

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

In the Matter of the Appeal of:

SUN VALLEY SKYLIGHTS, INC.  
12884 Pierce Street  
Pacoima, California 91331

Employer

Docket Nos. 03-R4D1-2613  
and 2614

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), having taken this matter under reconsideration on its own motion, issues this Decision After Reconsideration pursuant to the authority vested in it by the California Labor Code.

**JURISDICTION**

Commencing on April 21, 2003, the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Sun Valley Skylights, Inc. (Employer) at 1833 North Old Orchard Road, Los Angeles, California. On June 4, 2003, the Division cited Employer for violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup>

At a prehearing conference, the parties resolved all but one issue by agreement. The remaining issue involved an alleged violation of section 342(a).<sup>2</sup> A hearing was held before an Administrative Law Judge (ALJ) of the Board on April 8, 2005 at which Employer challenged the existence of the violation and sought financial hardship relief. The ALJ sustained the section 342(a) violation and found the \$5,000 penalty assessed reasonable under the Director of Industrial Relations' regulation, section 336(a)(6).<sup>3</sup> The ALJ determined, however, that Employer demonstrated it would experience financial hardship if the full penalty were imposed. The ALJ concluded that

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

<sup>2</sup> Section 342(a) requires employers to report serious injuries to the Division within eight hours, except as otherwise specified.

<sup>3</sup> Regulation section 336(a)(6) provides that a \$5,000 minimum penalty shall be assessed against an employer found in violation of section 342(a).

financial hardship relief was warranted and reduced the penalty to \$500.

The Board took this matter under reconsideration on its own motion on June 1, 2005. Both the Division and Employer submitted Answers in response to the Board's order.

### **ISSUES FOR RECONSIDERATION**

- 1) Does the Board have the ability to assess a penalty less than \$5,000 for a violation of section 342(a)?
- 2) Did the ALJ properly apply the criteria for granting penalty relief based upon financial hardship?

### **DISCUSSION AND ANALYSIS**

#### **1. The Board may assess a penalty of less than \$5,000 for a section 342(a) violation.**

When citing an employer for a section 342(a) violation, the Division believes it must propose a \$5,000 penalty based on the Director of Industrial Relations' regulation, section 336(a)(6). The Board ordered reconsideration of this matter, in part, because it was in the process of evaluating whether the Board was similarly bound by the regulation. After the ALJ issued the decision in this matter, and while reconsideration of this case was pending, we issued our decision in *Bill Callaway & Greg Lay dba Williams Redi Mix* Cal/OSHA App 03-2400, Decision After Reconsideration (July 14, 2006) (Callaway), which resolved this question.

In *Callaway, supra*, we held that this Board is not bound by the Director of Industrial Relations' regulations. Rather, we concluded that the intent of the Occupational Safety and Health Act (Act), and the history of decisions supporting that intent, required that we reassert the Board's discretionary authority to establish the appropriate penalties on a case by case basis for section 342(a) violations as required under Labor Code section 6602. Our ruling in *Callaway* reaffirmed the principles articulated in *Candlerock Restaurant*, Cal/OSHA App. 74-0010, Decision After Reconsideration (June 5, 1974), *Liberty Vinyl Corp.* Cal/OSHA App. 78-1276, Decision After Reconsideration (Sept. 24, 1980), *Lefty's Pizza Parlor* Cal/OSHA App. 74-580, Decision (Feb. 25, 1975), and the whole panoply of cases that recognize the authority of the Board and its ALJs to fashion appropriate relief.

We further concluded that, in general, an employer that reports a serious injury to the Division, albeit belatedly, should not be placed in the same category as an employer that purposely fails to report at all. Although ignorance of the duty to independently report is no defense to a violation<sup>4</sup>, the

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<sup>4</sup> *Steve P. Rados, Inc.*, Cal/OSHA App. 97-575, Decision After Reconsideration (Nov. 22, 2000); and *Jaco Oil Company*, Cal/OSHA App. 97-943, Decision After Reconsideration (Nov. 22, 2000).

penalty for the violation should not be disproportionate to the infraction.

We held in *Callaway* that, when appropriate in light of the facts presented, the Board may use reasonable discretion to reduce proposed penalties that exceed the levels necessary to encourage employers to seek out and eliminate hazardous conditions and maintain safe and healthful work places. See also, *T.M.C. Construction Co., Inc., Cal/OSHA App. 85-741, Decision After Reconsideration (Oct. 26, 1987)*; *Mladen Buntich Construction Co., Cal/OSHA App. 85-1668, Decision After Reconsideration (Oct. 14, 1987)*. We determined that the Board may reduce or eliminate penalties that are shown to be purely punitive or are inconsistent with the Act's intent.

We also specified factors that an ALJ should consider in deciding the proper penalty. As part of this discussion, we concluded that the purpose of Labor Code section 6409.1(b) (and the Division's corresponding regulation section 342(a)) is to impel employers to report every serious injury quickly, so the Division can initiate an investigation.

In applying these principles to the present case, we find Employer erred in not knowing that, in addition to reporting to its Workers Compensation Carrier, a report to the Division was required. As the ALJ found, Employer had no intent to hide the injury. The error was made by an inexperienced person who was not properly instructed. Employer indicated that it learned its lesson from this experience and has taken steps to ensure that it is not repeated.

The facts indicate that this was an innocent mistake, as seen by Employer's quick report to the Division once it became aware of the need to do so. Employer had no history of accidents and was clearly concerned for the well being of its employee, who was immediately attended to. In addition, we find that Employer's delay in reporting did not hamper the Division's investigation.

For the reasons stated, we believe that a \$5,000 penalty would be punitive in nature and inconsistent with the purposes of the Act. Although we reach our conclusion for different reasons, we agree with the ALJ's decision to reduce the assessed penalty to \$500. Indeed, we recognize that the ALJ utilized a similar analytical approach as this Board applied in *Callaway, supra*, to reduce the penalty.

## **2. Further Penalty Relief Based on Financial Hardship is Unwarranted.**

Because we determined that the \$5,000 penalty for the section 342(a) violation must be reduced to \$500 under our holding in *Callaway*, we conclude that additional financial hardship relief is unwarranted.<sup>5</sup>

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<sup>5</sup> We nonetheless concur with the ALJ's findings that Employer demonstrated it would have experienced financial hardship if required to pay the full \$5,000.

## **DECISION AFTER RECONSIDERATION**

For the reasons previously articulated, the Board upholds the \$500 penalty assessed by the ALJ for the section 342(a) violation.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: March 28, 2008