

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

In the Matter of the Appeal of:

HELPMATES STAFFING SERVICES  
4250 Hamner Avenue  
Mira Loma, CA 91752

Employer

Docket No. 05-R3D3-2239

**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 petition by Helpmates Staffing Services (Employer), renders the following decision after reconsideration.

**JURISDICTION**

On January 14, 2005, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at 4250 Hamner Avenue, Mira Loma, California.

On June 9, 2005, the Division issued one citation to Employer that included two alleged violations. Employer filed a timely appeal contesting both items in the citation.

This matter came on regularly for hearing on October 3, 2006 before an Administrative Law Judge (ALJ) for the Board and the matter was submitted that day.

The ALJ rendered a decision on October 31, 2006, denying Employer's appeals. The ALJ concluded Employer violated Title 8, Cal. Code of Regulations section 342(a) [failure to report a serious injury]<sup>1</sup> and imposed the penalty proposed by the Division, to wit, \$5000.00. Also, the ALJ found the Division established the other item in the citation, a violation of 3203(a)(4) [IIPP], and imposed a penalty of \$185.00 as proposed by the Division.

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<sup>1</sup> All references are to the California Code of Regulations, Title 8, unless otherwise indicated.

Employer timely filed a verified petition for reconsideration challenging only the 342(a) item in the citation. Employer has waived its appeal of the 3203 violation. (Labor Code §6618.) The Division did not file an answer. On January 18, 2007, the Board granted reconsideration. After review of the entire record, the Board finds the record does not support the ALJ's conclusion that a violation of 342(a) occurred. We therefore grant petitioner's appeal as to Citation 1, Item 1.

### **EVIDENCE**

The Division received a report of accident on December 31, 2004, regarding an injury to Anthony Green. The report indicates the injury occurred at 5:30 a.m. while the employee was operating a forklift. The accident report indicates the call was made at 2:00 p.m. that day. On the document, the Employer is identified as "sec ER: CLWI / Helpmates (temp agency)." The address provided is 4250 Hamner Avenue, Mira Loma, the Employer's address.

The report further indicated the injured worker was initially taken to US Healthworks, and thereafter taken to a medical center and ultimately had to have surgery for a "chipped bone" resulting from the heel puncture injury. Neither the report, nor any other evidence, provided a timeline for when the "chipped bone" injury or need for the surgery became apparent.

The Division inspector, who issued the citation, May Layfield, testified regarding the 342(a) citation. She confirmed that the person who reported the injury, Winfred Rios, worked for CLWI, the secondary employer. Layfield did not obtain any additional information about the reporting from Winfred Rios in the course of her investigation. She testified that Peggy Cutts, a representative of Employer with whom she spoke during her investigations, stated the Employer's failure to report was a mistake. The parties stipulated that Employer did not call in a report.

Employer's witness, Peggy Cutts, testified that Employer's failure to report was not an accident or an oversight.

### **ISSUE**

1. Does the record support the conclusion that the Division established a violation of section 342(a)?

**FINDINGS AND REASONS  
FOR  
DECISION AFTER RECONSIDERATION**

Section 342(a) states:

(a) 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.

Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

(b) Whenever a state, county, or local fire or police agency is called to an accident involving an employee covered by this part in which a serious injury, or illness, or death occurs, the nearest office of the Division of Occupational Safety and Health shall be notified by telephone immediately by the responding agency.

(c) When making such report, whether by telephone or telegraph, the reporting party shall include the following information, if available:

- (1) Time and date of accident.
- (2) Employer's name, address and telephone number.
- (3) Name and job title, or badge number of person reporting the accident.
- (4) Address of site of accident or event.
- (5) Name of person to contact at site of accident.
- (6) Name and address of injured employee(s).
- (7) Nature of injury.

(8) Location where injured employee(s) was (were) moved to.

(9) List and identity of other law enforcement agencies present at the site of accident.

(10) Description of accident and whether the accident scene or instrumentality has been altered.

(d) The reporting in (a) and (b) above, is in addition to any other reports required by law and may be made by any person authorized by the employers, state, county, or local agencies to make such reports.

Labor Code section 6409.1 creates the duty to report serious injuries.

(b) In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), 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 (\$5,000). Nothing in this subdivision 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.

No case has presented the exact facts at issue here, wherein one of two employers called in a report and provided both the primary and secondary employer names in conformance with section 342(c)(2). That is, even though the written report satisfies the requirements of section 342(a) and Labor Code section 6409.1, as to both the primary and secondary employer, is the Employer who did not actually make the call still in violation?

Section 342(d) allows an employer to satisfy the reporting requirement without its own employees making the phone call. That section specifically states a satisfactory report “may be made by any person authorized by the employer[]” to make such a report. The term “authorized” has not been specifically defined for its use in this section. We have long held that an employer may not satisfy its reporting duty by relying on the report of a fire department or other public agency. (*Jaco Oil Co.*, Cal/OSHA App. 97-943 Decision After Reconsideration (Nov. 22, 2000).) The rationale for that conclusion is the text of the Safety Order itself, which creates a reporting requirement for both employers and first responders. (Section 342(a); 342(b); *Labor Ready*, Cal/OSHA App. 99-3350 Decision After Reconsideration (May 11, 2001).) Allowing an employer to not report as required by section 342(a) simply

because a fire or police agency that responds also reports under section 342(b) would effectively read out of the Safety Order the 342(a) requirement. The clear terms of section 342(a) require two reports.

Unfortunately, such clear guidance does not emerge from the text of the Safety Order when one person, who works for one of two employers, calls in a 342(a) report identifying both employers, and gives the address of the cited Employer as the operative address. The Safety Order requires “every employer” to report, but also allows for authorized persons other than the employer to make the report. We observe that the Citations were effectively issued to Employer by mailing them to Employer at 4250 Hamner Avenue, Mira Loma, CA, the same address as appears on the Division’s injury report form. Thus, the Employer’s address on the report form makes clear the report is made on behalf of Employer. The report form satisfies the requirements of section 342(a) for Employer.

On the other hand, to uphold the violation, the Board would have to ignore the Employer’s name on the report form, and its address, and infer from the fact that the reporter, Winfred Rios, was an employee of a different employer, that he was not authorized by Employer to make the necessary report. The more reasonable inference to draw from the scant record is that Winfred Rios was authorized by Employer to report the injury, as he gave the Employer’s name and address to the Division.

If the Division investigation had revealed that Winfred Rios acted without authorization from Employer, such evidence would rebut the inference of authority arising from the report form. (342(d).) Alternatively, had Rios provided only the address for the secondary employer, we would also have difficulty drawing the inference of his authority to report on behalf of Employer.

Under this unique scenario, when an effective report has been made in a manner allowed by the Safety Order, creating a requirement for an additional (third) 342(a) report from a person actually employed by Employer, is not a common sense reading of the Safety Order. (*Marin Storage and Trucking, Inc.*, Cal/OSHA App.90-148 Decision After Reconsideration (Oct. 25, 1991).) We recognize the Safety Order does not specifically address the dual employment situation. It, however, allows employers to authorize others to report for them. The existence of Rios’s authority to report for Employer is a question of fact that was not resolved by the ALJ. (Witkin, Summary of California Law, 10<sup>th</sup> Ed, *Agency and Employment* §145(2005).) Ostensible authority is created when one represents to a third party his agency, and the principal does nothing to alter the reasonable belief thereafter held by the third party that the agency in fact exists. (*Id.*) Here, the Employer’s conduct is consistent with concluding Rios was authorized to make a 342(a) report, as it did not itself report. Further, when the Division investigator learned Rios did not work for Employer, she made no additional inquiry concerning the Employer’s 342(a) duty or the

applicability of 342(d). As such, the record merely consists of the un-rebutted inference of an authorized report. (342(d).) Since 342(d) reports are part of the reporting scheme, the single fact of Rios's employment by the secondary employer does not defeat the inference of his authority to report for the Employer created by the information contained in the Division's report form.

### **DECISION AFTER RECONSIDERATION**

Since the report form satisfies the requirements of 342(a), (c) and (d) concerning Employer, and no evidence was presented calling in to question Rios's ostensible authority to report on behalf of Employer, inferred from the report form, we find the Employer's 342(a) duty to report was satisfied by Rios's report on its behalf. Therefore, no violation occurred. Employer's Appeal of Citation 1 Item 1 is therefore granted.

CANDICE A. TRAEGER, Chairwoman  
ART R. CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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