

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

In the Matter of the Appeal of:

ORANGE COUNTY FIRE AUTHORITY
One Fire Authority Road
Irvine, CA 92602-0125

Employer

Docket 12-R3D1-0439

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Orange County Fire Authority (OCFA).

JURISDICTION

Commencing on January 25, 2012, the Division of Occupational Safety and Health (Division) conducted an accident inspection of a place of employment in California.

On January 26, 2012, the Division issued a citation to OCFA alleging a “repeat regulatory” violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 342(b) [failure of first responder to report serious workplace injury].¹

OCFA timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing. OCFA asserted that it did not violate the regulation as alleged, that therefore there was no repeat violation, and that the Division has no authority to cite or penalize a local fire agency.

On February 11, 2013, the ALJ issued a Decision (Decision) which upheld the citation and imposed a \$1,000 civil penalty on OCFA.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

ISSUE

Did the ALJ correctly sustain the violation?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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.

OCFA's petition contends that the ALJ acted in excess of powers, the evidence does not justify the findings of fact, and/or the findings of fact do not support the Decision. (Labor Code section 6617(a), (c), and (e) respectively.)

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on substantial evidence in the record as a whole, correctly analyzed and applied the law, and was appropriate under the circumstances.

Juan Valenzuela, the worker injured in the accident giving rise to the citation at issue, testified at the hearing. On August 5, 2011, Valenzuela was working as a drywall finisher for Kerns Drywall Corporation. While on a job in Yorba Linda, California, Valenzuela fell 13 feet from a scaffold to the cement floor below, suffering "serious" injuries as that term is used in section 342(b). OCFA was called to the scene of the accident, and transported Valenzuela to a hospital, where he had surgery to treat his injuries and where he remained for four days.

OCFA stipulated that it did not report the accident to the Division.

OCFA argues in its petition that the accident was not reportable. We disagree. First, as mentioned, Valenzuela's testimony established that he suffered serious injuries as that term is used in section 342(b). Thus there is substantial and uncontradicted evidence in the record that a reportable injury occurred. The issue then is whether OCFA is required by statute to report it.

OCFA argues (1) that the Division does not have authority to cite or fine OCFA in its capacity as a local police or fire agency for failing to report a serious injury to the Division; and (2) that the Division failed to establish a violation of 342(b).

OCFA first contends that Labor Code section 6409.2 and Director's Regulation section 342(b) do not authorize the Division to cite or impose a penalty on a local fire agency for failing to report a serious injury to another employer's employee. While textually correct insofar as those sections, *per se*, do not authorize enforcement but merely establish a duty to report, OCFA's assertion ignores other provisions of the California Occupational Safety and Health Act (the Act), Labor Code section 6300 *et seq.*, which do authorize the Division to cite and fine first responder agencies for failing to report serious injuries as required by Labor Code section 6409.2. (*California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012), citing (*Pacific Gas and Electric Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 24 [statutes read so as to harmonize to extent possible all provisions relating to same subject matter].) We next examine some other related provisions of the Labor Code.

Labor Code section 6307 gives the Division "the power, jurisdiction, and supervision over every employment and place of employment in this state[.]" Similarly, Labor Code section 6308 provides, "The [D]ivision, in enforcing occupational safety and health standards and orders and special orders may do any of the following: [¶] (c) Require the performance of any other act which the protection of life and safety of the employees . . . reasonably demands." Even if one were persuaded that Labor Code section 6308 does not refer to section 6409.2 or 342(b) (because they are not "safety and health standards and orders"), other Labor Code provisions provide ample enforcement authority.

First, Labor Code section 6313 requires the Division to investigate all serious occupational injuries and illnesses. Thus, the reporting requirements imposed on employers and first responders by sections 6409.1 and 6409.2 are consistent, as they require persons who initially learn of such incidents to inform the Division of them.

Second, Labor Code section 6317 gives the Division authority to cite an employer for violation of “any standard, rule, order or regulation established pursuant to this part[,]” meaning the Act as a whole, and impose a civil penalty for such a violation. Section 342(b) is a regulation established pursuant to the Act.

Third, Labor Code section 6434.5 provides that civil penalties assessed against “a public police or city, county, or special district fire department” are to be deposited into the Workers’ Compensation Administration Revolving Fund and be refundable to the penalized agency upon certain conditions. Were such agencies not subject to penalty, there would be no need for the refund provisions of section 6434.5. We must avoid any interpretation of a statute which renders some of its terms surplusage. (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App.4th 684, 695.)

OCFA further argues that Labor Code section 6413.5 does not authorize penalties against it. Section 6413.5 provides, in pertinent part:

Any employer or physician who fails to comply with any provision of subdivision (a) or Section 6409 or Section 6409.1, 6409.2, 6409.3, or 6410 may be assessed a civil penalty of not less than fifty dollars (\$50) nor more than two hundred dollars (\$200) by the director or his or her designee if he or she finds a pattern or practice of violations, or a willful violation of any of these provisions.

OCFA’s petition argues that the quoted language does not authorize penalties against first responders because they are not employers or physicians. This argument ignores the definition of “employer” in Labor Code section 6304 which states it “shall have” the same meaning as in Labor Code section 3300, where in turn the term is defined to mean “(b) Each county, city, district, and all public and quasi-public corporations and public agencies therein.” Thus, OCFA is an “employer” under the Act.

Moreover, to argue that because the Legislature established a reporting duty but did not in the *same* code section provide for enforcement of the duty is to argue for an absurd result as well as to argue that one must only read one section of the Act instead of the whole Act to ascertain its meaning. As the U. S. Supreme Court recently stated, “[A] proper [statutory] analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it.” (*Wos v. E. M. A.* (2013) ___ U.S. ___, (slip op., at 8.) And, a reading of all related sections of the Act is not only required but also shows that OCFA was required to report Valenzuela’s injury to the Division and may be cited and penalized for its admitted failure to do so. (*Pacific Gas and Electric Co. v. Superior Court supra* 144 Cal.App.4th at 24.)

OCFA next argues that it is not subject to penalty because it is not the employer of the injured employee. That argument does not stand against the plain language of Labor Code section 6409.2. First, Labor Code section 6409.2 requires a first responder such as OCFA which “is called to an accident involving an employee covered by [the Act]” to “notify” the Division. Valenzuela was an employee of a firm doing business in California and working for that firm when he had his accident, making him “an employee covered by” the Act. The plain language of the statute does not limit the reporting duty to injuries to an agency's own employees, and to so interpret it would be to read a term (to the effect of “the first responder’s own employee(s)”) into its language. We may not do so. (*E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) Second, as noted above, the Act includes OCFA within the scope of the term “employer,” and contemplates those public agencies such as a fire department may be penalized for violating provisions of the Act or regulations promulgated under its authority. (See Labor Code §§ 6304, 6307, 6317, and 6434.5.)

It is further noted that all of the above arguments were addressed and rejected by the Board in *Orange County Fire Authority*, Cal/OSHA App. 10-3667, Denial of Petition for Reconsideration (Jan. 3, 2013).

One question not raised by OCFA but implicit in its arguments is whether Labor Code section 6413.5 limits the amount of penalty which may be assessed against a first responder. As quoted above, Labor Code section 6413.5 limits a penalty to not more than \$200 for a violation of Labor Code section 6409.2., among other violations not pertinent here. Such a superficial reading makes the statutes (including Labor Code sections 6413.5, 6427, and 6434.5) inconsistent, since Labor Code section 6413.5 limits penalties for “employers and physicians” to no more than \$200 while Labor Code section 6427 allows higher penalties to be assessed against employers, including public agencies, for regulatory violations. The better reading of those various Labor Code provisions, in the Board’s view, is that Labor Code section 6413.5 provides for a penalty which may be assessed by the “director” [of the Department of Industrial Relations] which is *in addition* or an *alternative* to civil penalties under the other noted provisions. The penalty authorized by section Labor Code 6413.5 may be contested with the “director,” rather than appealed to the Board, as is the case when the penalty is proposed in connection with a citation issued by the Division. (Labor Code §§ 6317, 6600.) We conclude that public agencies may be assessed the penalties provided for in section 6427 notwithstanding section 6314.5’s provisions.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 29, 2013