BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: CENTRAL VALLEY ENGINEERING & ASPHALT, INC. 216 Kenroy Lane Roseville, CA 95678 Employer	Docket 08-R2D1-5001 **DECISION AFTER RECONSIDERATION and REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration, renders the following decision after reconsideration.

JURISDICTION

Employer was cited for failing to timely report a serious workplace injury (Cal. Code Regs., tit. 8, §342(a).)[1] Employer was aware on Tuesday, June 17, 2008, at approximately 10:00 a.m. that a serious injury was sustained by its employee. Employer reported the injury to the Division Friday, June 20, 2008, at approximately 4:00 p.m. The violation is established. Employer has 100 employees. No information is contained in the record regarding Employer's compliance or safety history, or whether Employer had an IIPP.

The Division proposed a penalty of $5000, without modification for size, history or good faith, or on any other basis. (See § 336(d).) In lieu of a hearing, the parties submitted stipulated facts on which the Administrative Law Judge (ALJ) relied in determining the penalty for the section 342(a) violation in this case should be $1000.[2] We consider the appropriate penalty for a section 342(a) violation.

[1] All references are to title 8, California Code of Regulations unless otherwise indicated.

[2] Three additional violations alleged by the Division were before the ALJ in this appeal and were resolved in the ALJs Order. The Board did not order reconsideration of any of those items, nor did either party preserve any other issue for our review by petition for reconsideration. Those items are not before us now, and are final orders of the Board.

DECISION

Labor Code section 6602 assigns to the Appeals Board the task of approving, modifying, or vacating penalties, *inter alia*, assessed by the Division, and the section also empowers the Appeals Board to direct "other appropriate relief." On this authority, we have previously considered a variety of situations which may merit reduction or increase from the penalty the Division has assessed for violations of section 342(a). (See, *Trader Dan's* dba *Rooms N Covers*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 9, 2009) [penalty reduction]; *Bill Callaway.and Greg Lay dba Williams Redi-Mix.*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Mar. 27, 2007) [same]; *Central Valley Contracting*, Cal/OSHA App. 05-2351, Decision After Reconsideration (Jun. 1, 2009) [penalty increase].)

First, we recognize that the Division's proposed $5000 penalty, without modification for other penalty considerations, represents a significant change from its pre-2002 practice regarding the penalty assessed in section 342(a) cases. Prior to the 2002 amendment of Labor Code section 6409.1(b), the penalty for section 342(a) violations was assessed as were all other penalties. (See *Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998) [upholding $175 penalty reached by modifying $500 gravity-based penalty in 336(a)(1) for size, history and good faith as directed in 336(d)]; *Huffman Logging Co., Inc.*, Cal/OSHA App. 93-382, Decision After Reconsideration (Nov. 21, 1996) [proposed penalty of $100, reached by giving maximum adjustments for size, good faith and history; Board amended citation to a Notice in Lieu of citation, Labor Code section 6317, on other grounds].) Failures to report and late reports were penalized equivalently.

In view of the history briefly recapitulated above, we limit our analysis here to the effect of the 2002 amendment of Labor Code section 6409.1(b) on the penalty for a violation of section 342(a) due to a late report. Labor Code section 6409.1(b) is ambiguous because in its context, both textual and historical, it could be interpreted in several different ways. The Board has interpreted it as a starting point for penalty assessment under Labor Code section 6602; the Division interpreted it as requiring a $5000 penalty in every case.[3] The principles of statutory construction reveal it is not a mandatory minimum penalty and may be adjusted, and the prohibition against repeal by implication clarifies it is a penalty assessment that remains subject to modifications for size, good faith and history under Labor Code section 6319(c).

---

[3] The Division did this in an amendment to Director's regulation section 336(a), which added new subdivision (6) to that provision. The "Director" is the Director of Industrial Relations, to whom the Division reports. (See Labor Code § 6302.) The Division's regulations, including those pertaining to calculating penalties for alleged violations, are among those promulgated by the Director. Moreover, the rulemaking package indicates the Division intended only to change the starting point for penalty assessment from $500 to $5000 for both late and non-reports. In practice, the Division declines to adjust the penalty as it had prior to the 2002 amendment.

It is clear, at least, that the Legislature intended to raise the initial penalty for violations of section 342(a) to $5000 from $500, but that it was not required to be $5,000 in every case. We conclude from this that the Legislature intended that if an initial penalty were to be assessed, it must be $5,000; if not, then no penalty, $0, was to be assessed.

The Board believes a strictly all or nothing penalty is uncalled for by the statute and an unnecessarily extreme means to use to determine a penalty. And, as it is inconsistent with the rest of the penalty setting scheme in the OSH Act, an all or nothing scheme was not the legislative intent for all violations of the reporting requirement, even minor ones. For example, construing section 6409.1(b) to mean than only one of two penalties is appropriate in all cases ignores other provisions of the Act, such as the obligation of the Division to account for the size, good faith, history of the employer, or the gravity of the violation when calculating a penalty. (See Labor Code section 6319(d).) In addition, section 6409.1(b) is not written in the statutory form used to establish a mandatory minimum penalty. (See Labor Code section 6712.)

A mandatory minimum penalty is created by using statutory language that is different than the language of the amendment to 6409.1(b) we evaluate here. For example, violations of field sanitation safety orders enacted pursuant to Labor Code section 6712(d) carry the minimum penalty of $750 for all employers, regardless of size, good faith, history of the employer, or gravity or severity of the violation. The consideration for factors of size, gravity, good faith and history are still applied to such violations when proposing a penalty, but no adjustment that results in a penalty below the statutory minimum is allowed. To achieve this minimum penalty effect, the Legislature used the following language: "Notwithstanding Sections 6317 and 6434, any employer who fails to provide the facilities required by the field sanitation standard shall be assessed a civil penalty under the appropriate provisions of Sections 6427 to 6430, inclusive, except that in no case shall the penalty be less than seven hundred fifty dollars ($750) for each violation." Section 6409.1(b) states, "An employer who violates this subdivision may be assessed a civil penalty of not less than $5000."

By selecting different language in section 6409.1(b) the Legislature communicated its intent was something other than a minimum penalty in all cases for a reporting violation. "'It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.'" (*Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1108 quoting *In re Jennings* (2004) 34 Cal.4th 254, 273.)

Faced with the ambiguity of section 6409.1(b), the Appeals Board reasoned in *Callaway* and *Trader Dan's* that the facts surrounding the violation could be looked to in an effort to impose equitable penalties that would, over time, result in like-situated employers paying like penalties. And, given the broad authority granted the Board by Labor Code section 6602, and silence in Labor Code section 6409.1(b) regarding any intended curtailment of that authority, the Board exercised its authority to reach a fair penalty in each case. The Board implemented the Legislature's intent to generally raise the penalty for failing to timely report contained in section 6409.1(b) by beginning each penalty assessment at the $5000 level established there.

However, the penalty-setting factors considered in those decisions have not resulted in an increase in compliance by employers, or a decrease in the number of 342(a) violations[4]. The subjectivity inherent in the penalty determinations based on the many factors considered by the Board's several ALJs in the exercise of their discretion has resulted in some similarly situated employers paying dissimilar penalties. Thus, though the Board's stated goal in its section 342(a) penalty decisions was to encourage employers to report late rather than not at all, that methodology appears to have had no effect on reporting. (We expected to see an increase in late reporting violations, as more employers would report serious injuries, albeit late. Instead, there has been no such discernable statistical impact on section 342(a) violations either before or after the *Calloway* decision, or before or after the *Trader Dan's* decision.)

The OSH Act intended similarly situated employers to receive similar penalties. One way the Act does so is by requiring the Division to take into account the size, good faith, and history of an employer in determining the proposed penalty. (Labor Code § 6319; CCR, title 8, section 336(d).) However, the Division, in Director's Regulation section 336(a)(6), has interpreted Labor Code section 6409.1(b) to mean the Division may only assess a $5000 penalty, in spite of the failure of section 6409.1(b) to instruct the Division not to, in this unique circumstance, give due consideration for the size, good faith, and history of employers when determining a proposed penalty. The Division's interpretation in this regard also requires assuming implied repeal of portions of Labor Code section 6319. Repeal by implication is consistently disfavored by California courts. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 571 [courts give full effect to all interrelated portions of a statutory scheme, and recognize repeal by implication only when two provisions are irreconcilable].)

The Division's regulatory interpretation also ignores the other option apparent in the text of section 6409.1(b), to wit, a zero penalty. "[A]dministrative construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent. (*Sanchez* v.

[4] Citations for 342(a) violations since 2008: 526 (2008), 454 (2009), 504 (2010), 399 (2011). *Trader Dan's, supra*, was issued in October 2009. This data does not support an inference of a trend temporally related to the decision.

Unemployment Ins. Appeals Bd., supra, 20 Cal.3d 55, 67; *Wilkinson* v. *Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 501 [138 Cal.Rptr. 696, 564 P.2d 848]; *Rivera v. City of Fresno, supra*, 6 Cal.3d 132, 140.)" (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117.) The Director's administrative construction of the enactment cannot prevail because a different intent is apparent. An administrative agency may not adopt a regulation unless it is consistent with the statutes being implemented or interpreted. (Gov. Code § 11342.2; *Woods v. Superior Court* (1981) 28 Cal.3d 668, 679; *Nortel Networks, Inc. v. Board of Equalization* (2011) 191 Cal.App.4th 1259, 1276-1277.)

Regulations that fulfill the agency's delegated authority are considered quasi-legislative and are upheld unless the "classification is 'arbitrary, capricious or [without] reasonable or rational basis.'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 11, quoting *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93.) The pre-2002 penalty scheme appears to have been a reasonable implementation of the OSH Act. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal. 4th 999, at 1013-1014.) Courts presume the Legislature, when enacting a statute, was aware of existing and related laws and intended to maintain a consistent body of rules. (*Stone Street Capital, LLC* v. *California State Lottery Com'n* (2008) 165 Cal.App. 4th 109, 118.) Other portions of the Act determine adjustable penalties without specifically referencing the penalty adjustment statute, and section 6409.1(b) can likewise be read as proposing an adjustable penalty. (*Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 747-748 [principles of statutory construction include reading parts of a statue in context with the remainder of the Act].)

Last, the word "assess" in the amendment is ambiguous. The amendment describes a penalty that may be "assessed." This term is used in the regulations to refer to the gravity-based penalty prior to adjustment. (§ 336(a)) The Division so referred to the word "assess" as meaning the gravity-based penalty, not the final penalty amount, in the rulemaking justification accompanying the adoption of section 336(a)(6). "Consistent with [existing] exceptions (to the gravity base of a regulatory penalty being $500), 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 [current rule 336] creates a minimum $500 penalty for regulatory violations. In addition, the Division has no authority to adopt a regulation setting the minimum penalty for a violation of Section 342 lower than $5,000." The then-existing rule did provide that the gravity base of regulatory penalty was $500, and that initial penalty amount was further adjusted for the size, good faith, and history of the employer. These modifications are not mentioned in the justification for

the rulemaking, and removing such modifications without mentioning that effect would not be appropriate under the APA. (Govt. Code § 11346 et seq.)

The Board assumes the Legislature selected the word "assess" with regard to its use in the penalty setting regulations. (*California Assn of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal. App. 4th 286, 315.) It appears that the Legislature meant only to replace the $500 initial assessed penalty amount representing the gravity of the violation in section 336(a)(1) with a new minimum $5000 initial assessed penalty. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017, 9 Cal.Rptr.2d 358, 831 P.2d 798 [the Legislature is presumed to be aware of an administrative construction of a statute when the construction has been made known to it].) The choice of the word "assess" makes section 6409.1(b) ambiguous because it could mean either a pre-adjusted assessment, as in section 336(a), or a final penalty amount, as the penalty maximums in Labor Code sections 6428-6430 use the word "assess" to describe a penalty that could not be adjusted upward (though a downward adjustment is allowed). For all of these reasons, the provision is ambiguous.

The Appeals Board need not determine the validity or invalidity of the Director's implementation of Labor Code section 6409.1(b) in section 336(a)(6) of its regulations because the Board has an independent duty to impose the appropriate penalty. (Labor Code § 6602; see *Nortel Networks Inc. v. State Bd. of Equalization* (2011) 191 Cal.App.4th 1259, 1277 [no deference accorded regulatory interpretation that is in conflict with the intent of the statute].) We implement that duty in a manner consistent with the discernable intent of the statute.

The legislative history of the 2002 amendment to Labor Code section 6409.1(b) also indicates that other penalty outcomes were permissible when a report was late. We are mindful of the comments in the Legislative Counsel's Digest indicating the purpose and effect of the legislation was that a penalty of $5000 is to be imposed when an employer fails to report. However, no mention is made of the Legislative intent when an Employer reports untimely, but indeed reports. In *Trader Dan's* we recognized a great distinction between a late report and a failure to report. To fulfill the Legislative intent contained in the language of the enactment, and the legislative history, we conclude that a failure to report violation must carry a penalty of $5000. The Legislature did not state in any portion of the Legislative history that an employer who reports three days late must be given a $5000 penalty. While we assume the new enactment intended to change existing law (*Union League Club v. Johnson* (1941) 18 Cal. 2d 275, 278), we do not derive an intent to impose a $5000 penalty for a late report from silence in the legislative history.

"The final step (in statutory construction, after reviewing the language of the enactment and the legislative history) - and one which we believe should

only be taken when the first two steps have failed to reveal clear meaning – is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable [citations], in accord with common sense and justice, and to avoid an absurd result [citations]." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal. App. 4th 112, 123, quoting *Halbert's Lumber Inc. v. Lucky Stores Inc.* (1992) 6 Cal.App.4th 1233, 1239-1240.) Since the language, in context, is ambiguous, and the legislative history is silent, we construe section 6409.1(b) to allow for modification to the proposed $5000 gravity based penalty, for factors of size, history and good faith, in the case of a late report. This is consistent with the Division's view of the effect of the enactment when it processed a regulatory change to be consistent with the Act. The result is that employers who report, though somewhat untimely, will receive penalty modifications as were applied prior to the amendment of Labor Code section 6409.1(b). This category of violator was not included in the legislative history as deserving of a $5000 penalty regardless of other widely applied penalty setting factors. Treating this employer who reported a few days late, the same as those who fail to report at all leads to an unjust and absurd results. (*National Steel and Shipbuilding Company (NAASCO*), Cal/OSHA App. 10-3794, Denial of Petition for Reconsideration (Sep. 20, 2012), citing *Barnes v. Chamberlain* (1983) 147 Cal. App. 3d 792).

Here, a large employer (over 100 employees) was three days late. If the employer had an effective IIPP and no previous violations, it would receive reductions therefore. (Labor Code section 6319; 336(d).) The matter is remanded to the Administrative Law Judge to determine these penalty-related facts, and to impose the proper penalty after giving due consideration for such factors.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 4, 2012