

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

In the Matter of the Appeal of:

ALLIED SALES AND DISTRIBUTION, INC.
2021 East 52nd Street
Vernon, CA 90058

Employer

Docket 11-R6D2-0480

**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 above referenced matter on its own motion, renders the following decision after reconsideration.

JURISDICTION

On January 18, 2011, the Division of Occupational Safety and Health issued a citation alleging two violations of Title 8, California Code of Regulations [342(a) failure to report a serious injury; 3650(t)(12) failure to ensure all persons in the clear before moving pallet jack]¹. Employer filed timely appeals, and the facts were presented at a hearing through testimony and stipulations. Employer withdrew its appeal of item 2. In the resulting Decision, the ALJ amended the Citation to be a Notice in Lieu of Citation, per Labor Code section 6317, and imposed no penalty.

Issue

Was the penalty assessed for the violation of section 342(a) in Citation 1, Item 1, appropriate?

Evidence

The record contains thirteen stipulations and the testimony of Employer's vice president, Gregg Nivens. In sum, Employer did not report a serious injury. Employer was informed by the Vernon Fire Department, who responded to the workplace injury, that Employer did not have to report, as the Fire Department, specifically the Fire Chief, would be reporting.

¹ All references are to Title 8, California Code of Regulations unless otherwise indicated.

Based on this representation, the Employer refrained from reporting. It knew about the reporting requirement, and was prepared to call in the report on the day it occurred. But for the statements of the Fire Chief, Employer would have reported. Employer is a medium sized employer, with 33 employees. Employer had no history of any violations, and, after inspection by the Division, was found to have a complete IIPP. However, Employer was also cited for a violation of 3650(t)(12) [failure to ensure all persons in the clear before moving pallet jack] and withdrew its appeal of that citation at the hearing.

Decision

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. (Labor Code § 6602.) Section 342(a) requires employers 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 \$5000.00 for violating the reporting requirement. Previously, the reporting requirement had no individualized statutory penalty. Rather, the penalty for a section 342(a) violation was authorized by Labor Code section 6319, and calculated by section 336. (See also Labor Code sections 6423 through 6436). Regulatory penalties are calculated by the Division by applying subsections (a) and (d) of section 336. Under those provisions, prior to 2002 the gravity based penalty for a section 342(a) regulatory violation was \$500.00, and was subject to adjustment under section 336(d) for the history, good faith, and size of the employer. (See Labor Code section 6319.) Penalties could be adjusted under the provisions of section 336(d) to as low as \$100.00 in some, but not all, cases. Except for repeat or willful failures to report, the most an employer would receive as a penalty for reporting, either late or not at all, was \$500.00.

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 dollars (\$5000.00). Nothing in this subdivision shall be construed to increase the maximum civil penalty, pursuant to Sections 6427 to 6430², inclusive, that may be imposed for a violation of this section.”

² 6427: \$7000.00 maximum for non-serious violations; 6428: Maximum penalty for serious violation, \$25,000, Employer’s without an IIPP are not entitled to adjustment for good faith or history as provided by Labor Code section 6319, para.s 3 and 4; 6428.5: definition of IIPP; 6429: Willful or repeat violations, maximum penalty of \$70,000, repeat violators receive no adjustment for good faith or history of the employer; 6430: maximum penalties for failure to abate.

Whether this language requires a mandatory minimum penalty in all cases, or allows for zero penalty in some cases, or allows varying penalties depending on the circumstances of the case, or eliminated the requirement of Labor Code section 6319 and section 336(d) that all proposed penalties shall account for employer size, history and good faith, are issues that are unresolved by either the language of the amendment or the legislative history. Specifically, the language uses “may”, which is defined in Labor Code section 15 as “permissive”. If the legislature meant that the penalty “shall” be \$5000.00 in each case without regard to any circumstance, it could have used the word “shall”, also defined in Labor Code section 15 as “mandatory”. If the Legislature intended to eliminate the mandate in Labor Code section 6319 that all penalties shall account for size, history and good faith of the employer, it could have stated that as well. It did not. Repeal by implication is disfavored, and silence regarding the intentions of the Legislature cannot be considered to embody the intent of the Legislature. (*Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission, et al*, (2012) 209 Cal. App. 4th 1182.)

The Division’s subsequent regulation implementing the change to Labor Code section 6409.1(b) did not conform the regulation to the new statutory language. The regulation varied from the Labor Code use of “may” by using the word “shall.” The new regulation, however, was promulgated as a change without regulatory effect.³

Section 336(a)(6) is silent as to whether the mandatory considerations allowing adjustments, previously available under 336(d), were eliminated. The word “assess” is used throughout the regulation to refer to the gravity based assessment for a regulatory violation, which is subject to section 336(d) adjustments for size, good faith and history. In the Rulemaking file submitted to the Office of Administrative Law as part of its addition of section 336(a)(6), the Division wrote

Section 336 also contains exceptions to the rule that regulatory violations shall have a minimum penalty of \$500. [Examples omitted.] Consistent with these exceptions, the Division proposes to add a further exception to assess a minimum \$5000 penalty for a violation of Section 342. This proposed amendment to section 336 has no regulatory effect, because it merely makes Section 336 consistent with Labor Code section 6409.1, as recently amended. In the words of Section 100 of Title 1 of the California Code of Regulations, Section 336 is currently inconsistent with, and superseded by, Labor Code section 6409.1 because it creates a minimum penalty for regulatory violations.

³ Division Regulatory Rulemaking file 1-30-2003, effective 3/01/03 (Register 2003, No. Z-7).

When the change was made, the minimum \$500 penalty was adjusted for size, good faith, and history per section 336(d). The Division reasoning states the only change made by the addition of section 336(a)(6) was to increase the unadjusted regulatory penalty from \$500 to \$5000. However, despite this reasoning, the Division also in practice declines to apply the mandate of Labor Code section 6319 that consideration be given for the size, good faith, and history of the employer in all proposed penalties.

Consistent with Labor Code section 6602, which was not amended when section 6409.1(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 automatically, and does not adjust it based on any evidence other than the occurrence of the violation. (See Evidence Code section 664; *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003) [When Division fails to provide any evidence of a penalty calculation, an employer is given maximum credits rather than no penalty]; and *Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004) [Board declined to consider factors other than those in regulation when setting final contested penalty, and required some evidence of the facts used to calculate the penalty prior to upholding the Division's proposed penalty].)

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).) In *Callaway*, the Board determined \$5000.00 was more than what would be required to fulfill the purposes of the Act, and reduced the penalty for the three-days-late report to \$750.00.⁴ Likewise, the Board in other contexts takes the position that when a penalty will have no remedial effect, but only a punitive effect, such as in the case of financial hardship, adjustments should be made. (*Stockton Tri Industries*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Unique to the late reporting penalty, the Division does not evaluate any evidence when issuing a Notice of Penalty under section 336(a)(6). The penalty is thus subject only to the determination by the Board under the Board's authority in Labor Code section 6602.

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. In the instant legislative action, the intent is not

⁴ One factor for the adjustment was the accident happened on a weekend. Labor Code 6300 sets forth the Purpose of the OSH Act: "The California Occupational Safety and Health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health."

clear from the language chosen, because of the ambiguity in the text of section 6409.1(b). When a statute is ambiguous it is appropriate to look to the legislative history for guidance. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 122-123.) The legislative history clarifies that the change was intended to effectuate a \$5000.00 penalty whenever an employer fails to report. “Existing law requires an employer to immediately file a report to the division in every case involving a serious injury or illness, or death. This bill would impose a civil penalty of not less than \$5000 against any employer who fails to file a report as specified.” (Legisl. Counsel’s Dig. Assem. Bill No. 2837, Ch. 885 (2001-2002 Reg. Sess.) p.1.) The Minutes of the Assembly Committee on Labor and Employment also considered the legislation. The minutes of the April 3, 2002, Hearing contain the following: “[T]his bill . . . Provides that an employer who files (sic) to report of (sic) a serious injury, illness, or death, as required by existing law, may be assessed a penalty of not less than \$5 thousand or more than \$25 thousand.” “With respect to reporting of accidents, this bill adds new civil and criminal penalties for an employer who fails to immediately report such accidents as required by law. Civil penalties are added for failure to report serious or fatal workplace accidents.” “Many of the issues in this bill were raised in a series of articles in the Orange County Register in October 2001 which reported on problems with fatal workplace accidents in Orange County that were not timely reported or investigated.” (Assembly Committee On Labor and Employment, A.B. 2837, as Amended April 3, 2002, Hearing dated April 10, 2002, pp. 1, 2)

Amendments were made to the bill which removed the upper limit of the penalty. The reasons given for the resulting language, facilitating a significant increase, is consistently stated as to address failures to report a death or serious injury. The Senate Rules Committee Third Reading Digest contains the following: “This bill . . . (2) adds civil and criminal penalties for failure to report accidents.” (p. 1). A Senate Committee on Labor Relations report states the purpose of the bill is to “add civil and criminal penalties for failure to report accidents.” (Report of Senate Committee on Labor Relations, Hearing date, June 26, 2002, p. 1.) The Report also states: “an employer who fails to report a serious injury, illness, or death may be assessed a civil penalty of not less than \$5000.” (Id. p. 2.)

As the bill moved through the legislature, the description of the effect and purpose of the bill shows it was intended only to address the failure of employers to report workplace fatalities. The Appropriations Committee Fiscal Summaries describe the bill as follows: “AB 2837 makes employers who fail to report workplace accidents resulting in death to DOSH liable for civil penalties and misdemeanor prosecution.” (See reports dated 8/22/02. 8/5/02) Last, the Enrolled Bill Report describes the change as follows: “This bill revises reporting and investigation procedures of workplace accidents resulting in serious injury or death and the prosecution of criminal violation (sic) of such accidents, add civil penalties and criminal penalties for failure to report such accidents[.]” (Enrolled Bill report A.B. 2837, p.1) The one clear intent of the

Legislature is that the penalty for failing to report a serious injury or illness, or death, should be \$5000.00.

Here, Employer admitted its failure to report. The reason for the failure was reliance on the express claim of the Fire Chief that no report was needed. Such a claim does not rise to the level of estoppel. (See *Underground Construction Co., Inc.*, Cal/OSHA App. 09-3518, Denial of Petition for Reconsideration (Mar. 22, 2012) [the party inducing Employer to act in reliance must be apprised of the facts when making a representation that is relied upon in order to be estopped from enforcing the requirement].) 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.

The ALJ amended the citation to a Notice in Lieu of Citation under Labor Code section 6317. To so amend, evidence must show the violation "did 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 regulatory or general in nature." (Labor Code § 6317) The decision concludes that the Division's actual receipt of a timely report by the first responder, and the Division's unimpeded ability to undertake an investigation render the violation without immediate relationship to the health or safety of a worker. To the first point, the statute and regulations create duplicate reporting requirements. 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, 2011); § 342(d).) And, we believe the Legislature established a sizeable penalty in Labor Code section 6409.1(b) because it considered the reporting requirement to be important, and not fulfilled by the first responder's own report. 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 duplicative⁵ thus undermines this purpose.

As to the second point, while the parties stipulated the Division was able to effectively investigate, this factor is not meaningful in determining whether the violation bears an "immediate relationship to health and safety of an employee." The circumstances of the workplace determine whether the failure to report bears an immediate relationship to employee health and safety. Here, Employer was cited for an additional violation. This was identified during the investigation, which began November 4, 2010, 16 days after the injury. There was potentially some ongoing exposure of an employee to a workplace hazard

⁵ 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.

in this period of time. As such, the Employer did not show the violations bore no immediate relationship to health or safety of an employee. Since the Division did not stipulate to amending the citation to a Notice, evidence must support the amendment. It is lacking on this record.

Although the Legislative record is clear that the penalty of \$5000.00 was intended for a failure to report a serious injury, the language of section 6409.1(b) indicates that the penalty is not required in all cases. Although there may be cases wherein a penalty of \$5000.00 for failing to report results in a miscarriage of justice, thus requiring a zero penalty, such standard is not met in this case. Thus, we no longer consider the calculation factors in *Trader Dan's* for adjusting penalties, and instead exercise our discretion to affirm, modify, or vacate a penalty when the employer fails to report by imposing either a \$5000.00 or zero penalty. In this case, the appropriate penalty for the failure to report a serious injury to the Division is \$5000.00.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 29, 2012