

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

In the Matter of the Appeal of:

TRADER DAN'S  
dba ROOMS N COVERS, ETC.  
840 S. Rochester Avenue, Suite C  
Ontario, California 91761

Employer

Docket No. 08-R6D2-4978

**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**

An employee of Trader Dan's dba Rooms N Covers, Etc. (Employer) suffered a serious injury on September 11, 2008, in Pomona, California. On December 2, 2008, the Division of Occupational Safety and Health (the Division) issued three citations to Employer, including a regulatory citation for a violation of section 342(a) (failure to report a serious injury to the Division) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup>

Employer filed a timely appeal contesting the alleged violations. The parties settled the appeals<sup>2</sup> and entered into a series of stipulations pertaining to the section 342(a) violation. On March 25, 2009, the parties' stipulations and settlement terms were recorded in an Order issued by an Administrative

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

<sup>2</sup> In addition to resolving the 342(a) violation, the settlement included a serious violation of section 3203(a) for failing to train employees using the angle grinder, which carried a \$12,600 penalty, and a general violation of section 3328(b) for failing to properly maintain equipment, which included a \$150 penalty.

Law Judge (ALJ) for the Board. Based on the stipulations presented, the ALJ assessed a civil penalty of \$350 for the section 342(a) violation.

On April 15, 2009, the Board ordered reconsideration of the section 342(a) appeal on its own motion. The Division filed an Answer to the Board's Order on June 12, 2009.<sup>3</sup>

### **EVIDENCE**

The parties stipulated to the following facts. An injury accident occurred in Pomona, California on September 11, 2008. The injured employee suffered a large gash across his right cheek and had to hold his eye in place. Employer reported the injury to its workers' compensation carrier on September 12, 2008. At the time of the accident, Employer was unaware of the duty to report the injury to the Division and did not have a system in place to report serious injuries to the Division. Employer now has such a system in effect. Employer's failure to report the injury did not impede the Division's inspection.

Employer was a medium sized employer at the time of the inspection with 39 employees and had reduced its staff to 14 employees at the time it entered into the stipulations. All three violations for which Employer was cited were corrected to the Division's satisfaction. Employer's safety program was such that Employer does not need to be assessed the full \$5,000 penalty proposed by the Division in order to encourage future compliance with the injury reporting requirement. The parties did not object to the Board exercising its authority under Labor Code section 6602 to reduce the \$5,000 penalty proposed by the Division. The parties asserted their belief that a \$350 penalty was appropriate in this case, while recognizing that the Division cannot unilaterally modify the penalty amount.

### **ISSUE**

Did the ALJ properly assess the section 342(a) penalty in this case?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

The Board has recently taken a number of ALJ orders pertaining to section 342(a) violations under reconsideration because we recognize the need to provide additional guidance regarding proper penalty assessment in these matters. Given the diversity of scenarios presented in the multitude of section 342(a) citation appeals presented to the Board, it is not possible to address the

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<sup>3</sup> The Order was served on the parties on May 8, 2009, rendering the Division's Answer timely.

various issues these cases present in one Board decision after reconsideration (DAR). Rather, the Board anticipates issuing a series of DARs that will address different concerns. The present DAR focuses on penalty assessment in situations in which an employer fails to report a serious injury as required by section 342(a).

## **1. Board Precedent**

The Board has issued two DARs that address penalty assessment for section 342(a) violations where employers report the serious injury belatedly: *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006); and *Safeway #951*, Cal/OSHA App. 05-1410, Decision After Reconsideration (July 6, 2007).<sup>4</sup> In *Callaway*, we recognized the Legislature's aim to aggressively encourage compliance with reporting duties when it amended Labor Code section 6409.1, the statute underlying section 342(a). We also acknowledged that imposing a \$5,000 minimum penalty across-the-board for all section 342(a) violations, irrespective of circumstances and employer conduct, would create a disincentive for employers to report a serious injury late.

Because we recognized that a late report would do far more to secure occupational safety and health for California workers than would no report at all, we concluded that each case must be considered on its own merits and the appropriate penalty assessed for the infraction committed. *Callaway, supra*. Both the *Callaway* and *Safeway* decisions provided guidance regarding points to consider when determining whether the full \$5,000 proposed by the Division should be assessed.<sup>5</sup> We noted that myriad factors might contribute to an employer's failure to fulfill the reporting obligation timely. In *Safeway, supra*, we further emphasized that each case of late reporting does not necessarily warrant a reduced penalty.

## **2. Failure to Report Serious Injury**

Neither of our decisions on section 342(a) penalty assessments specifically addressed situations in which an employer fails to report at all. We do so now and hold that there is a great distinction between situations in which legitimate circumstances contribute to a late report by an employer and situations in which an employer never reports. Where, as here, an employer fails to report the injury, the gravity of the offense is greater than when an employer reports late. The penalty assessed must be proportional to the offense committed and greater offenses warrant higher penalties. See,

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<sup>4</sup> We also applied our rationale from *Callaway* in yet another DAR, *Sun Valley Skylights, Inc.*, Cal/OSHA App. 03-2613, Decision After Reconsideration (Mar. 28, 2008).

<sup>5</sup> As stated in section 336(a)(6), the Division believes it must propose a \$5,000 penalty for all section 342(a) violations.

*Callaway, supra*, citing, *City and County of San Francisco v. Sainez* (2000) 77 Cal. App. 4<sup>th</sup> 1302; *Safeway, supra*.

It is well established that the Division proposes penalties and the Board assesses them. *Callaway, supra; Safeway, supra; Capri Manufacturing Corporation Bas. Corp.*, Cal/OSHA App. 83-869, Decision After Reconsideration (May 17, 1985). One of the Board's functions is to exercise independent discretionary authority to adopt, modify, or set aside the penalties proposed by the Division. *Callaway, supra; Safeway, supra*.

Nonetheless, when evaluating the proper penalty for a violation, the analysis does not start with a blank slate. Rather, it begins with the Division's proposed penalty and, most frequently, the proposed penalty is the penalty assessed. This is true even though the Board is not bound by the Department of Industrial Relations Director's regulations regarding penalty calculations. *Callaway, supra; Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006). Even when the Board determines that a proposed penalty is inappropriate, the Board most often modifies it or refers to the Director's regulations for a starting point; the Board does not start fresh without a point of reference. We conclude that the same approach should apply in section 342(a) penalty assessments.

In each section 342(a) case in which a violation is found or an employer concedes the violation's existence, the ALJ must begin the penalty assessment from the \$5,000 proposed penalty and determine what adjustments to that figure, if any, are appropriate. As we said in *Safeway, supra*, it is incumbent upon the employer to present sufficient information to explain why a penalty reduction is warranted.<sup>6</sup>

Although we affirm that an ALJ may consider various factors when assessing the proper penalty, and must evaluate each case individually based on the facts presented, we hold that a failure to report a serious injury must be given significantly more weight than other considerations that might be relevant to determining the proper penalty. An employer's failure to report places it in a category apart from an employer who reports late and precludes a drastic reduction in penalty. Any factors found to mitigate against imposition of the full \$5,000 proposed must be given less effect than they would have in a late report situation.

Where an employer fails to report, however, minor penalty reductions may be made if warranted and to the extent appropriate. For example, in

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<sup>6</sup> As we recently affirmed in *Central Valley Contracting*, Cal/OSHA App. 05-2531, Decision After Reconsideration (June 1, 2009), a penalty increase, consistent with statutory limits, may also be appropriate in some instances.

*Callaway, supra*, we acknowledged that an employer whose failure to report is an innocent mistake may be viewed differently than one who purposely or callously opts not to report. Where the parties stipulate to an employer's innocent error, an ALJ may afford a minimal penalty reduction (e.g., \$100-200).

Similarly, we frequently see that employers mistakenly believe that a first responder's report of the injury obviates their own need to report.<sup>7</sup> Such situations may also warrant a minor reduction in penalty, especially where an employer justifiably relies to its detriment on a first responder's representation that the employer need not report (e.g., \$100-500). The employer's justifiable reliance cannot simply be an assumption, but must be based on an affirmative representation by the first responder that its report would be sufficient. A significant reduction in such instances would not be appropriate because employers are expected to be familiar with their legal obligations. *Safeway, supra*.

Small reductions (e.g., \$100-200) may also be afforded for other appropriate factors, such as the employer's attention to the injured employee following the accident, a lack of impact on the Division's ability to investigate, a proactive stance on safety, timely and effective abatement measures, a good safety record, and employer size, where appropriate under Board precedent.<sup>8</sup> *Callaway, supra; Safeway, supra*.

### **3. The Present Dispute**

In the present case, the parties submitted a series of stipulations. The stipulations reflect that Employer reported the injury to its workers' compensation carrier,<sup>9</sup> but did not report it to the Division. Nonetheless, the penalty assessed in this matter, \$350, was substantially lower than was given to the employers in *Callaway* and *Safeway*, both of which reported the injuries to the Division within days of their occurrence. We find this to be error.

A 93 percent penalty reduction, such as was given here, cannot be justified where an employer fails to report an injury. We find that, if an

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<sup>7</sup> This is distinct from situations in which an employer authorizes a third party, including a first responder, to report the injury on its behalf. Section 342(d) allows a report to be made by someone authorized by an employer to do so. If the parties so stipulate, there would be no violation.

<sup>8</sup> Any consideration of an employer's size when assessing the proper penalty must be consistent with our decision in *Safeway, supra*, in which we said that employer size, while relevant, is not a dispositive factor in determining the proper penalty. We stated, "a small employer that conducts itself in a manner inconsistent with providing for employee safety, after consideration of all mitigating factors, should suffer the same consequence as a large employer that fails to protect its employees."

<sup>9</sup> We applaud such reporting, but emphasize that its function is different than the purpose behind section 342(a). One form of reporting does not relieve an employer's obligation to fulfill the other.

employer fails to report, it should not fare better than the employers that reported the injuries, albeit untimely, in these precedential decisions.

Moreover, in this case, the parties' stipulations reflect little else that supports more than a modest penalty reduction. The stipulations evince Employer's ignorance of its reporting requirements and its subsequent institution of a reporting system. In both *Callaway* and *Safeway, supra*, the employers' knowledge of the reporting requirements was a significant basis used to support reducing the penalty.

The stipulations here also indicate that Employer is a medium-sized employer that corrected the other violations for which it was cited to the Division's satisfaction. In addition, the parties stipulated that Employer's failure to report did not impede the Division's investigation, its safety program was such that the full penalty need not be imposed to secure future compliance,<sup>10</sup> and a \$350 penalty would be appropriate in this case.<sup>11</sup> Although consideration might be given to these factors when assessing the proper penalty, we find that their impact on the \$5,000 proposed penalty must be minimal.

#### **4. Penalty Assessment**

Based on the information contained in the Order here, the penalty relief ordered by the ALJ is not justified. On the present record, we conclude that a \$4,000 penalty is appropriate.

Nonetheless, we acknowledge that the parties entered into their stipulations, and the ALJ issued the Order below, without the benefit of this DAR. We recognize that this decision alters the manner in which these cases have been addressed by the ALJs.

Accordingly, we find it appropriate to remand this matter to the hearings operation unit to afford the parties the opportunity to supplement their stipulations, if they choose, or to proceed to hearing. The ALJ may then render a decision on the amended record in light of the guidance provided in this decision.

#### **DECISION AFTER RECONSIDERATION**

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<sup>10</sup> We note that the Division did not stipulate that Employer had a good safety program, but rather agreed only that it was sufficient to justify some penalty relief.

<sup>11</sup> In its answer, the Division contends that its representative at hearing merely did not object to the ALJ's proposal to impose a \$350 penalty. If an ALJ suggests a possible penalty to the parties, rather than the parties proposing a figure to the ALJ, the stipulations should clearly reflect as much.

The Board vacates the Order below and the \$350 civil penalty imposed for the section 342(a) violation in this matter. This matter is remanded to the hearing operations unit for further proceedings.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Board Member  
ART CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: October 8, 2009