

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

In the Matter of the Appeal of:

SDCCD – CONTINUING EDUCATION
N C CENTER
3375 Camino Del Rio South, Room 285
San Diego, CA 92108

Employer

Docket 11-R3D2-1196

**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 ordered reconsideration of the above referenced matter on its own motion, renders the following decision after reconsideration.

JURISDICTION

On March 15, 2011, the Division of Occupational Safety and Health (Division) commenced an investigation at a place of employment maintained by SDCCD – Continuing Education N C Center (Employer) in California. The investigation concerned an accident which occurred on February 23, 2011, which was reported to the Division by the San Diego Fire Department, but not by Employer. On April 19, 2011, the Division issued one citation alleging one violation of Title 8¹, California Code of Regulations, section 342(a). No other citations were issued. Employer filed a timely appeal contesting the violation, and the proposed penalty of \$5000.00. The Administrative Law Judge (ALJ) imposed a penalty of \$2500.00.

On January 11, 2012, the Board issued an Order of Reconsideration, and allowed the parties to submit answers to its Order. The Employer did not file an Answer. The Division filed an Answer asserting the Decision contained an inaccurate application of the Board’s reasoning in previous decisions regarding section 342(a) violations, and urged a greater penalty be imposed consistent with those previous decisions.

¹ All references are to Title 8, California Code of Regulations unless otherwise indicated.

EVIDENCE

All evidence was submitted by way of stipulation. Employer has 1700 employees, and a reporting system in place. Employer failed to report the injury giving rise to the instant citation to the Division. The reason proffered for the failure to report was that the employee responsible for such report was in her first week on the job and failed to make the necessary report. The fire department made a report to the Division on the same day as the injury. The Division began its inspection 18 days later. If additional citations were issued, they were not appealed. Employer reported the injury to its insurance carrier and in all other respects appears to have fulfilled its obligations to the employee.

DECISION

There is no dispute as to the existence of the violation here. The only issue is the appropriate penalty. The penalty setting rules concerning a failure to report a serious workplace injury to the Division include Labor Code section 6319, Labor Code section 6409.1(b), and sections 336(a)(6), and 336(d) of Title 8. The Board is required to affirm, modify, vacate, or direct other appropriate relief regarding an appealed penalty. (Labor Code § 6602). We endeavor to effectuate the Legislative intent when applying statutes, and must do so even when the language of the enactments is subject to several reasonable interpretations. (*Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal. App. 3d 662, 666-667.) While Legislative history is not the starting point for statutory construction, any construction given to a statute should be consistent with that history. (*People v. Ramirez* (2009) 45 Cal. 4th 980, 987.)

In 2002, Labor Code section 6409.1(b) was amended to add: “An employer who violates this subdivision [reporting requirement] may be assessed a civil penalty of not less than five thousand dollars (\$5000). 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.” Previously, the reporting requirement had no individualized statutory penalty, but carried the same penalty as other regulatory violations. (Labor Code section 6319, section 336(a) and (d); see also Labor Code sections 6423 through 6436). Under those provisions, the gravity based penalty for a failure to report was \$500.00, and was subject to adjustment under section 336(d) for the history, good faith, and size of the employer. (See Labor Code § 6319.) Penalties could be adjusted, then, to as low as \$100.00 in some, but not all, cases. Except for repeat or willful failures to report, the most an employer would receive as a penalty for reporting, either late or not at all, was \$500.00.

Whether the new language of Labor Code section 6409.1(b) requires a mandatory minimum penalty in all cases, or allows for zero penalty in some cases, or allows varying penalties depending on the circumstances of the case, or eliminated the requirement of Labor Code section 6319 and section 336(d) that all penalties shall account for employer size, history and good faith, are issues that are unresolved by either the language of the amendment or, in some cases, the legislative history.² Specifically, the statute uses the permissive term “may”, which is defined in Labor Code section 15. If the legislature meant that the penalty “shall” be \$5000.00 in each case without regard to any circumstance or other provisions of the Act, it could have used the word “shall”, also defined in Labor Code section 15 as “mandatory”. If the Legislature intended to eliminate the mandate in Labor Code section 6319 that all penalties shall account for size, history and good faith of the employer, it could have stated that as well. It did not.

The Division’s subsequent regulation implementing the change to Labor Code section 6409.1(b) addressed the penalty for section 342(a) violations, but failed to conform the regulations to the new language. The regulation varied from the Labor Code use of “may” by using the word “shall.” The new regulation was promulgated as a change without regulatory effect.³ Neither section 336(a)(6) nor the rulemaking file indicate the mandatory adjustments previously available under 336(d) are not to be used. The word “assess” is used throughout section 336 to refer to the gravity based assessment for a regulatory violation. All such assessments are subject to section 336(d) which can adjust for size, good faith and history. Although the Rulemaking file indicates that the only change was to alter the \$500 pre-adjusted penalty from \$500 to \$5000, in practice, the Division assessed a penalty of \$5000.00, declining to adjust this amount for the size, good faith, and history of the employer, or for any other reason.

In any event, the Board has authority in Labor Code section 6602 to set an appropriate penalty. The Division agrees. It responded to the Board’s Order of Reconsideration and asserted that under *Trader Dan’s dba Rooms n Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009) and *Bill Callaway and Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006), the reduction in the proposed \$5000.00 penalty in this case should have been less than the amount deducted by the ALJ in the Decision, stating “[w]hether the Appeals Board resolves the case based upon the example presented in the Division’s argument or its own determination is irrelevant and as (sic) it is clearly under the auspices for the Board to assess penalty.” (Division’s Answer, p.4, lines 5-8.)

² We refer to the Assembly Committee on Labor and Employment report of April 10, 2002, that states the intent behind the changes to 6409.1(b) in 2002 was to raise the penalty for failure to report. (Page 1, para. 5) The selected level of penalty was five thousand dollars (\$5000.00).

³ Division Rulemaking filed 1-30-2003, effective 3/01/03 (Register 2003, No. Z-7).

The Board has concluded that when a penalty will have no remedial effect, but only a punitive effect, such as in the case of financial hardship, adjustments should be made. (*Stockton Tri Industries*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The authority for these adjustments is Labor Code section 6602.

In the failure to report context, we have additional indications of what the Legislature intended through the 2002 amendment to section 6409.1(b) of the Labor Code. Since the amendment is susceptible to multiple reasonable interpretations, and did not directly repeal either sections 6602 or 6319 of the Labor Code, and used the term “may” when describing the imposition of a minimum penalty of \$5000, the statute is ambiguous. In such cases, the Legislative history is an appropriate resource to determine what the enactment does. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 122-123.) That history indicates the target of the amendment was employers who fail to report, and that in such cases, the penalty is to be \$5000.00 or zero. “This bill revises reporting and investigation procedures of workplace accidents resulting in serious injury or death and the prosecution of criminal violation (sic) of such accidents, add[s] civil penalties and criminal penalties for failure to report such accidents[.]” (Enrolled Bill report A.B. 2837, p.1) Also, the Appropriations Committee Fiscal Summaries describe the bill as follows: “AB 2837 makes employers who fail to report workplace accidents resulting in death to DOSH liable for civil penalties and misdemeanor prosecution.” (See reports dated 8/22/02 and 8/5/02.)

Here, however, this large employer left it to the new hire to make a report required by the Legislature, and apparently did not adequately supervise or train this staff person to assure compliance with the law. The Employer never reported the injury. While we retain the ability to impose either a \$5000.00 penalty or a zero penalty, none of the facts here justify the latter option. In this case, the ALJ applied the *Trader Dan’s* analysis and reached an individualized penalty of \$2500.00. *Trader Dan’s* and *Callaway* reasoned that individualized, fact-based penalties would encourage compliance with the reporting requirement. However, compliance has been unaffected by the variable penalty scheme first articulated in those cases.⁴ Since such variability has not had the desired effect, the various factors justifying reduction in penalty are no longer relevant to the penalty analysis for reporting violations. Rather, the purpose of this portion of the Act, as clarified by the Legislative history, is to impose a

⁴ According to data contained in a DOSH Budget and Program Office reports for 2005 through 2011, 342(a) violations were the most appealed, except for 2005 when it was the most frequently cited and the fourth most frequently appealed, and 2006 and 2009, when it was the second highest percentage appealed. The fluctuating level of citations (low of 399 to a high of 632) have not demonstrated a trend affected by the efforts of the Board to match the penalty to the gravity of the employer’s conduct. That is, the board’s 342(a) decisions had no statistically significant impact on the number of such citations being issued or appealed.

\$5000.00 penalty in all cases of non-reporting, except if it would result in a miscarriage of justice, when a zero penalty is allowed. Since the Legislative history contains no reference to the situation of a late report, we limit our result here to cases where the Employer failed to report at all.

Thus, we affirm the penalty of \$5000.00 assessed in the citation.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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