

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

AGWOOD MILL & LUMBER INC.
650 Kinzler Ranch Road
Ukiah, CA 95482

Employer

Docket No(s). 08-R1D5-1068 and 1069

**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 this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On December 21, 2007, the Division of Occupational Safety and Health (Division) issued two citations to Agwood Mill & Lumber, Inc. (Employer) alleging violations of Title 8, Cal. Code of Regulations sections 342(a) and 6365(d).¹ Employer timely appealed, and the factual issues were resolved by the parties through a series of stipulations. The parties disputed the appropriate penalty for the 342(a) violation, and submitted the issue to the Administrative Law Judge (ALJ) for determination based on the factual stipulations. The ALJ concluded a two thousand dollar (\$2,000.00) penalty was appropriate under the circumstances. The Board ordered reconsideration of the matter on its own motion only regarding the appropriateness of the penalty assessed for the alleged violation of section 342(a).²

EVIDENCE

All of the evidence was entered in to the record by way of stipulations. The parties stipulated that on August 7, 2007, an employee of Employer suffered a serious, non-fatal injury of which Employer was aware at the time it occurred. The injury required multiple surgeries and hospitalization, and Employer was aware of this treatment and the serious nature of the injury. Employer did not report the injury because it was unaware of the requirement

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

² Employer did not answer the Order of Reconsideration. The Division did, but did not raise any other issues. The settlement reached by the parties regarding the violation of 6365(d) is thus not before us.

to do so. On October 26, 2007, the employee reported the injury. The failure of Employer to report impeded the Division's investigation.

ISSUE

What is the appropriate penalty for the 342(a) violation?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Section 342(a) states:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made longer than 24 hours after the incident . . .

The statutory authority for this regulation is Labor Code section 6409.1(b), which states:

In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a) [lost-time workplace injuries reported within 5 days to Administrative Director of Division of Workers' Compensation], a report shall be made immediately by the employer to the Division of Occupational Safety and Health by telephone or telegraph. An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars (\$5000). Nothing in this section shall be construed to increase the maximum civil penalty, pursuant to Sections 6427 to 6430, inclusive, that may be imposed for a violation of this section.

In *Trader Dan's dba Rooms N Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009), the Board clarified the factors that could justify setting a penalty lower than that proposed by the Division.³

³ By its own regulation, the Division is only allowed to propose a \$5,000.00 penalty. (§336(a)(6).) This penalty and the penalty for failure to obtain an elevator permit (336(a)(5) maximum \$1,000.00 penalty)

We note *Trader Dan's* was issued after the ALJ set the penalty, as the Order is dated September 6, 2009. In *Trader Dan's* one fact that justified reduction of the penalty below the proposed \$5,000.00 penalty was that the failure to report did not impede the Division's investigation. Here, we have a stipulation establishing that the Division's investigation was impeded.

We infer from the stipulations that Employer was not intentionally trying to deceive the Division. The parties stipulated that the reason for the failure of Employer to report was that it was unaware of its obligation to do so. However, ignorance of the law is not a reason for non-compliance. (*Nick's Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).) Thus, the innocence of the error here is irrelevant to the penalty amount.

Rather, the Division's proposed penalty is before us to determine whether it is appropriate to affirm, modify, or vacate the proposed penalty, or direct other appropriate relief given the purposes of the Occupational Safety and Health Act (Act). (Labor Code sections 6602, 6300.) Labor Code section 6300 states:

The California Occupational Safety and health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education training and enforcement in the field of occupational safety and health.

Having already established the Act's purpose, the Legislature enacted 6409.1(b) in 2002 stating that in every case, a penalty of not less than \$5,000.00 may be assessed. Section 6409.1(b) makes specific reference to other penalty setting portions of the Act, specifically those setting forth the maximum allowable penalty.

Those sections, Labor Code section 6427 through 6430, state the maximum penalties that may be "assessed." We note that when the Legislature imposes a minimum penalty, it uses language different than that used to describe a maximum penalty. In the minimum penalty setting, the Legislature has written: "except that in no case shall the penalty be less than seven hundred fifty dollars (\$750) for each violation." (Labor Code section 6712(d)(1).) However, in the serious injury reporting requirement provision, the Legislature only speaks to the assessment of a penalty. Thus, the \$5,000.00 assessment is not a minimum penalty, but rather, a minimum assessment in cases where the Division elects to assess a penalty. The word "assess" is undefined in the Act, and refers both to minimum penalties,

are the only regulatory penalties that do not state whether adjustment based on size, good faith, or history is specifically appropriate.

maximum penalties, and gravity-based penalties. In subsection 336(a)(1), the regulations speak of a proposed penalty that shall be “assessed”, then adjusted for size, good faith and history.

In this case, since Employer did not report the injury, the Division would not have been aware of the injury without the employee’s report. The delay impeded the Division’s ability to investigate to some extent. Thus, a penalty of \$5,000.00 is not so out of proportion to the violation as to be purely punitive. Accordingly, we decline to modify, vacate, set aside, or afford other appropriate relief, and instead affirm the proposed penalty assessed by the Division. A penalty of \$5,000.00 is hereby imposed regarding docket number 08-R1D5-1068. The agreement of the parties regarding docket number 08-R1D5-1069 remains affirmed.

DECISION

The Decision of the ALJ in Docket Number 08-R1D5-1068 is affirmed insofar as it found Employer had violated section 342(a), and modified to reflect that the penalty for the section 342(a) violation is \$5,000.00 as proposed by the Division.

ART R. CARTER, Chairman
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 19, 2012