

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

In the Matter of the Appeal of:

SAFEWAY # 951  
867 Island Drive  
Alameda, California 94502

Employer

Docket No. 05-R1D4-1410

**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 taken the petition for reconsideration filed in the above entitled matter by Safeway (Employer) under submission, and ordered reconsideration on its own motion, makes the following decision after reconsideration.

**Background and Jurisdictional Information**

Commencing on October 15, 2004, the Division of Occupational Safety and Health (the Division), through Associate Safety Compliance Officer Manuel Bacani conducted an accident investigation at a place of employment maintained by Employer at 867 Island Drive, Alameda, California. On March 15, 2005, the Division cited Employer for an alleged violation of section 342(a) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup> The Division proposed a civil penalty of \$5,000 for the violation.

Employer filed a timely appeal challenging the existence of the alleged violation and the reasonableness of the proposed civil penalty.

In lieu of an evidentiary hearing the parties presented a Stipulation of Facts for consideration by the Administrative Law Judge (ALJ) with respect to the appropriate penalty for an alleged violation of section 342(a).

On January 5, 2007, the ALJ issued a decision based on stipulated facts finding a regulatory violation of section 342(a) and assessing a civil penalty of \$5,000. The Board took the matter under reconsideration on its own motion

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

on February 2, 2007. Employer subsequently filed a timely petition for reconsideration and the Division filed an answer to the petition.

### **Summary of Stipulated Facts**

The following stipulated facts were accepted by the ALJ and incorporated by reference into her decision.

On Thursday, September 23, 2004, an employee of Employer sustained a crush injury to her hand at approximately 6:00 a.m. while operating a pallet truck. The injured employee was immediately transferred via ambulance to Alameda Hospital, and thereafter, released and referred to a specialist that same day at approximately 10:00 a.m. Upon learning that the specialist did not treat occupational injuries, the injured employee was taken to Kaiser Hospital at which time she was referred to its Occupational Medical Clinic, and later, to its Orthopedic Clinic. At approximately 5:00 p.m. that same day, the injured employee was referred back to the emergency room at Kaiser. The injured employee's supervisor accompanied her throughout the day to the various treatment facilities. After waiting in the emergency room until 7:00 p.m. that same day without actual treatment, the injured employee requested that her supervisor drive her home, which he did.

At approximately 11:00 p.m. that same day the injured employee returned to the Kaiser emergency room without notifying her supervisor. She underwent surgery at 1:00 a.m. on Friday, September 24<sup>th</sup>, and was released from the hospital at noon the following day on Saturday, September 25<sup>th</sup>. The injured employee contacted her supervisor on the day of her release from the hospital (September 25<sup>th</sup>) and informed him that she had undergone surgery.

Employer reported the injury to the Division on Friday, October 1, 2004. The Employer did not report the serious injury sooner because its Loss Control Manager (Mr. Hobson) was in Phoenix, Arizona from Monday, September 27<sup>th</sup> through the 30<sup>th</sup> and did not return to the office and learn of the hospitalization until Friday, October 1<sup>st</sup>, the sixth day after the employee informed Employer of the surgery. Upon his return, Mr. Hobson immediately reported the matter to the Division.

Following the accident, Employer immediately undertook an accident investigation. Beyond the citation for late reporting, the Division issued no citations associated with the accident. Further, the parties stipulated that Employer implemented and maintained an effective Injury and Illness Prevention Program and has a well documented history of timely reporting injuries to the Division, both before and after the incident. The stipulation contained examples of timely reports made by Employer to the Division.

## ISSUES ON RECONSIDERATION

1. Did the ALJ correctly apply the guidance provided in *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006) to the record and assess the proper penalty?
  - a. Did the ALJ properly consider the stipulation submitted by the parties in assessing the monetary penalty?
  - b. Was Employer's size and sophistication properly evaluated?

One of the Board's functions is to exercise independent discretionary authority to adopt, modify, or set aside the penalties proposed by the Division. Blanket adoption of penalties proposed by the Division is not compatible with that function. (*Associated Ready Mix*, Cal/OSHA App. 95-3794, Decision After Reconsideration (Dec. 6, 2000).) Accordingly, we have held that the Appeals Board is vested with the authority to determine the reasonableness of civil penalties proposed by the Division. *Capri Manufacturing Co.*, Cal/OSHA App. 83-869, Decision After Reconsideration (May 17, 1985); Labor Code section 6602.

The Appeals Board has acknowledged that “[c]ivil penalties may have a punitive or deterrent aspect, but their primary purpose should be to secure obedience to statutes and regulations enacted to serve public policy objectives, the amounts should not exceed levels necessary to punish and deter, and the amount should bear some relationship to the gravity of the offense, not be disproportional to it.” *Bill Callaway & Greg Lay dba Williams Redi Mix*, *supra* at pg. 8, (hereafter “*Callaway*”) [citing *City and County of San Francisco v. Sainez* (2000) 77 Cal. App.4th 1302].<sup>2</sup>

In issuing our decision in *Callaway*, we set forth guidelines that serve as a general approach for evaluating the proper penalty where an Employer belatedly reports a serious injury to the Division. We agree with the ALJ that our decision in *Callaway* should not be applied indiscriminately to reduce penalties in every case where an employer is late in reporting a serious injury to the Division. To routinely reduce the proposed penalty in each instance of late reporting would contravene the Appeals Board's discretionary authority to determine the reasonableness of the proposed penalty based on the particular facts presented in each case. The burden is on an employer to establish by credible evidence the reason for the late report and whether its conduct as a whole is in furtherance of protecting employee safety. Although ignorance of the duty to independently report is no defense to a violation,<sup>3</sup> the *penalty* for

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<sup>2</sup> See also *Anresco, Inc.*, Cal/OSHA App. 90-855, Decision After Reconsideration (Dec. 20, 1991).

<sup>3</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).

the violation should not be disproportionate to the infraction. *Callaway, supra*. In each matter, the Board must examine the sufficiency of the evidence to determine whether penalty relief is warranted.

Here, the injured employee notified her supervisor on Saturday, September 25<sup>th</sup> of her ultimate hospitalization and surgery.<sup>4</sup> Employer's Loss Control Manager was in Phoenix, Arizona from Monday, September 27<sup>th</sup> through the 30<sup>th</sup> and returned to California on October 1<sup>st</sup>. Had Employer reported the serious injury on September 25<sup>th</sup> when it was notified by the injured employee of the treatment needed, it is likely that either no violation of section 342(a) would have been found or a substantial penalty reduction would have been appropriate because Employer would have acted as soon as it received notice of its injured employee's condition. Employer's excuse for its late report (i.e., its Loss Control Manager being out of town), however, is not viable and Employer's conduct constitutes a violation of section 342(a).

Having established a violation, our decision in *Callaway, supra*, requires that the evidence be considered to determine whether the proposed penalty should be reduced. We first review the stipulated facts.

**a. The stipulations were not properly considered in assessing the monetary penalty.**

It is significant that the ALJ's decision was based upon facts stipulated to by the parties without an evidentiary hearing being held. The Board's rules of practice and procedure do not expressly address the effect of stipulations entered into between the parties and we find that Board precedent provides little assistance in this regard.<sup>5</sup> Accordingly, we look to general rules regarding stipulations for guidance.

California courts have long held that a stipulation agreed to by the parties is binding on the court unless contrary to law, court rule, or policy. *Salazar v. Upland Police Dept.* 116 Cal. App. 4<sup>th</sup> 934, 11 Cal. Rptr. 3d 22 (4<sup>th</sup> Dist 2004), review denied, (June 23, 2004), citing *Leonard v. City of Los Angeles*, 31 Cal. App. 3d 473, 107 Cal. Rptr. 378 (2d. Dist. 1973); Cal Jur. 3d

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<sup>4</sup> In reviewing the evidence, we take into consideration that Employer may have had sufficient knowledge of the seriousness of the employee's injury to have triggered the duty to report the accident that same day. Nonetheless, we will give Employer the benefit of the doubt and allow that the seriousness of the injury may not have been known at the time of the accident because the medical treatment needed was not immediately known.

<sup>5</sup> In *Oildale Mutual Water Company*, Cal/OSHA App. 76-064, Decision after Reconsideration (May 11, 1978) the Appeals Board considered the significance of stipulations. There, the Appeals Board referred to Labor Code section 5702 and, apparently, the implementing regulations, both of which pertain to the Worker's Compensation Appeals Board. In *Oildale Mutual*, the Appeals Board represented that its conclusions regarding stipulations were based on "general rules." Because our research suggests that the discussion of stipulations in *Oildale Mutual*, and the provisions pertaining to stipulations in workers' compensation proceedings, better represent the exception than the rule, we decline to follow the conclusion reached there and disapprove that Decision After Reconsideration to the extent that it addresses the effect of stipulations in proceedings before this Appeals Board.

Agreed Case and Stipulations, §41. In considering the effect of an agreed statement of facts, “the court is conclusively bound by the facts stated and must render judgment according as the facts agreed upon require.” *Capital National Bank v. Smith*, 62 Cal App. 2d 328, 343 (Cal. App. 3d Dist. 1944).<sup>6</sup>

We find these rules compelling and believe they govern appeals brought before the Appeals Board. Stipulations entered into by the parties must be honored and may not be disregarded by an ALJ absent proper cause. See, *Estate of Burson*, 51 Cal. App. 3d 300, 305 (2d Dist 1975). This is consistent with our discussion in *Callaway*, in which we stated that the Board must review “*all relevant facts* to determine the reasonableness of Employer’s conduct under the then-existing circumstances which resulted in the failure to comply with section 342(a).” (emphasis added). *Callaway, supra, pg. 9*. We conclude that these principles require an ALJ to consider all stipulated facts that are relevant to the resolution of a case. In section 342(a) cases, this means, at a minimum, that stipulations which address factors identified as relevant to determining the proper penalty in *Callaway* may not be ignored.

Nonetheless, in the present matter, stipulated facts accepted by the ALJ and pertinent to determining the proper penalty under our holding in *Callaway* were disregarded. We believe this was error and now discuss these facts individually.

The parties stipulated that Employer implemented and maintained an effective Injury and Illness Prevention Program, which is a factor to be considered in determining the proper penalty under *Callaway*. Maintenance of work safety programs should be encouraged in order to further the Occupational Safety and Health Act’s goal of establishing such programs.

Similarly, the parties stipulated that Employer had a well documented history of timely reporting injuries to the Division,<sup>7</sup> which indicates that Employer knew of the reporting requirement but failed to adhere to it in this instance. Employer’s failure to properly train its employees to timely report injuries in the absence of the employee primarily responsible for reporting them is significant and we consider it in our deliberation. Nonetheless, it does not nullify Employer’s knowledge of the reporting requirement. We further note that the appointed employee reported the injury as soon as he learned of it.

In addition, the stipulated facts reflect that Employer instituted an investigation into the cause of the injury immediately after the injury and took a course of action to prevent further injuries. This is indicative of the type of

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<sup>6</sup> An unrelated rule of law asserted in the cited authority was disavowed in *County of San Bernardino v. Doria Mining & Engineering Corp.*, 72 Cal.App.3d 776, 140 Cal.Rptr. 383 (Cal.App. 4 Dist. Aug 22, 1977)

<sup>7</sup> We disagree with the Division’s contention in its answer to Employer’s petition for reconsideration that Employer’s failure to make a timely report of the accident can be viewed as purposeful or even willful. The stipulated facts agreed to by the Division are contrary to that contention.

proactive stance on promoting safety we referred to in *Callaway*.<sup>8</sup>

Although these factors were identified in *Callaway* as relevant to determining the proper penalty for a section 342(a) violation, they were not mentioned in the decision's "Findings and Reasons for Decision" section in this case. The ALJ was bound by these facts, unless they were contrary to law, policy or Board procedure,<sup>9</sup> which, given our discussion of *Callaway*, they clearly were not. In fact, these findings are similar to those in *Callaway* (*supra*, *pg.* 10) where we found that a penalty reduction was warranted because "Employer knew of the reporting obligation, fully intended to report the injury, demonstrated an ability to report and did so on the first day (Monday) it believed was possible to report."

We believe it was incumbent upon the ALJ to consider these factors and "all relevant facts" in determining the appropriate penalty. See, *Callaway, supra*. We find, however, that the ALJ improperly ignored key aspects of Employer's conduct in assessing the penalty. While an ALJ's consideration of the relevant facts might lead the ALJ to conclude that a penalty reduction is unwarranted in a given case, the decision must state the basis for that finding and may not simply ignore relevant information. In such situations, the decision must weigh the factors that argue for and against a penalty reduction and explain the conclusion reached. Here, we see nothing in the stipulated facts or the decision to suggest that these items should not have been given significance in assessing the penalty, nor that argue against a penalty reduction. We, therefore, conclude that the penalty proposed should have been, and must be, reduced.

**b. Employer's size and sophistication were improperly considered in assessing the monetary penalty**

We next address the findings made regarding, and significance given to, Employer's size and sophistication. Although Employer's size was not addressed in the stipulated facts, the decision concluded (accurately, we believe) that Employer had at least 100 employees. The decision then states, "borrowing from the legislature's intent under Labor Code § 6319(d) with respect to other violations where the penalty can be reduced based on the size of the employer, a reduction in the proposed penalty based on size in this case

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<sup>8</sup> We also agree with the ALJ's conclusion, drawn from the stipulated facts, that the injured employee's supervisor demonstrated great care toward her and behaved laudably. And, we note that the purpose of Labor Code section 6409.1(b) (and the Division's corresponding regulation § 342(a)) is to impel employers to report every serious injury quickly, so the Division can initiate an investigation. In the instant case, Employer reported the injury on October 1, 2004, six days after the injured employee informed Employer of her hospitalization. Although not specifically addressed in the stipulated facts, the Division conducted its inspection two weeks later on October 15, 2004. It appears that Employer's failure to report the injury as required by section 342(a) did not delay the Division's investigation, which is another factor we found relevant in *Callaway*.

<sup>9</sup> *Salazar v. Upland Police Dept.* 116 Cal. App. 4th 934, 11 Cal. Rptr. 3d 22 (4th Dist 2004), review denied, (June 23, 2004), citing *Leonard v. City of Los Angeles*, 31 Cal. App. 3d 473, 107 Cal. Rptr. 378 (2d. Dist. 1973); Cal Jur. 3d Agreed Case and Stipulations, §41.

would not be appropriate.”<sup>10</sup> Similarly, although not expressly addressed in the stipulated facts, the decision concluded that, unlike a small employer with limited resources, Employer had personnel and internal operating procedures that specifically address health and safety issues. The decision stated that Employer’s sophistication did not warrant a reduction in penalty.

We reject this line of reasoning, because it contravenes the legislature’s aim to encourage compliance with the occupational safety and health orders. If we conclude that a large employer is not entitled to relief solely because of its size and sophistication, large employers have no incentive to establish safe practices or to report injuries late as opposed to not at all. Subjecting such employers to an automatic \$5,000 penalty if they fail to report timely provides no incentive to report injuries as quickly as possible. Moreover, it is harmful to suggest that employers who use their resources to hire appropriate personnel and establish important operating procedures will be penalized for doing so. Such an approach is contrary to the intent of the Act, which seeks to encourage all employers, large and small, to establish policies and procedures to protect employees from injury and to report injuries when they occur.

Although we acknowledged in *Callaway* that an employer’s size might be relevant in deciding the proper penalty, we considered a number of other criteria, as well. We, in fact, qualified our comment in *Callaway, supra*, that larger employers might need greater inducement to comply with the reporting requirements. Specifically, we said at p. 10,

Assessing the flat \$5,000 penalty would impact this Employer, which had less than 10 employees, more severely than larger employers with larger cash flows. This factor *and all the others mentioned* persuade the Board that Employer requires less of a penalty to induce conformity to the letter of the reporting regulation than *may* larger employers with *no reporting systems in place*. (emphasis added)

The size of the employer is not the determining factor. A small employer that conducts itself in a manner inconsistent with providing for employee safety, after consideration of all mitigating factors, should suffer the same consequence as a large employer that fails to protect its employees.

In this case, the stipulated facts demonstrate that Employer established and implemented safety practices and procedures, knew of the reporting requirement, had a reporting system in place and a history of timely reporting,

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<sup>10</sup> The decision’s reliance on Labor Code section 6319(d) is misplaced. That section’s express terms limit its applicability to serious injuries or illnesses caused by any serious, willful or repeated violations, or by any failure to correct a serious violation within the time permitted. The citation at issue here is classified as a regulatory violation, making section 6319(d) and any legislative intent for it irrelevant. Moreover, there is no statement of legislative intent in the section, nor does the decision describe the “intent” from which it purports to borrow.

and ultimately reported the injury at issue here, albeit belatedly. In light of all these factors, we believe a penalty reduction is warranted here.

As we held in *Callaway, supra*, a reduction of the penalty for a section 342(a) violation, where appropriate, furthers the Act's objectives to promote safe practices and prompt reporting of injuries.

Taking into account the Legislature's intent, the objectives of the Act, and the circumstances, it is found that the \$750 penalty assessed by the ALJ is reasonable. That amount, which is hereby affirmed, recognizes Employer's innocent mistake, its effective safety program, and its proactive stance on promoting safety. It also acknowledges the Legislature's aim to aggressively encourage compliance with reporting duties, while minimizing the disincentive to report created by applying the \$5,000 minimum penalty across-the-board. *Callaway, pg. 9.*

Although we do not ignore Employer's failure to report in a timely manner, we find the stipulations entered into between the parties controlling and meaningful in assessing the proper penalty. We also disagree that Employer's size and sophistication render a penalty reduction inappropriate. In assessing the penalty, we take into consideration that the Division stipulated that Employer: had an effective injury and illness prevention program; knew of the reporting requirement and had a history of timely reporting serious injuries; and that the appointed employee reported the injury as soon as he learned of it.

### **DECISION AFTER RECONSIDERATION**

It is hereby ordered that the violation of section 342(a) is established. Giving consideration to all the evidence, the penalty is modified and reduced, and a penalty of \$3,000 is assessed against Employer.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Member  
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: July 6, 2007