

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

*In the Matter of the Appeal of:*

**MICROWAVE ANTENNA SPECIALTIES,  
A NEVADA CORPORATION  
39650 Liberty Street, Suite 250  
Fremont, CA 94538**

Employer

**DOCKETS 12-R1D4-3132  
through 3138**

**DECISION**

**Statement of the Case**

Microwave Antenna Specialties, A Nevada Corporation (Employer) was involved in the design, manufacture, and sale of microwave antenna products, primarily for military contractors and the U.S. Government. On July 26, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Mark Katz, conducted a safety inspection at a place of employment maintained by Employer at 37444 Sycamore Street, Newark, California. On September 28, 2012, the Division cited Employer for 50 violations of Title 8, California Code of Regulations.<sup>1</sup>

Employer filed timely appeals for Citation 1, Items 1 through 44, and Citations 2, 3, 4, 5, 6, and 7, contesting on each alleged violation the existence of the violation, the classification, the reasonableness of abatement requirements, and the reasonableness of the proposed penalty, and on each alleged violation asserted a series of affirmative defenses and other bases for its appeal.<sup>2</sup>

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Oakland,

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

<sup>2</sup> At the hearing the parties stipulated to terms of settlement for Citations 1, Items 1 through 44, and Citations 2, 3, 3, 4, 5, 6, and 7. Good cause being found, the terms of settlement for Citations 1, Items 1 through 44, and Citations 2, 3, 3, 4, 5, 6, and 7, as proposed by the parties, and as reflected in the attached summary table, were approved. The original proposed penalty has now been amended to \$32,015. Upon acceptance of those terms by the Administrative Law Judge, Employer withdrew all issues relating to its appeals, and proceeded solely on the issue of whether the proposed penalty is reasonable in light of Employer's current financial circumstances (hereinafter "financial hardship.") As part of the settlement agreement, the Division agreed to withdraw all citations in the consolidated matter of G-M Development Company Nevada Limited Partnership, Dockets 12-R1D4-3129 through 3131. An order reflecting the Division's withdrawal in that matter was issued on March 24, 2014.

California on March 18, 2014. John B. McMorrow, Attorney at Law, represented Employer. Cynthia Perez, Staff Counsel, represented the Division. The parties presented oral and documentary evidence, a list of which is reflected in Appendix A. The matter was submitted for decision on March 18, 2014. The submission date was extended to August 15, 2014, by the ALJ.

### Issue

1. Does Employer warrant penalty relief based on financial hardship?

### Finding of Fact:

1. Employer ceased business operations on June 1, 2013.

### Analysis:

- 1. Because Employer closed its business in 2013 penalty relief is not necessary to sustain any business operations, and as such, no basis exists for penalty relief. Employer's current financial condition warrants a payment plan.**

Penalties proposed by the Division are presumptively reasonable, but this presumption may be rebutted by sufficient, credible evidence of financial hardship. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) In *Stockton Tri Industries, Inc.*, *supra*, the Appeals Board provided guidance with respect to the determination of financial hardship appeals on the merits of each case. In that case, it held that the Board can reduce or eliminate a proposed penalty due to proven financial distress, citing *Veterans in Community Service*, Cal/OSHA App. 96-624, Denial of Petition for Reconsideration (Sep. 24, 1997) and *Paige Cleaners*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997). Lab. Code §6602 provides the authority for the Board to make such penalty reductions.

In its "Motion for Hardship Relief" (Exhibit A) Employer relies on *Wm. L. and Marion Ornes, dba Lefty's Pizza Parlor* (hereinafter *Lefty's*), Cal/OSHA App. 74-580, Decision After Reconsideration (Feb. 24, 1975) as a basis for its prayer for penalty relief. *Lefty's*, *supra*, stood for the premise that assessment of a civil penalty against an employer whose establishment was no longer in existence did not promote the purposes of the California Occupational Safety and Health Act of 1973 (the Act) and that such a penalty was considered to be "purely punitive" and "not constructive."

Recently, in the matter of *Delta Transportation, Inc.*, Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012), the Appeals Board concluded that "the doctrine of complete penalty relief under *Lefty's* was based on a weak premise, and, more importantly, was counterproductive to the Act's mandate of assuring safe and healthful working conditions for all California working men and women. (Lab. Code §6300.)" Under *Delta Transportation, Inc.*,

*supra*, the Board disapproved the granting of complete penalty relief for an out-of-business employer. As such, Employer, which shut down its business operations in 2013, cannot be afforded complete penalty relief as once enunciated in *Lefty's*, *supra*. Furthermore, the ruling in *Stockton Tri Industries, Inc.*, *supra*, disallows any penalty relief for an employer who has ceased business operations at the time of the hearing.

Herein, Rutschow closed the business on June 1, 2013. Rutschow plans to dissolve the corporation once outstanding tax issues are settled. In *Stockton Tri Industries, Inc.*, *supra*, the Appeals Board held that “financial hardship is shown in situations where an employer’s income is inadequate to sustain its business operations ... .” Because Employer closed the business in 2013, there is no need to sustain its business operations, and as such, no basis exists for penalty relief.

Abatement of all violations is a pre-requisite to the Board granting financial hardship relief. (See, e.g., *Specific Plating Co., Inc.*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997).) Here, abatement is not an issue, as Employer closed business operations on June 1, 2013.

Rutschow testified that a payment plan would be helpful for any penalty amount assessed.<sup>3</sup> At the hearing the Division did not oppose a payment plan. Therefore, the Administrative Law Judge hereby asserts discretionary authority pursuant to Labor Code §6602 to fashion relief by allowing payment of the total penalties over 12 months.

### **Conclusion**

Employer has not met its burden to establish that the penalties should be reduced based on financial hardship. Employer presented sufficient evidence to demonstrate that a payment plan is warranted in this matter.

### **Order**

In regard to the 50 cited items, and pursuant to the parties’ stipulations, 35 violations are established and penalties are assessed as set forth in this Decision and in the attached Summary Table. Total penalties are assessed in the amount of \$32,015.

The penalty total set forth in this Decision and in the attached summary table is payable in twelve (12) installments. The first payment of \$2,700 is due November 1, 2014, and then \$2,665 each is due on the 1<sup>st</sup> of every succeeding

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<sup>3</sup> Employer presented a Profit and Loss Statement showing losses for the years 2010 through 2013 (Exhibit C). Rutschow testified that the business has never been profitable and that he kept the business open out of concern for his employees who had longevity with the company. The business closed on June 1, 2013, and Rutschow plans to dissolve the corporation once certain outstanding tax issues are settled.

month until the total is fully paid. One late payment renders the entire balance immediately due and payable.

Dated: September 11, 2014

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**KEVIN J. REEDY**  
Administrative Law Judge

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**Microwave Antenna Specialties, A Nevada Corporation**

**Dockets 12-R1D4-3132 through 3138**

**Date of Hearing – March 18, 2014**

**Division’s Exhibits – Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
1.	Jurisdictional documents
2.	Jurisdictional documents relating to The G-M Development Company, Dockets 12-R1D4-3129 through 3131
3.	Email from Cynthia Perez to ALJ outlining the agreement between the parties, including revised “Proposed Penalty Worksheet”

**Employer’s Exhibits – Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
A.	Employer’s Motion for Hardship Relief
B.	Declaration of Joseph Rutschow
C.	2006 U.S. Corp. Income Tax Return and Profit and Loss Statement

**Witnesses Testifying at Hearing**

1. Mark Katz
2. Joseph Rutschow

CERTIFICATION OF RECORDING

*I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



<b>SUMMARY TABLE</b>										
<b>PAGE 2 OF 5</b>										
<b>12-R1D4-3132 - 3138</b>										
		9	3220(c)(1)	G	Failure to establish an employee alarm system. <b>DOSH withdrew as duplicative.</b>	X		\$185	\$0	<b>\$0</b>
		10	3220(e)(1)	G	Failure to designate and train sufficient number of persons to assist in the safe and orderly evacuation of employees. <b>DOSH withdrew as duplicative.</b>	X		\$185	\$0	<b>\$0</b>
		11	3241(c)	G	Failure to store materials in a manner to prevent tipping and falling. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		12	3272(b)	G	Failure to maintain clear walkway. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		13	3273(a)	G	Failure to maintain floor free of dangerous projections or obstructions and in good repair. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		14	3276(e)(11)	G	Failure to ensure ladder extend at least 36" above landing. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		15	3314(g)(2)	G	Failure to provide written hazardous energy control procedures. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		16	3314(h)(3)	G	Failure to certify that the inspections of hazardous energy control procedures were performed or document certification of the periodic inspections of hazardous energy control procedures. <b>DOSH withdrew as duplicative.</b>	X		\$185	\$0	<b>\$0</b>
		17	3314(j)	G	Failure to train employees in lockout/tagout safety. <b>DOSH withdrew as duplicative.</b>	X		\$375	\$0	<b>\$0</b>
		18	3364(d)	G	Failure to provide toilet paper in restroom. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		19	3366(d)	G	Failure to provide soap in restroom. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		20	3366(e)	G	Failure to provide hand towel or air blower in restroom. <b>DOSH withdrew as duplicative.</b>	X		\$185	\$0	<b>\$0</b>
		21	3382(a)	G	Failure to ensure use of face and eye protection. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
<b>TOTALS ON PAGE 5</b>										
<b>PAGE 2 OF 5</b>										

<b>SUMMARY TABLE</b>										
<b>PAGE 3 OF 5</b>										
<b>12-1-4-3132 - 3138</b>										
		22	3383(a)	G	Failure to ensure use of body protection. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		23	3384(a)	G	Failure to ensure use of appropriate hand protection. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		24	3395(f)(1)	G	Failure to train employee in heat illness safety. <b>DOSH withdrew as duplicative.</b>		X	\$375	\$0	<b>\$0</b>
		25	3395(f)(3)	G	Failure to provide specific written Heat Illness Prevention procedures. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		26	3650(b)(1)	Reg	Failure to label forklift specific to design and construction requirements. Er withdrew appeal.	X		\$250	\$250	<b>\$250</b>
		27	3650(c)	G	Failure to design, construct, or maintain forklift in accordance with applicable standards. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		28	3653(a)	G	Failure to provide seat belt assembly on forklift. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		29	3664(a)	Reg	Failure to post and enforce operating rules for industrial trucks. Er withdrew appeal.	X		\$250	\$250	<b>\$250</b>
		30	3668(a)(2)	G	Failure to train forklift operator. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		31	5143(a)(5)	G	Failure to conduct or document in writing ventilation rate testing for mechanical ventilation system. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		32	5144(c)(1)	G	Failure to provide written respiratory protection program. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		33	5144(c)(2)(A)	G	Failure to provide required information to respirator user. <b>DOSH withdrew as duplicative.</b>		X	\$185	\$0	<b>\$0</b>
		34	5144(e)(1)	G	Failure to provide medical evaluations for employees using respirators. <b>DOSH withdrew as duplicative.</b>		X	\$375	\$0	<b>\$0</b>
		35	5144(f)	G	Failure to provide fit tests for employees using respirators. <b>DOSH withdrew as duplicative.</b>		X	\$375	\$0	<b>\$0</b>
<b>TOTALS ON PAGE 5</b>										
<b>PAGE 3 OF 5</b>										

<b>SUMMARY TABLE</b>										
<b>PAGE 4 OF 5</b>										
<b>12-R1D4-3132 - 3138</b>										
		36	5144(h)(2)(A)	G	Failure to store respirators to protect from dust. <b>DOSH withdrew as duplicative.</b>		X	\$185	\$0	<b>\$0</b>
		37	5155(e)(1)	G	Failure to monitor air for exposure to airborne contaminants. Er withdrew appeal.	X		\$375	\$375	<b>\$375</b>
		38	5194(e)(1)	G	Failure to provide written Hazard Communication Program. <b>DOSH withdrew as duplicative.</b>		X	\$185	\$0	<b>\$0</b>
		39	5194(e)(1)(A)	G	Failure to provide a complete list of hazardous substances. <b>DOSH withdrew as duplicative.</b>		X	\$185	\$0	<b>\$0</b>
		40	5194(f)(4)	Reg	Failure to label spray bottle containing hazardous substance. Er withdrew appeal.	X		\$250	\$250	<b>\$250</b>
		41	5194(g)(8)	G	Failure to make available or make complete material safety data sheets. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		42	5194(h)(2)	G	Failure to provide adequate hazard communication training and documentation thereof. <b>DOSH withdrew as duplicative.</b>		X	\$375	\$0	<b>\$0</b>
		43	6151(e)(3)	G	Failure to subject portable fire extinguishers to annual maintenance checks. Er withdrew appeal.	X		\$185	\$185	<b>\$185</b>
		44	14001(c)	Reg	Failure to complete Form 5020 pertaining to employee who fell through skylight. Er withdrew appeal.	X		\$250	\$250	<b>\$250</b>
12-R1D4-3133	2	1	1670(a)	S	Failure to ensure use of personal fall arrest/restraint system or positioning system. Er withdrew appeal.	X		\$4,050	\$4,050	<b>\$4,050</b>
12-R1D4-3134	3	1	3212(e)	S	Failure to provide adequate skylight protection to prevent accident. Er withdrew appeal.	X		\$4,050	\$4,050	<b>\$4,050</b>
12-R1D4-3135	4	1	4002(a)	S	Failure to adequately guard fan. Er withdrew appeal.	X		\$4,050	\$4,050	<b>\$4,050</b>
12-R1D4-3136	5	1	4050(a)	S	Failure to guard rotating line shafting on tooling oven. Er withdrew appeal.	X		\$4,050	\$4,050	<b>\$4,050</b>
<b>TOTALS ON PAGE</b>										
<b>PAGE 4 OF 5</b>										

<b>SUMMARY TABLE</b>										
<b>PAGE 5 OF 5</b>										
<b>12-R1D4-3132 - 3138</b>										
12-R1D4-3137	6	1	4070(a)	S	Failure to adequately guard belt and pulley on tooling oven. Er withdrew appeal.	X		\$4,050	\$4,050	<b>\$4,050</b>
12-R1D4-3138	7	1	5162(c)	S	Failure to provide emergency eyewash and shower within 10 seconds of unobstructed travel from manufacturing operations. Er withdrew appeal.	X		\$4,050	\$4,050	<b>\$4,050</b>
					<b>Sub-Total</b>			\$35,740	\$32,015	<b>\$32,015</b>
					<b>Total Due</b>					<b>\$32,015</b>

(INCLUDES APPEALED CITATIONS ONLY)

<p>NOTE: <i>Please do NOT send payments to the Appeals Board.</i>  <b>ALL penalty payments must be made to:</b></p>	<p>*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.</p>
<p>Accounting Office (OSH)  Department of Industrial Relations  PO Box 420603  San Francisco, CA 94142  (415) 703-4291, (415) 703-4308 (payment plans)</p>	<p><b>*The penalty set forth on this table is payable in twelve (12) installments. The first payment of \$2,700 is due November 1, 2014, and then \$2,665 each is due on the 1<sup>st</sup> of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.</b></p>

**ALJ: KR**  
**POS: 09/11/14**

