

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

LONG BEACH CITY COLLEGE
4901 East Carson Street
Long Beach, CA 90808

Employer

Docket No. 03-R3D5-2747

**DECISION AFTER
RECONSIDERATION**

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

Background and Jurisdiction

On March 17, 2003, the Division of Occupational Safety and Health (the Division) conducted an accident inspection at a place of employment maintained by Long Beach City College (Employer) located at 1305 East Pacific Coast Highway, Long Beach, California. On June 18, 2003, the Division issued Employer Citation 1, Item 2¹ for an alleged regulatory violation of § 342(a) [untimely report of serious injury] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations², with a proposed civil penalty of \$5,000.

Employer filed a timely appeal contesting the existence of the alleged violation.

This matter came on regularly for hearing before an Administrative Law Judge (ALJ) of the Board on April 26, 2005 and the matter was submitted that day. A decision dated May 23, 2005 upheld the violation and, because Employer did not appeal the reasonableness of the proposed penalty, also upheld the \$5,000 penalty.

¹ Citation 1, Item 1 was not appealed.

² Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On June 22, 2005, the Board took this matter under reconsideration on its own motion. The order of reconsideration stated a number of issues to be addressed, which were resolved in the Board's decision after reconsideration in *Bill Callaway & Greg Lay dba Williams Redi Mix* Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006) (*Callaway*). The Board took a number of decisions pertaining to section 342(a) violations under reconsideration while the *Callaway* decision was being prepared, including the present matter.

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

Because the issues stated for reconsideration in the Board's Order were addressed in *Callaway*, there is no need to repeat the Board's analysis here. Rather, the Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, and the decision of the ALJ. In light of the foregoing, we find that the ALJ's decision was proper, that the decision was based on substantial evidence in the record as a whole, and that the findings of fact support the decision. Therefore, we adopt the attached ALJ's decision in its entirety and incorporate it into our decision by this reference.

Nonetheless, we will further address the penalty assessed. As noted above, Employer only appealed the existence of the violation and did not appeal the reasonableness of the proposed penalty. As a result, we are unable to apply the factors identified in *Callaway* to reduce Employer's penalty. Title 8, section 359.2; *Roger Byg dba Packing Plus* Cal/OSHA App. 96-4574, Decision After Reconsideration (July 19, 2000); *Pacific Underground Construction* Cal/OSHA App. 89-510 Decision After Reconsideration (Nov. 28, 1990). Had Employer appealed the reasonableness of the penalty, we would have found that application of the *Callaway* factors warranted a substantial penalty reduction.

As a community college, Employer is among the entities identified in California Labor Code section 6434(b) as eligible for a refund of the penalty amount, if the qualifying criteria apply. Given the Board's inability to reduce Employer's penalty, we encourage Employer to seek such a refund. We note that the Board has retained jurisdiction over this matter essentially since Employer was first cited, which may have caused Employer to postpone seeking a refund. We believe it would be unjust if Employer was denied a refund due to the passage of time created by the Board's decision to take this matter under reconsideration and would urge the agency charged with administering the refund to honor Employer's request, if Employer chooses to apply for a refund under Labor Code section 6434(b).

Decision After Reconsideration

The decision of the ALJ dated May 23, 2005 is affirmed and reinstated. A \$5,000 civil penalty is assessed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 8, 2008