

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

IN THE POCKET, INC. dba
BRENTWOOD BOWL
237 El Camino Real
South San Francisco, CA 94080

Employer

Docket No. 11-R1D3-2272

**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 Decision of the Administrative Law Judge (ALJ) on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on March 17, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in South San Francisco, California maintained by In the Pocket, Inc., dba Brentwood Bowl (Employer). On August 3, 2011 the Division issued a citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Regulatory violation of section 342(a) [failure to report serious injury].

Employer filed timely appeals of the citations. Employer contested the reasonableness of the proposed penalty and listed “financial hardship/inability to pay” as a defense.

Administrative proceedings were held, including a contested 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 an Amended Decision on August 21, 2012. The Decision denied

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

Employer's appeal and upheld the regulatory citation, reducing the civil penalty to \$1500 from the Division's proposed \$5000.

The Board ordered reconsideration of the decision on its own motion. The Division filed an answer to the petition. Employer did not file an answer.

ISSUE

Did the ALJ correctly analyze and apply the labor code to the penalty determination?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

The parties stipulated to a number of facts underlying the alleged violation. We summarize those stipulated facts as follows. On February 17, 2011, at 9:45 a.m., a handyman employee of employer was preparing to remove stucco from the ceiling of a porch. Pieces of stucco struck the employee, who was transported to the hospital, where doctors determined the employee had a broken arm, at least one broken rib, and a skull fracture. The employee remained hospitalized in excess of 24 hours for other than observation from February 17 through February 23, 2011.

Millard Tong (Tong), Employer's owner, went to the hospital to visit the employee, and placed calls to the hospital to be updated on the employee's condition. Employer was aware that the employee was in the hospital from February 17 through February 23. Employer did not report the employee's serious injury to the Division; the South San Francisco Fire Department timely reported the injury to the Division. Employer was unaware that the Fire Department was planning to make the report. The Division was not impeded in its investigation, as the Fire Department made a timely report.

At the time of the accident, Employer had no system in place for reporting serious injuries to the Division. At the time, Employer would call its insurance company and believed that the insurance company would make any necessary reports. Employer now has a system in place and does not rely on the insurance company. Employer has been in business for 10 years and has no prior experience with reportable occupational injuries. Employer also abated two substantive violations.²

² Decision, p. 3-4. The parties also stipulated that Employer was a small employer eligible for a 40% size discount, had been cooperative and would receive a maximum good faith credit of 30%, and that Employer now had an adequate safety program, making a maximum penalty unnecessary for Employer's compliance. The parties also stipulated that neither objected to a lowering of the penalty.

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 Division's answer to the Board's order of reconsideration.

Section 342(a) states:

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 longer than 24 hours after the incident . . .

Labor Code section 6409.1(b) is the authority for the section, and states:

In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a) [lost-time workplace injuries reported within 5 days to Administrative Director of Division of Workers' Compensation], 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 (\$ 5000). Nothing in this section 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.

As the Board has discussed in a number of prior decisions after reconsideration, the Legislature used specific language to demonstrate its intent in section 6409.1(b), as quoted above. By analyzing the language of the statute, as well as the legislative history, the Board has determined that the intention of the statute is to create a penalty of either \$5000 or zero. (*SDCCD-Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012).) The Board will only modify the \$5,000 civil penalty when an employer fails to report a serious injury in extraordinary circumstances, and the penalty would represent a miscarriage of justice. (*Allied*

Sales and Distribution, Inc., Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012.)

In the case at hand, the parties have stipulated that Employer acted in good faith, but nonetheless failed to report the injury. Had it not been for the local fire department making the report, the Division may not have ever become aware of the serious injury that the Employer's employee suffered, or the two other safety violations which were present at Employer's worksite. By doing business in California, an Employer assumes the obligation of complying with its various laws and regulations, including the duty to report serious injuries to the Division. Ignorance of this requirement is no excuse for failure to comply. (*OC Turf and Putting Greens*, Cal/OSHA App. 13-1751, Denial of Petition for Reconsideration (Jun. 9, 2014), citing *Nick's Lighthouse*, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).) It cannot be said that it is a miscarriage of justice in this instance to issue a penalty to Employer for its failure to report the serious injury. (*SCCD- Continuing Education N C Center*, supra).

Nor does the evidence presented at hearing establish a sufficient basis upon which to grant a penalty reduction. The incomplete financial information provided by Employer suggests that the business, while perhaps not booming, has managed to earn a gross profit, with only a small loss shown after all total deductions are calculated, including depreciations. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The proposed penalty of \$5000 assessed by the Division is reasonable, and is reinstated. The penalty may be payable over a 12 month installment plan.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 31, 2014