

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

In the Matter of the Appeal of:

NEW CREATION BUILDERS
17809 Clark Avenue
Bellflower, CA 90706

Employer

Docket No. 09-R3D1-1460

**DECISION AFTER
RECONSIDERATION**

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

JURISDICTION

The Division of Occupational Safety and Health (the Division) issued a citation to New Creation Builders (Employer) alleging a violation of section 342(a) [failure to timely report a serious injury to the Division] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ The Division proposed a \$5,000 civil penalty. Employer timely appealed the citation.

On August 27, 2009, an Administrative Law Judge for the Board issued an Order assessing a penalty of \$1,000 for the violation based, in part, on the parties' stipulations regarding the serious injury and Employer's response thereto.

The Board then took this matter under reconsideration on its own motion on September 17, 2009 to determine whether an appropriate penalty had been assessed. Neither party filed an answer to the Board's Order of Reconsideration.

On January 7, 2010, the Board issued an Order of Remand, which instructed the ALJ to determine whether the penalty assessed was appropriate in light of the Board's decision in *Trader Dan's dba Rooms N Covers, Etc.*,

¹ Unless otherwise specified all section references are to Title 8, California Code of Regulations.

Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009). The ALJ issued an Order After Remand in which she again assessed a \$1,000 penalty citing the factors she deemed warranted reductions from the \$5,000 penalty proposed by the Division.

On March 9, 2010, the Board took reconsideration of the Order After Remand on its own to again determine if the penalty assessed was appropriate.

ISSUE

Was the penalty assessed appropriate under the circumstances?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

To resolve Employer's appeal of the section 342(a) violation, the parties submitted a series of stipulations. From these, the ALJ assessed the referenced \$1,000 penalty.

The stipulations reveal, among other things, that Employer did not report the injury to the Division and did not know of its independent duty to report. Employer mistakenly believed that reports made by the first responders and the hospital would suffice. The stipulations further reflect that this is a small employer with a good safety record who was only cited for the one violation, which it promptly abated. Employer has suffered financially as a result of the economic downturn and its failure to report did not impede the Division's ability to investigate the incident. Employer ensured quick care for the injured worker and monitored his progress, and Employer implemented additional safety training to correct the reporting failure for the future.

While we applaud Employer's corrective measures and note the mitigating factors included in the parties' stipulations, we recently held in *Trader Dan's dba Rooms N Covers, Etc., supra*, that factors found to mitigate against imposition of the full \$5,000 penalty proposed for a section 342(a) violation must be given less weight in a no-report situation than they might be given in a late report context. This is because we found a "*great distinction* between situations in which legitimate circumstances contribute to a late report by an employer and situations in which an employer never reports." (*Id.*; emphasis added.) We clarified that the offense is greater where no report is made and affirmed that the penalty must be proportional to the offense. (*Id.*)

In the present case, we find that undue weight was given to the factors mitigating against imposition of the \$5,000 proposed penalty and conclude that a higher penalty is required.

We note, for example, that Employer was given a \$200 reduction for showing initial concern for the injured worker by calling the paramedics and an additional \$200 reduction for showing continued concern for the injured by following up and allowing a co-worker to accompany the injured to the hospital. Similarly, Employer was given a \$200 reduction because it did not intend to hide the injury and an additional \$200 reduction because it promptly reported the injury to its worker's compensation carrier, the only import of which in this context is that it shows Employer had no intent to hide the injury. Also, Employer was given a \$200 reduction because it did not have any history of violations with Cal/OSHA and an additional \$200 reduction because it had a long and good safety record and had not experienced a prior serious injury. We deem these to be largely duplicative considerations.

While we agree that, under established Board precedent, Employer need not be assessed the full \$5,000 proposed by the Division, we find that the reductions afforded here were excessive given Employer's failure to report the serious injury to the Division. Accordingly, we assess a civil penalty of \$2,500.

DECISION AFTER RECONSIDERATION

The \$1,000 penalty assessed for the section 342(a) violation is vacated. A civil penalty of \$2,500 is assessed.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JUNE 2, 2010