

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CALIFORNIA HIGHWAY PATROL
601 North 7th Street
Sacramento, CA 95811

Employer

Docket No. 09-R2D1-3762

**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 submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on June 11, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in California maintained by Ahlstrom Construction Company, Inc., (Ahlstrom) in Sacramento, California. The accident involved a vehicle driven by a third party striking an employee of Ahlstrom on a public street. The California Highway Patrol (CHP) was one of the public agencies which responded to the accident scene. On October 15, 2009, the Division issued one citation to the CHP alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a violation of section 342(b) [failure by police agency to report occurrence of serious workplace injury to Division].

CHP filed a timely appeal of the citation.

Administrative proceedings were held, including an evidentiary hearing before an administrative law judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on May 18, 2012. The Decision granted Employer's appeal and dismissed the citation.

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

The Division timely filed a petition for reconsideration. CHP answered the petition.

The Board took Employer's petition under submission by order of July 18, 2012.

ISSUE

Whether the Decision correctly held that CHP was not required to report the accident to the Division.

EVIDENCE

The evidence is not disputed, and the summary and discussion of the evidence in the Decision are incorporated here by reference. For clarity, we briefly restate the evidence.

The accident in question occurred in the early morning of June 11, 2009, at the intersection of Marconi Avenue and Howe Avenue, public streets in Sacramento, where Ahlstrom was engaged in construction. An employee of Ahlstrom was killed when a car driven at high speed entered the construction zone and struck him. CHP responded to the scene, but did not notify the Division of the fatality. The Division cited CHP for that alleged failure to comply with section 342(b).

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

The Division petitioned for reconsideration on the basis that the Decision was made in excess of the ALJ's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The issue presented is a legal one: Whether the language of section 342(b) -- as its terms are defined in section 330(h) -- and the corresponding provisions in Labor Code sections 6409.2 and 6302(h) except CHP from having to report the fatality in question.

To consider section 342(b) in context, we start with section 342(a):

(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 [Code of Regulations].

Section 342(b) establishes a corresponding reporting requirement applicable to first responders:

(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.

The rules of regulatory construction require courts and this Board “to give meaning to each word and phrase and to avoid a construction that makes any part of a regulation superfluous.” (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 465.) We construe the regulations by according words their common sense meaning based on the evident purpose for which the enactment was adopted. (*In re Rojas* (1979) 23 Cal. 3d 152, 155.) Under accepted canons of statutory construction, we must “give meaning to each word if possible and avoid a construction that would render a term surplusage.” (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal.App.4th 684, 695.) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1517; *Webcor Builders, Inc.*, Cal/OSHA App. 06-3031, Denial of Petition for Reconsideration (Jan. 11, 2010).)

We read section 342(b) in the context of section 342(a)'s terms, "harmonizing to the extent possible all provisions relating to the same subject matter." (*Pacific Gas and Electric Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 24.) The term "serious injury or illness," is used in both section 342(b) and section 342(a). The rules of statutory and regulatory interpretation require that terms be given their ordinary meaning if not specially defined otherwise. (*Id.*; *Lungren v. Deukmejian (Roberti)* (1988) 45 Cal.3d 727, 735.) Since "serious injury or illness" is specifically defined, we are obligated to apply that definition.

Section 330(h) states:

"Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway. [Emphasis added.]

We note the parties stipulated that the accident in question occurred on a public street in Sacramento. Accordingly, the provision in section 330(h) that excepts from the definition of serious injury or illness "any . . . death caused by . . . an accident on a public street or highway" applies. (§ 330(h).) The death of Ahlstrom's employee falls within the definition's exception because it occurred on a public street, and therefore CHP was not required to report it to the Division.

The regulatory language quoted and discussed above has parallels in the Labor Code. Labor Code section 6409.2 states in pertinent part: "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 responding agency shall immediately notify the nearest office of the Division of Occupational Safety." Although the word order is different in some respects, the quoted sentence is substantively the same as section 342(b).

Likewise, Labor Code section 6302(h) defines "serious injury or illness" in terms identical to section 330(h): "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway."

We find that the two regulations cited above derive from and codify in the California Code of Regulations the language of Labor Code sections 6409.2 and 6302(h). Given that the parallel statutory and regulatory provisions use essentially the same wording, we hold that they have the same meaning: both relieve the CHP from having to report deaths which occur as a result of an accident on public streets. (*Outdoor Resorts etc. Owners' Assn. v. Alcoholic Beverage Control Appeals Bd.* (1990) 224 Cal.App.3d 696, 701 [generally accepted tenet of statutory construction that same words used in related statutes have same meaning]; see *In re Estate of Thomas* (2004) 124 Cal.App.4th 711, 723.)

The Division's petition claims that CHP's failure to report "significantly impacted the Division's ability to investigate the accident to determine if Ahlstrom had complied with" applicable regulations regarding traffic controls. That argument, however, is essentially nullified by the Division's admission that Ahlstrom itself reported, as required by section 342(a). It would be rank speculation to conclude that a report by CHP, had one been made, would have occurred any more "immediately" than Ahlstrom's.² "Immediately" has the same meaning, i.e. within 8 hours of the injury or death, in both sections 342(a) and 342(b).

The Division also argues that the statutes and regulations were not intended to except CHP from reporting the subject accident, and further that the establishment of a construction zone deprived the street of its public character.³ As to the first of those two points, the Division's interpretation of the subject Labor Code and regulatory sections contradicts their clear language and their purpose or alters their meaning. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1211 [agency interpretation which contradicts or alters meaning of statute entitled to no deference].) We will not apply the Division's interpretation. As to the second argument, that when a portion of the street was coned off in order to do the work involved it was no longer a public roadway, it is not correct. Temporary restrictions to traffic do not alter the legal character of the street as a public thoroughfare. (See *People v. Henderson* (1948) 85 Cal.App.2d 653, 657 [public agencies are vested with control over public thoroughfares].)

The Division next argues that the ALJ read the statute and regulation too narrowly, and that *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303 (*Carmona*) requires regulations be construed to achieve a safe working environment. *Carmona* is distinguished from the current circumstances.

² Further, the Division's contention that its inspection was hindered by CHP's not reporting is premised on the assumption that CHP was required to report. CHP is not required to do so under Labor Code section 6302(h) and section 330(h).

³ The contention regarding the changed character of the street due to its being coned off for construction contrasts with the Division's stipulation at hearing that the accident occurred on a public street. Although that argument in the Division's petition is therefore inappropriate, we address it for thoroughness. (*Luu's Brothers Corp. dba A & A Supermarket*, Cal/OSHA App. 07-5156, Denial of Petition for Reconsideration (Feb. 23, 2009) [party bound by stipulation, may not seek to avoid effect thereof by petition].)

In *Carmona* the Supreme Court was concerned with whether short-handled hoes were “unsafe hand tools” within the meaning of a regulation which prohibited use of such unsafe tools. In contrast, the instant proceeding deals with a regulation creating a reporting requirement and an exception to it, which are only indirectly related to workplace safety. Another issue in *Carmona* not present here was that the Division of Industrial Safety had determined in the administrative action under review that it would have been “unreasonable extension of its authority” to interpret the regulation at issue to find that short-handled hoes were unsafe hand tools. (*Carmona, supra*, p. 314.) The Supreme Court held that to be error, indicating that the Division did have such authority.

Further, liberal construction is a tool for resolving statutory ambiguity where it is not possible through other means to discern the Legislature’s intent. (*Zenith Ins. Co. v. Workers’ Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483.) The language in the Labor Code and the Director’s regulations at issue regarding accidents on public streets is not ambiguous, and therefore need not be construed liberally.

A final argument made by the Division is that the Legislature intended every workplace fatality be reported to the Division. First, this contention overlooks Ahlstrom’s report of the fatality. Second, the Legislature has already declared its intent by excepting first responders such as CHP here from reporting this accident in the applicable Labor Code provisions.

DECISION

For the reasons stated above, we affirm the Decision of the ALJ granting Employer’s appeal and dismissing the citation.

ART CARTER, Chairman
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 16, 2012