although an employer can authorize another to make a report on its behalf, employers and first responders have separate duties to report. (*Helpmates Staffing*, Cal/OSHA App. 05-2239, Decision After Reconsideration (Jan. 20, 011); §342(d).) The duplication built in to these reporting requirements indicates the importance to the Legislature that the Division receives injury reports. Excusing reports because they are duplicative thus undermines this purpose.<sup>4</sup>

Employer's representative, President George Courtney (Courtney), stated in his testimony that his supervisor Art Nava (Nava) was present when the accident occurred and the emergency responders were on site. Nava told Courtney that "they said they would call OSHA". Courtney, was not present at the time of the accident, but he understood, "they" to mean the Fire Department emergency responders would report on Employer's behalf. He testified that he believed there was no need for Employer to report as the goal was accomplished, the Division was made aware of the injury. To substantiate

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<sup>2</sup> The parties submitted a joint list of stipulations (Exhibit 5) handwritten by Senior Safety Engineer, Brandon Hart. The ALJ was read the stipulations into the record at which time Senior Safety Engineer, Brandon Hart, corrected the parties' stipulation on the record amending the hospital discharge date from April 1, 2014 to April 4, 2014. Employer agreed.

<sup>3</sup> Employer's stipulation was made during the course of the hearing.

<sup>4</sup> Section 342(c) lists ten items of information that, if known, must be included in the report by both the employer and the responding agency. The employer's report may be more comprehensive and are thus not always duplicative of the responding agency.

this, Employer submitted an email from a contractor onsite when the accident occurred. (Exhibit A)<sup>5</sup>

It is not disputed that an employee of Employer's was seriously injured at the worksite from burns received to his face, neck, shoulder, wrist and leg when hot rubber splashed on him while carrying a bucket. Employer concedes it never made a call to the Division reporting the serious injury of March 31, 2014. Nor did it send a telegraph. The accident and serious injury was reported to the Division by the Orange County Fire Authority (OCFA) on March 31, 2014 at 11:33 a.m. No report was made by Employer, so Dhillon testified that he had to issue a citation with a penalty of \$5,000 (Exhibit 4) as required by Labor Code section 6409.1(b).

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

## **2. The proposed penalty of \$5,000 is reasonable.**

The Division issued the citation with a proposed penalty of \$5,000 for Employer's failure to report the serious injury. Title 8, CCR, section 336(a)(6) penalty setting regulations specifically states 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.

Although the Division is required to assess a \$5,000 penalty, under Labor Code section 6602, the Board is required, in the course of resolving an appealed penalty, to affirm, vacate, or modify such penalty, or determine other appropriate relief in order to fulfill the purposes of the Occupational Safety and Health Act. Section 342(a) requires employer to report to the Division any and all serious injuries occurring in the workplace, within 8 hours of the employer obtaining knowledge of the gravity of the injury using reasonable diligence. The section implements Labor Code section 6409.1(b), which requires employers to report serious injuries.

In 2002, Labor Code section 6409.1(b) was amended to add a penalty of \$5,000.00 for violating the reporting requirement. The 2002 amendment of Labor Code section 6409.1(b) added the following: "An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand

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<sup>5</sup> Exhibit A is an email from Matthew Jones, Project Manager of Western National Contractors dated December 17, 2014, stating "on the day of the injury to your employee at Park Place the Ambulance Driver contacted OSHA due to the severity of the injury. Courtney was present with the employee when he was being attended to and removed from the site by the paramedics." Page 1 of Exhibit A was admitted over hearsay objection. It is hearsay as Matthew Jones was not called to testify and thus could not authenticate the email, not the statements therein. Page 2 of Exhibit A entitled "Keeping Records & Reporting" was not admitted, no foundation was laid, there was no explanation of where the document came from. Division witnesses knew nothing about the document in terms of where it came from.

dollars (\$5000.00).” Penalties calculated in accordance with the penalty setting regulations<sup>6</sup> are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

However, consistent with Labor Code section 6602, which was not amended when section 6209.1(b) was amended, the Board has declined to give the Division’s section 342(a) penalty proposal any presumptive effect. The Division applies the \$5,000 penalty and does not adjust it based on any evidence other than the occurrence of the violation. *Allied Sales and Distribution Inc., Id.* (See Evidence Code section 664; *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003). The Board has a history of relying on section 6602 to impose the final penalty (*Bill Callaway and Greg Lay dba Williams Redi Mix.* (Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006).) While the Board continues to have the authority to adjust or modify any penalty, when the Legislature significantly changes a specific penalty for a specific type of violation, the Board should implement the purpose of the Act embodied in that change.

Here, Employer admits it did not call the Division to report the serious injury. There is no indication in the Legislative history, the language of section 6409.1(b), or the penalty setting provisions of the Act that reasonable reliance on another’s report fulfills the reporting requirement, or has any relevance to setting a penalty. As stated in *Allied Sales and Distribution, Inc.*, supra, the Appeals Board no longer considers the calculation factors in *Trader Dan’s*<sup>7</sup> for adjusting penalty, and instead exercises its discretion to affirm, modify, or vacate a penalty when the employer fails to report by imposing either a \$5,000 or zero penalty.

The Board indicated in dicta in *Allied Sales (supra)*, that there may be a situation where imposing such a fine would result in a miscarriage of justice, but the circumstances that could qualify under that standard were not before the Board in that case. (*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).)

Essentially, the Employer argued it is not fair to impose such a huge penalty when the Division was in fact made aware of the serious injury by the emergency responder. The essence of Employer’s argument is that it did not know about the reporting requirement. Ignorance of the law is not an excuse (*Nick’s Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (June 8, 2007).) The circumstances here are similar to those in *Allied Sales and Distribution (supra)* where an employer did not report a serious injury in reliance upon representations by a fire department captain. The Board did not find a miscarriage of justice under those circumstances.

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<sup>6</sup> §§ 333-336

<sup>7</sup> *Trader Dan’s dba Rooms N Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009).

The \$5,000 penalty is therefore sustained.

**Conclusion**

In Citation 1, Item 1, the evidence supports a finding that Employer violated §342 (a) by failing to report a serious injury to CAL/OSHA. A penalty of \$5,000 is assessed for Citation 1, Item 1.

**ORDER**

Citation 1, Item 1, is sustained and a penalty of \$5,000 is assessed for that violation.

Dated: January 14, 2015

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**URSULA L. CLEMONS**  
Presiding Administrative Law Judge

ULC:ml

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**COURTNEY, INC.**

**DOCKET 14-R3D1-2023**

**Date of Hearing – December 17, 2014**

**Division's Exhibits – Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
1.	Jurisdictional documents
2.	Accident Report
3.	Employer's First Report of Occupational Injury or Illness Proposed Penalty Worksheet Stipulations of Parties

**Employer's Exhibits – Admitted**

A.	Email dated Dec. 17, 2014 from Matthew Jones (pg. 1 only)
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**Employer's Exhibits – Not Received**

Keeping Records & Reporting document

**Witnesses Testifying at Hearing**

1. Jag Dhillon
2. Brandon Hart
3. George Courtney

**CERTIFICATION OF RECORDING**

*I, Ursula L. Clemons, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
Signature

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Date

## SUMMARY TABLE

### DECISION

<i>In the Matter of the Appeal of:</i>  <b>COURTNEY, INC.</b> <b>DOCKET 14-R3D1-2023</b>						ABBREVIATION KEY:  Reg=Regulatory G=General S=Serious ER=Employer <span style="float: right; margin-left: 100px;">                     DOSH=Division                      W=Willful                      R=Repeat                 </span>				
IMIS No. 317387074										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A F I R M	V A C A T E	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
14-R3D1-2023	1	1	342(a)	Reg	ALJ affirmed violation.	X		\$5,000	\$5,000	<b>\$5,000</b>
						<b>Sub-Total</b>		\$5,000	\$5,000	<b>\$5,000</b>
						<b>Total Due</b>				<b>\$5,000</b>
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> <b>All penalty payments must be made to:</b>						(INCLUDES APPEALD CITATIONS ONLY)				
Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142						*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have questions				

**ALJ: ULC:ml**  
**POS: 01/14/15**