

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SDUSD - PATRICK HENRY HIGH SCHOOL
4860 Ruffner Street
San Diego, CA 92111

Employer

Docket Nos. 11-R3D2-1296 &
1297

**DECISION AFTER
RECONSIDERATION
AND
ORDER OF 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, orders the matter remanded to the Administrative Law Judge to conduct further proceedings.

JURISDICTION

On May 12, 2011, the Division of Occupational Safety and Health (Division) issued to SDUSD – Patrick Henry High School (Employer) two citations alleging two violations of the Occupational Safety and Health Standards, one of which was for failing to timely report a serious workplace injury. (Cal. Code Regs., tit. 8, §342(a).)¹ The parties stipulated that Employer’s report of the injury was untimely. The injury occurred on February 15, 2011, and was reported on February 17, 2011.

The citations were timely appealed, and the matter came before an Administrative Law Judge (ALJ) of the Board. The parties stipulated to a series of facts regarding the section 342(a) violation, and settled the remaining serious violation. Based on the stipulations, the ALJ determined the appropriate penalty for the section 342(a) violation was \$1,200. An order was issued on February 28, 2012, containing this determination. On March 21, 2012, the Board ordered reconsideration of the matter on its own motion to address whether the penalty determination was appropriate under the circumstances. Neither party filed an Answer to the Order of Reconsideration. We now address the appropriate penalty for this late report.

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

DECISION AFTER RECONSIDERATION

The Labor Code assigns to the Board the duty to review penalties proposed by the Division. The Board is to approve, modify, or vacate, the Division's citation, order or penalty, or direct other appropriate relief when the Division action is appealed. (Labor Code section 6602.) The Division proposed a \$5,000 penalty for the section 342(a) violation, and declined to adjust the penalty for the size, good faith, or history of the employer. Labor Code section 6319 requires the Division to consider the effect of the employer's size, good faith, and history when assessing a penalty.

We recently reviewed the effect of Labor Code section 6409.1(b), which was amended in 2002, and set the nominal penalty for failing to report serious injuries or deaths at \$5,000. (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012); *SDCCD – Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012).) It is clear that the legislation in 2002 was directed at the penalty the Legislature intended to impose on employers who fail to report serious injuries, illnesses, or deaths. From this review of the legislative history, it is also clear the Legislature made no indication as to its intention regarding late filed reports. (*Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012).) In such circumstances, the pre-2002 penalty considerations in Labor Code section 6319 cannot be deemed to have been repealed by implication. (*Central Valley Engineering & Asphalt, supra*; *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 571.)

The Board's previous decisions, such as *Trader Dan's dba Rooms N Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009) and *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006), rested on the Board's Labor Code section 6602 authority in examining all of the equities in a particular section 342(a) violation rather than solely the penalty provisions in the Act. While the Board has ultimate authority pursuant to Labor Code section 6602 to set a final penalty, given that the Legislative history is silent regarding an intention to change the application of the pre-2002 penalty adjustment considerations in Labor Code section 6319 in the case of a late report, we believe a better approach is to apply those factors in these cases. When the violation is a late report, and there is some compliance with the reporting requirement, the only effect of the 2002 amendment of the Labor Code, and the subsequently adopted regulation (§ 336(a)(6)) was to increase the gravity-based penalty assessment (i.e. the penalty subject to adjustment per Labor Code § 6319 as appropriate) from \$500 to \$5000. Remaining unchanged by the amendment is the obligation in Labor Code section 6319 that the

Division's regulations take into consideration the size, good faith, and history of the employer when assessing a final penalty.

However, the Division gave no consideration for those factors. The record does not disclose Employer's size. It does disclose that Employer had an acceptable IIPP, and that it had no prior history of violations with the Division. Some of the considerations the Division must weigh when setting a penalty are contained in the record, but not all. While it is likely Employer, a school district, has more than 100 employees, we will not assume facts not in evidence. This additional evidence is relevant to the penalty adjustment factors, but the Division has not taken it in to consideration.

We therefore remand the matter to the ALJ to allow the Division to comply with Labor Code section 6319, and its own regulations, such as section 336(d), and evaluate the proper penalty. The ALJ is to impose a penalty consistent with Labor Code section 6319 unless other penalty-related defenses are established by Employer. (See, e.g., *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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