

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

*In the Matter of the Appeal of:*

**STONEWARE ENTERPRISES, INC.**  
1575 South State College Boulevard  
Anaheim, CA 92806

Employer

**DOCKET 13-R3D1-3514**

**DECISION**

**Statement of the Case**

Stoneware Enterprises, Inc. (Employer) is an importer and retailer of granite products. Beginning September 10, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Thurman Randall “Randy” Johns (Johns), conducted an accident inspection at a place of employment maintained by Employer at 1575 South State College Boulevard, Anaheim, California (the site). On November 6, 2013, the Division cited Employer for a single violation of California Code of Regulations, title 8.<sup>1</sup>

Employer filed a timely appeal contesting the existence of the alleged violation as to Citation 1, item 1 (an alleged violation of section 342, subdivision (a) [failure to timely file a report of a serious workplace injury, illness or fatality]), asserting miscarriage of justice, and reserving a plea of financial hardship.<sup>2</sup>

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<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

<sup>2</sup> At a duly noticed mandatory settlement conference held before ALJ Dale Raymond on December 16, 2014, the parties entered into numerous stipulations that, taken together, establish that Employer violated section 342, subdivision (a). Those stipulated facts are listed in the section “Finding of Facts”, below. Employer also stated at hearing that it does not dispute that a violation occurred. Instead, Employer reserved the argument that assessing any penalty for its violation would result in miscarriage of justice. Employer also reserved a plea of financial hardship.

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on September 1, 2015. Nishar Siddiq, Owner, and Brian Kordik, represented Employer. Richard Fazlollahi, District Manager, represented the Division.

The matter was submitted on September 1, 2015. The ALJ extended the submission date to September 9, 2015 on his own motion.

### **Issue**

1. Would assessing a \$5,000 penalty for Employer's violation of section 342, subdivision (a), constitute a miscarriage of justice?
2. Did Employer establish that it would suffer financial hardship if assessed a \$5,000 penalty?

### **Findings of Fact<sup>3</sup>**

1. Employer employed Carl Kitchen (Kitchen) on August 31, 2013.
2. Kitchen suffered a serious, reportable injury on August 31, 2013, and he was hospitalized for treatment for more than 24 hours.
3. Employer did not report Kitchen's serious injury to the Division.
4. A fire department employee timely reported Kitchen's injury to the Division.
5. The fire department did not act on Employer's behalf when it made its own report to the Division.
6. Employer was aware of the reporting requirement of section 342, subdivision (a), on August 31, 2013.
7. Employer has the financial means to continue to operate even if assessed a \$5,000 penalty.
8. Requiring Employer to pay a \$5,000 penalty in one lump sum payment may result in Employer needing to lay off at least one employee.
9. Employer may pay the \$5,000 penalty over 36 months in exchange for waiver of the statute of limitations for filing a collections action.

### **Analysis**

- 1. Would assessing a \$5,000 penalty for Employer's violation of section 342, subdivision (a), constitute a miscarriage of justice?<sup>4</sup>**

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<sup>3</sup> Facts 1, 2, 3, 4, and 9 result from the parties' stipulations prior to and during the hearing. (See Exhibits 1 and 2.) All other facts are drawn from the evidence cited in the "Analysis" section of this Decision.

<sup>4</sup> Although Employer raised the non-existence of a violation in its appeal form filed with the Board, Employer stipulated prior to hearing that it violated section 342, subdivision (a). Furthermore, competent and credible testimony from Johns established that Employer violated the section. Therefore, the violation is established and further discussion is unnecessary for determination of the remaining issues in this case.

Employer argued at hearing that assessing any penalty for its violation of section 342, subdivision (a), would result in a miscarriage of justice. In 2002, the Legislature amended Labor Code section 6409.1, subdivision (b), to create a minimum penalty of \$5,000 where an employer fails to timely report a serious injury, illness or fatality.<sup>5</sup> (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).) The Appeals Board has previously stated that “there may be cases wherein a penalty of \$5000.00 for failing to report results in a miscarriage of justice, thus requiring a zero penalty”. (*Id.*) Because miscarriage of justice provides for an exception to the minimum \$5,000 penalty required by the Labor Code, Employer therefore bears the burden of establishing the miscarriage of justice exception by a preponderance of the evidence. (See *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982).) The Board has so far not given any guidance for determining when a miscarriage of justice would occur. Although the term “miscarriage of justice” is not defined by the Board or by statute, the term “miscarriage” is defined in *Webster’s New World Dictionary of American English, Third College Edition* (1988), p. 866, column 1, as “failure to carry out what was intended [a miscarriage of justice]”.

In addition to the dictionary definition of “miscarriage”, reported decisions of the California courts give some guidance as to circumstances that may constitute miscarriage of justice. For instance, in civil cases such as those involving license forfeiture, California’s courts have equated “miscarriage of justice” with a prejudicial result arising from an error of law, where the result would have been more favorable to the appellant absent the error. (See, e.g. *Broney v. California Com. On Teacher Credentialing* (2010) 184 Cal.App.4th 462, 476, citing Cal. Const., art. VI, § 13.) Generally, “the appellant bears the duty of [establishing] exactly how the error caused a miscarriage of justice.” (*Broney*, 184 Cal.App. 4th at p. 476, citing and quoting *Paterno v. State of California* (1999) 74 Cal.App.4th 68.)

Here, the stipulated facts and the facts gained through testimony at hearing do not support a finding that assessing a \$5,000 penalty against Employer would constitute miscarriage of justice. Prior to hearing, the parties stipulated that Employer violated section 342, subdivision (a). Johns credibly testified that the penalty was calculated in accordance with the Labor Code and California Code of Regulations, title 8.<sup>6</sup>

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<sup>5</sup> Although Employer did not challenge the reasonableness of the penalty, the Division offered legally sufficient, credible evidence through Johns’ testimony, that the penalty for Citation 1, item 1 was calculated in accordance with applicable statutory law and Board regulations. (See Exh. 4.)

<sup>6</sup> Johns’ qualifications are set forth in Exhibit 3. Furthermore, the Division enjoys a rebuttable presumption that its proposed penalties are reasonable. (*Stockton Tri Industries*,

In order to demonstrate a miscarriage of justice, Employer offered minimal evidence that it relied on a third party to make the report to the Division. Kordik, who testified credibly on behalf of Employer at hearing<sup>7</sup>, stated that he relied on an unidentified responding City of Anaheim firefighter's alleged statement that he or she was gathering information to prepare "the OSHA report". Kordik's testimony that he believed that the fire department's report would satisfy "the spirit of the law", was weak in light of his admission that Employer was aware at the time of the accident that Employer was separately required to make a report to the Division.<sup>8</sup> Kordik also admitted that there was no agreement between Employer and the fire department requiring the fire department to file a report with the Division on Employer's behalf. Kordik's admission that Employer made no effort to confirm whether the fire department made a report to the Division, serves as further evidence that Employer had no reasonable belief that it was satisfying its duty through the fire department. And, because Employer's reliance (whether reasonable or not) on the hearsay statement of an unidentified firefighter is not relevant to the setting of the penalty for a violation of section 342, subdivision (a)<sup>9</sup>, the preponderance of the evidence at hearing establishes that assessing a \$5,000 penalty in this matter will not constitute a miscarriage of justice.

For the foregoing reasons, the proposed penalty of \$5,000 for Employer's violation of section 342, subdivision (a), is affirmed.

## **2. Did Employer establish that it would suffer financial hardship if assessed a \$5,000 penalty?**

Employer reserved a plea of financial hardship in response to the Division's proposed \$5,000 penalty for violation of section 342, subdivision (a). Labor Code section 6602 gives the Appeals Board the authority to

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*Inc.*, Cal/OSHA pp. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Employer failed to rebut the presumption at hearing.

<sup>7</sup> Kordik was calm and respectful throughout his testimony, and demonstrated that he had the ability to recall facts accurately and answer questions truthfully. His testimony, therefore, was deemed credible by the undersigned ALJ.

<sup>8</sup> Even if Employer were unaware of the regulation, the Board has previously found that "Employers are presumed to know the safety orders applicable to their operations." (*Geo Plastics*, Cal/OSHA App. 13-0810, Denial of Petition for Reconsideration (Mar. 24, 2014), citing *Crown Disposal Company, Inc.*, Cal/OSHA App. 86-9017, Denial of Petition for Reconsideration (Oct. 9, 1986).) Furthermore, the Board has previously held that "There is no indication in the Legislative history, the language of [Labor Code] section 6409.1(b), or the penalty setting provisions of the Act that reasonable reliance on another's report fulfills the reporting requirement, or has any relevance to setting a penalty." (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision after Reconsideration (Nov. 29, 2012).)

<sup>9</sup> Nor, in light of the lack of additional corroborating evidence, would the undersigned ALJ deem the hearsay statement sufficiently reliable to support a different outcome, even if it were relevant.

approve, modify, or vacate penalties. In *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006), the Board reaffirmed that it had discretion to “reduce or eliminate a proposed penalty due to proven financial distress.” 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).) The employer bears the burden of proving financial hardship. (*Id.*, see *Paige Cleaners*, Cal/OSHA App. 96-1145, Decision After Reconsideration (Oct. 15, 1997).) 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).)

Employer offered minimal evidence to support a finding of financial hardship. Kordik credibly testified that Employer operates in a highly competitive environment, and is subject to high inventory and shipping costs. But, although Kordik testified that Employer may have to lay off at least one employee if required to pay a \$5,000 penalty all at once, this speculative statement receives little weight in light of Kordik's uncontroverted testimony that Employer had the ability to pay the penalty in its entirety without disruption to its business, particularly if afforded a payment plan of up to 36 months.<sup>10</sup> Employer had previously stipulated that it is willing to waive the statute of limitations for commencement of the collection of any civil penalty pursuant to Labor Code section 6651(a) in exchange for a payment plan. Employer's evidence of financial hardship was minimal and Kordik's testimony in particular, that Employer may need to lay off an employee, was merely speculative in light of the evidence that Employer has the means to pay the penalty in its entirety. Thus, Employer did not meet its burden of establishing financial hardship.

Nonetheless, the undersigned ALJ, in the exercise of his discretion pursuant to Labor Code section 6602, fashions appropriate relief in this case by allowing payment of the penalty assessed for Employer's violation of section 342, subdivision (a), over a 36 month period, in exchange for which Employer agreed to waive the statute of limitations for collection of the penalty.

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<sup>10</sup> Nishar Siddiq, Employer's owner, was present at hearing and was offered the opportunity to testify and/or present documentary evidence supporting Employer's financial hardship claim, but he declined.



### **Conclusion**

The evidence supports a finding that Employer violated section 342, subdivision (a), by failing to report a serious injury. Employer failed to present sufficient evidence to warrant a reduction in the proposed penalty based on financial hardship. Employer's financial condition does, however, warrant a payment plan of 36 months. The assessed penalty is reasonable and correctly calculated.

### **Order**

It is hereby ordered that the Citation 1, Item 1 is affirmed and the penalty of \$5,000 is affirmed as indicated above and as set forth in the attached Summary Table. Total penalties are assessed in the amount of \$5,000, payable in 36 monthly installments.

Dated: October 6, 2015  
HIC:ml

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**HOWARD I. CHERNIN**  
Administrative Law Judge

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**Name: Stoneware Enterprises Inc.  
Docket 13-R3D1-3514**

**Date of Hearing: September 1, 2015**

**Division's Exhibits**

<b>Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	YES
2	Stipulation of the Parties_Agreed Facts And/Or Legal Conclusions	YES
3	CV of Thurman R. Johns, Assoc. Safety Eng.	YES
4	Division's C-10 Proposed Penalty Worksheet	YES

**Employer's Exhibits**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
	None	

**Witnesses Testifying at Hearing**

Thurman Randall "Randy" Johns  
Brian Kordik  
Nishar Siddiq

**CERTIFICATION OF RECORDING**

*I, HOWARD I. CHERNIN, 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.*

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**HOWARD I. CHERNIN**

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Date



