

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

In the Matter of the Appeal of:

A 1 PROTECTIVE SERVICES, INC.  
1601 Donner Avenue, Suite 2  
San Francisco, CA 94124

Employer

Docket. 10-R1D1-1592

**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 the matter under reconsideration upon its own motion by order dated March 26, 2012, renders the following decision after reconsideration.

**JURISDICTION**

Commencing on March 9, 2010, the Division of Occupational Safety and Health (Division) conducted an accident investigation at a place of employment in San Francisco, California where A 1 Protective Services, Inc. (Employer) was conducting operations. On May 6, 2010, the Division issued one citation to Employer alleging two violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup> Employer timely appealed the citation.

Administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board. The parties entered into an agreement to resolve the citation under the terms of which the alleged "general" violation was stipulated to have been abated; that the alleged "regulatory" section 342(a) violation was abated; and that the section 342(a) violation was submitted to the discretion of the ALJ to determine, under the circumstances, what penalty was appropriate. The parties also made a number of factual stipulations. After considering the evidence the ALJ issued an Order (Order) on February 29, 2012, holding that Employer had violated section 342(a), and imposing a civil penalty of \$3,500 (with payment plan).

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

We took the matter under reconsideration to determine whether section 342(d) applied. As explained below we hold that section 342(d) does apply under the stipulated facts so that there was not a failure to report; the report authorized under section 342(d) was, however, late; and we adjust the penalty accordingly.

## **ISSUES**

Was the Decision correct in holding that Employer had violated section 342(a); was section 342(d) applicable?

## **EVIDENCE**

In making this decision the Board relies on its independent review of the entire record in this case. The Board has taken no new evidence.

We find from the parties' stipulations the following facts. On January 31, 2010 between 2 and 4 p.m., Employer learned that one of its employees died at work of what appeared to be natural causes. The San Francisco police and San Francisco County Medical Examiner's Office reported to the scene. At the scene a representative of the San Francisco County Medical Examiner's Office told Employer that the Medical Examiner's Office would report the death to the Division both for itself and for Employer. (See section 342(a) [employer's duty to report], (b) [first responder's duty to report].) In return, Employer agreed to notify the deceased employee's minor children because Employer was a personal friend of the deceased. The Medical Examiner's Office reported the fatality to the Division the next day, February 1, 2010, at 12:16 p.m. Employer itself did not report the death to the Division.

## **DISCUSSION**

In addressing this matter we must consider how section 342(a) and section 342(d) apply here in light of the parties' stipulations.

Section 342 embodies in the California Code of Regulations the duty to report serious workplace injuries and illnesses enacted in Labor Code section 6409.1(b).<sup>2</sup> Section 342(a) in pertinent part requires employers to report "serious" workplace injuries and illnesses to the Division within 8, or, if there are "exigent circumstances," within 24 hours. Section 342(d) further provides, also in pertinent part, that the required report "may be made by any person authorized by the employers . . . to make such reports."

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<sup>2</sup> Labor Code § 6409.1(b) as in effect in 2010.

The questions arising from the terms of sections 342(a) and (d) then are: was the Medical Examiner's Office authorized by Employer to report the fatality on its behalf, and, if so, whether that report was timely. To answer those questions we turn first to the facts as established by the stipulations.<sup>3</sup>

Party stipulations are binding on the parties themselves. (See *Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition For Reconsideration (Apr. 16, 2007).) Party stipulations are binding on the Board unless they are illegal; violate public policy or our rules of procedure. (*Jaguar Farm Labor Contracting, Inc.*, Cal/OSHA App. 09-1135, Denial of Petition for Reconsideration (Oct. 6, 2010), citing *Salazar v. Upland Police Dept.* (2004) 116 Cal.App.4<sup>th</sup> 934, review denied Jun. 23, 2004.) There is no basis in this record to hold any of the stipulations non-binding. Where the parties enter into a binding stipulation, it ends the matter (*Times Mirror Co. v. Franchise Tax Board* (1980) 102 Cal.App.3d 872, 877). The stipulation removes an undisputed item from contention. (*County of Sacramento v. Workers' Compensation Appeals Bd.* (2000) 77 Cal.App.4<sup>th</sup> 1114, 1119.)

Given the facts established by the stipulations, we find that the Medical Examiner's Office and Employer entered into an agreement by which each would perform certain actions to relieve the other of certain duties. The Medical Examiner's Office agreed to notify the Division of the employee's death on behalf of Employer. Doing so would satisfy Employer's obligation under section 342(a) to report the death, and such delegation is authorized by section 342(d).<sup>4</sup> In turn, Employer undertook to inform the decedent's next of kin, and (presumably) relieved the Medical Examiner's Office of the need and/or duty to do so. Therefore, we hold that the Medical Examiner's Office was authorized by Employer to make the required report, and that Employer reasonably relied on the Medical Examiner's Office's commitment that it would do so. In effect, the agreement of the Medical Examiner's Office and Employer created a special agency. (Civ. Code § 2297; Rest.2d Agency § 3; *Cronin v. Coyle* (1935) 6 C.A. 2nd 205, 212.) And although the exchange of performances between the Medical Examiner's Office and Employer may be deemed consideration for their agreement, we note that consideration is not required to create an agency relationship. (Lab. Code § 2850; *McPhetridge v. Smith* (1929) 101 C.A. 122, 138.) Since a special agency relationship was established for purposes of reporting the death to the Division, Employer was responsible under that relationship for the acts and omissions of its agent in performing its duties. (Civ. Code § 2330.)

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<sup>3</sup> Since the ALJ did not state whether she considered section 342(d) in issuing the Order, we infer she did not.

<sup>4</sup> The Order inferred that Employer failed to report because it was ignorant of the reporting requirement. Given the stipulated facts we find that inference not to be justified.

Having concluded that the Medical Examiner's Office was authorized to report on Employer's behalf and that Employer can be liable for the Medical Examiner's failing to report or making a late report, we must next consider whether that report was timely. As noted, section 342(a) requires reports to be made within 8 hours or, if there are "exigent circumstances," within 24 hours of the employer's learning of the event. From the stipulations it appears the report was made later than 8 hours but within 24 hours of Employer acquiring knowledge of the death. There was no stipulation or showing that any exigent circumstances pertained, and thus the report was late.

We have held that a late report, as distinguished from a failure to report, may result in a reduced penalty. (*Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration and Remand (Dec. 4, 2012); *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).) We find here such a reduction to be appropriate in this situation as well. The report was made within 24 hours of Employer's learning of the death of its employee; Employer had fewer than 100 employees at the time; Employer cooperated fully with the authorities and with the Division's investigation; Employer made appropriate arrangements for reporting the incident; and the parties agreed to submit the penalty determination to the Board's discretion. Employer's reliance on the Medical Examiner's Office to report for both itself and Employer was justified given their agreement and the dual reporting requirement, and Employer could reasonably assume the report would be made timely.

Accordingly, we reverse the Order in part by amending the penalty against Employer. The record shows that Employer may receive penalty reductions for size, good faith and history of ten per cent, thirty per cent, and 10 per cent, respectively. (§ 336(a)(1), and (d)(1), (2), and (3).) Accordingly, the \$5,000 penalty is reduced by 50 per cent to \$2,500. We further note that the Order authorized Employer to pay the original penalty over a period of months, and we apply that aspect of the Order here. Employer may pay the \$2,500 penalty in ten monthly installments of \$250 each commencing on March 1, 2014, and ending on December 1, 2014. Failure to pay any installment will cause the total amount not yet paid to become due immediately.

## **DECISION AFTER RECONSIDERATION**

For the reasons stated above, we affirm the Order as to the existence of the violation of section 342(a) because the Medical Examiner's report was late although authorized under section 342(d), and reverse in part, reducing the amount of the penalty.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDI FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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