

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

OC TURF AND PUTTING GREENS
24548 Sunshine Drive
Laguna Niguel, CA 92677

Employer

DOCKET 13-R3D2-1751

DECISION

Statement of the Case

OC Turf and Putting Greens (Employer) installs artificial putting greens. Beginning January 15, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Louis Vicario conducted an accident inspection at a place of employment maintained by Employer at 18394 Via Ambiente, Rancho Santa Fe, California (the site). On May 15, 2013, the Division cited Employer for an incomplete Illness and Injury Prevention Program, failure to have procedures in place to identify and evaluate workplace hazards, failure to have a Heat Illness Prevention Program, and failure to report a serious injury to the Division.

Employer filed a timely appeal contesting the reasonableness of all proposed penalties.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on March 5, 2014. John C. Vita, Attorney, represented Employer. Kathleen Derham, District Manager, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on March 5, 2014.

Stipulations and Pre-Hearing Determinations

1. Employer withdrew its appeal to Citation 1, Items 1 and 2. The reasonableness of the \$5,000 penalty for Citation 1, Item 3, regarding failure to report a serious injury was the only issue remaining.
2. On January 10, 2013, an employee was injured in an accident at Employer's job site.
3. The accident resulted in a serious injury which caused the employee to be hospitalized for over 24 hours for more than observation. He was seriously injured within the meaning of Labor Code § 6432(e).
4. Employer did not report the injury to the Division.
5. The fire department reported the injury to the Division.
6. Associate Safety Engineer Louis Vicario (Vicario) began an inspection on January 15, 2013.
7. On May 15, 2013, Vicario issued citations to Employer.
8. Citation 1, Item 3 was a violation of § 342(a)¹ for failure to report a serious injury to the Division with a \$5,000 penalty.

Issues

1. Is upholding the \$5,000 penalty a miscarriage of justice?
2. Does Employer warrant relief based on financial hardship?

Findings of Fact or Conclusion of Law

1. Assessment of a \$5,000 penalty would not result in a miscarriage of justice.
2. Employer has established financial hardship sufficient to warrant payment of the penalties over a period of time.

Reasons or Grounds for Decision²

- 1. A violation of § 342(a) was established by law. Assessment of a \$5,000 penalty would not result in a miscarriage of justice.**

Section 342(a) provides as follows:

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

² Exhibits received and testifying witnesses are listed in Appendix A. Certification of the Record is signed by the ALJ.

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 no longer than 24 hours after the incident.

Employer did not appeal the existence of the violation. Therefore, it is established by operation of law. An issue not properly raised on appeal is deemed waived. (See § 361.3 [“Issues on Appeal”]; *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

The Director’s regulations, based on Labor Code § 6409.1(b), require the Division to impose a \$5,000 penalty for a violation of § 342(a). Section 336(a)(6) states as follows: For Failure to Report Serious Injury or Illness, or Death of an Employee—Any employer who fails to timely report an employee’s injury, illness, or death, in violation of § 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of \$5,000.

Although the Division is required to assess a \$5,000 penalty, the Appeals Board has the power to approve, modify, or vacate the penalty. (Labor Code § 6602) Penalties calculated in accordance with the penalty setting regulations³ are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Employer cites *Bill Callaway and Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006); however, the Board has recently declined to follow that reasoning in cases of a failure of an employer to report at all. In recent Decisions After Reconsideration, the Board held that the Legislature intended to impose a \$5,000 penalty in all cases when a serious injury was not reported. The Board indicated in dicta that there may be a situation where imposing such a fine would result in a miscarriage of justice, but the circumstances that could

³ §§ 333-336

qualify under that standard were not before the Board in that case. (*Allied Sales and Distribution*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012); *SDCCD—Continuing Ed N C Center*, Cal/App. 11-1296, Decision After Reconsideration (Dec. 4, 2012).)

Employer argued that imposing a penalty would be a miscarriage of justice. Nothing the employer did caused the injury, Employer reported the accident to its workers' compensation carrier, the workers' compensation carrier told him it would call Cal/OSHA, no agency told him about his independent duty to report, and Employer would have reported the injury to Cal/OSHA if he had known.

Even if these facts are true, they are inapposite. The gravamen of the argument is that it did not know about the reporting requirement. Ignorance of the law is not an excuse (*Nick's Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (June 8, 2007).) The circumstances here are similar to those in *Allied Sales and Distribution*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012) where an employer did not report a serious injury in reliance upon representations by a fire department captain. The Board did not find a miscarriage of justice under those circumstances.

2. Employer did not establish financial hardship sufficient to warrant reduction of the penalty.

In *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006), the Appeals Board provided guidance with respect to the determination of financial hardship appeals on the merits of each case. In that case, it held that the Board can reduce or eliminate a proposed penalty due to proven financial distress, citing *Veterans in Community Service*, Cal/OSHA App. 96-624, Denial of Petition for Reconsideration (Sep. 24, 1997) and *Paige Cleaners*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997).

Penalties proposed by the Division are presumptively reasonable, but this presumption may be rebutted by sufficient, credible evidence of financial hardship. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Financial hardship is shown in situations where an employer's income is inadequate to sustain its business operations, i.e., to pay its ongoing debts, such as payroll taxes, vendors, and so forth. (*Sree Construction, Inc.*, Cal/OSHA App. 06-1527, Denial of Petition for Reconsideration (Sep. 9, 2009); *Sheffield Furniture Corporation*, Cal/OSHA App. 00-1322, Decision After Reconsideration (June 8, 2006).) The Board has held that when a financial hardship claim is made, an employer's financial

strength is examined at the time of hearing. (*Central Valley Contracting, Cal/OSHA App. 05-2351, Decision After Reconsideration (June 1, 2009).*)

On the day of the accident, Employer had five employees. It has three permanent employees now. A \$5,000 penalty would affect Employer's operations. Employer can barely make payroll at this time. It is not able to pay \$5,000 all at once without possibly going out of business.

Although Owner and General Manager David Vega credibly testified that a payment of \$5,000 in a lump sum could place Employer's ability to remain in business in jeopardy, Employer is able to pay its debts that come due. Vega testified that Employer could pay over time and it is so found. Thus, Employer has not met its burden to establish that complete elimination of penalties based on financial hardship is warranted.

Therefore, the Administrative Law Judge hereby asserts discretionary authority pursuant to Labor Code § 6602 to fashion appropriate relief by allowing payment of the total penalties over 12 months.

Conclusion

Accordingly, Employer's appeal is denied. A violation of § 342(a) is affirmed and a penalty of \$5,000 is assessed. Total penalties of \$5,500 are assessed for all violations. Due to financial hardship, Employer may pay the total penalties due for all violations in 12 installments.

Dated: April 3, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
OC Turf and Putting Greens
Docket 13-R3D2-1751**

Date of Hearing: March 5, 2014

Division Exhibits – Admitted

Exhibit Number	Exhibit Description
1	Jurisdictional Documents
2	Form C-10
3	Policies and Procedure Manual – Completion of Proposed Penalty Worksheet
4	Labor Code sections - reporting work-connected injuries

Employer Exhibits

Exhibit Letter	Exhibit Description
A	Hearing Statement –marked for identification only

Witnesses Testifying at Hearing

1. Louis Vicario
2. David Vega

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**OC TURF AND PUTTING GREENS
Docket 13-R3D2- 1751**

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 315347328

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D2-1751	1	1	3203(a)	G	Er withdrew appeal	X		\$325	\$325	\$325
		2	3395(f)(3)	G	Er withdrew appeal	X		175	175	175
		3	342(a)	Reg	ALJ affirmed violation	X		5,000	5,000	5,000
Sub-Total								\$5,500	\$5,500	\$5,500

Total Amount Due*

\$5,500

(INCLUDES APPEALED CITATIONS ONLY)

NOTE:
 Please do not send payments to the Appeals Board.
All penalty payments must be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. **Employer may pay the total penalties in 11 monthly installments of \$460.00 beginning May 1, 2014 and a final payment of \$440.00. Any late payment shall cause the remaining balance to become immediately due and payable without further order.** Nothing in the Decision or Summary Table shall preclude Employer from making a different payment arrangement with the Accounting Office, Department of Industrial Relations. Please call (415) 703-4291 or (415) 703-4308 (payment plans) if you have any questions.

ALJ: DR/ml
 POS: 04-03-2014