

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

In the Matter of the Appeal of:

SAM'S GARDENING
853 Penarth Avenue
Walnut, CA 91789

Employer

DOCKETS 13-R4D4-2769

DECISION

Statement of the Case

Sam's Gardening (Employer) is a gardening business that has operated for approximately three years, whose clients are primarily residential homes. Beginning on June 27, 2013, Thomas Miceo (Miceo), a Compliance Officer with the Division of Occupational Health and Safety (the Division), conducted an investigation at 2237 North Laurel Way, Upland, California. On August 22, 2013, the Division cited Employer for the following violations¹: Citation 1, Item 1, for failure to report a serious injury that occurred to one of Employer's employees; Citation 1, Item 2, for failure to implement and maintain a written Injury and Illness Prevention Program; and Citation 1, Item 3, for failure to provide training to non-supervisory employees in heat illness.

Employer filed a timely appeal contesting the existence of the violation of the safety orders and the reasonableness of all proposed penalties and a plea for financial hardship.

The matter was heard on September 17, 2014 at West Covina, California, before Clara Hill-Williams, Administrative Law Judge (ALJ) for California Occupational Safety and Health Appeals Board. Samuel Gwon (Gwon) represented Employer. Associate Safety Engineer (ASI) Thomas Miceo represented the Division. The Employer submitted documents in support of its plea of financial hardship. The matter was submitted on September 17, 2014 and extended by Order of the undersigned ALJ to March 31, 2015.

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

At the April 28, 2014 Prehearing Conference, ALJ Hill-Williams issued a Prehearing Order wherein: Employer withdrew its appeal to Citation 1, Items 1, 2 and 3 and the Division reduced the proposed penalties from \$5,620 to \$5,100. Employer reserved a plea of financial hardship regarding the reduced penalty of \$5,100 to be heard at the hearing herein. The parties reached a partial stipulated settlement based upon additional evidence presented by the Employer, which included:

1. No changes proposed to Citation 1, Item 1.
2. The Division reduced the extent and likelihood to low resulting in a reduced penalty of \$50 for Citation 1, Items 2 and 3.
3. The parties stipulated that the terms and conditions set forth in the above-described agreement, are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by Employer.

The parties further stipulated that neither Employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

The parties further stipulated that Employer has entered into this agreement in order to avoid protracted litigation and costs associated thereto.

The parties further stipulated that no findings or conclusions have been made by any trier-of-fact regarding the citations and fines at issue herein.

4. The employer agreed to withdraw its appeal of all citations in its entirety, with the exception of a request for penalty reduction based on financial hardship for ALJ Hill-Williams' determination.

Issues

1. Has Employer established financial hardship?
2. If Employer has established financial hardship, by what amount should the penalty be reduced?

Findings of Fact

1. Employer's Profit and Loss statement for 2014 through the month of August showed total sales in the amount of \$22,139.55 and a loss of \$301.61 (See Exhibit A).
2. Employer's Profit and Loss statement for 2013 showed total sales in the amount of \$37,419.62 and showed a net profit of \$6,077.40 (See Exhibit B). The 2013 1040 U.S. Tax Return showed an adjusted gross income of \$11,022.00 for 2013 (See Exhibit D) and ordinary business income of \$4,158 (See Exhibit F).
3. Employer's Profit and Loss statement for 2012 showed total sales in the amount of \$27,688.87 and showed a net profit of \$1,623.68 (See Exhibit C). The 2012 1040 U.S. Tax Return showed an adjusted gross income of \$3,462.00 (See Exhibit E), and a loss of business income of \$2,538 (See Exhibit G).
4. In 2014 Employer lost approximately 50 percent of its clients because Samuel Gwon (Gwon), the principal owner and gardener retired approximately a year before the hearing due to leg discomfort. Gwon's wife, Xyung Ja Gwon (Xyung) manages the business and the day laborers hired to complete work for clients.
5. Gwon listed his social security benefit with a deduction for Medicare resulting in a monthly check of \$114 (See Exhibit H).
6. Employer does not have any outstanding debts for the operation of the gardening business. All of the tools used in the business (leaf blower, lawn mower and hedge trimmer) are without any costs. Employer's utility costs for the business' office administration operated from his home, are a small percentage of his home's utilities.
7. Employer does not have any employees other than the day laborers he uses when he cannot do the work. He does not have insurance for the day laborers.
8. Gwon's personal expenses include his student loan for an outstanding past due amount of \$846.56 with a current amount due of \$76.96 with Sun Trust Bank, and a Federal Student loan with a current principal balance of \$21,984.69 with a monthly payment due of \$312.04.

Analysis²

1. Employer failed to provide evidence sufficient to warrant a reduction in penalties based on a claim of financial hardship. Employer provided sufficient evidence to warrant a payment plan.

Employer may rebut the presumption that the Division's proposed penalties are reasonable if an employer raises financial hardship as a basis for challenging penalties and supports its plea with proof.

The Board reaffirmed that the penalties proposed by the Division are presumptively reasonable (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006), p. 12), but the presumption may be rebutted where an employer raises financial hardship as a basis for challenging penalties and supports its plea with proof. The employer has the burden of proof on all issues pertaining to its financial condition (See *Paige Cleaners*, Cal/OSHA App. 96-1145, Decision After Reconsideration (Oct. 15, 1997)), and must present sufficient, credible evidence to establish financial hardship. Employer bears the burden of proof by a preponderance of evidence (Evidence Code section 115) on all issues pertaining to financial hardship.

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 through 1629, DAR (Oct. 15, 1997). Here, abatement of the conditions upon which the citations were issued has been completed, resulting in the stipulated settlement of the Division and Employer (See Statement of the Case, *supra*).

In *Stockton Tri Industries, Inc. (supra)*, the Board set new guidelines for evaluating an employer's financial hardship claim "on the merits of each case as presented" and reasserted its discretionary authority pursuant to Labor Code section 6602 to fashion appropriate relief as follows:

[T]he Board can reduce or eliminate a proposed penalty due to proven financial distress. (*Veterans in Community Service*, Cal/OSHA App. 96-624, Denial of Petition for Reconsideration (Sep. 24, 1997); *Paige Cleaners*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997).)

That an employer's financial hardship is not attributable solely to safety expenditures does not operate to automatically

² Exhibits received are listed in Appendix A. Certification of the Record is signed by the ALJ.

rule out granting penalty relief. Historically, the Board's focus was on what penalty amount, based on the circumstances of a particular case, serves the purposes of the Act. In some cases, an employer's distressed financial condition may warrant assessing a lower penalty amount to induce safety efforts and future compliance than would be the case if the same employer were not under such hardship. Such economic factors should not therefore be disregarded as irrelevant to the issue of "reasonableness of the proposed penalty."

For the purposes of penalty reduction, financial hardship is shown in situations where an employer's income is inadequate to sustain its business operations, i.e., to pay its ongoing expenses and remaining debts such as payroll, taxes, insurance, rent and supplies.

In asserting a plea of financial hardship, Gwon, Employer's owner testified that he was the principal in the gardening business owned with his wife, Kyung Gwon (Kyung). In 2014 Gwon started experiencing leg discomfort which made it difficult for him to operate the gardening business in addition to the competitive gardening market. In 2014 Employer lost approximately 50% of his clients and work orders were sporadic. Due to his leg ailment clients were serviced with day laborers.

At the hearing Gwon submitted profit and loss statements for 2012 up through August 2014, which included the following: a loss of \$301.61 for 2014 (See Exhibit A); ordinary business income of \$4,158 for 2013 (See Exhibit F); and a loss of business income of \$2,538 for 2012 (See Exhibit G). The only other income Gwon submitted was records of his \$114 monthly social security benefits. Gwon presented outstanding personal expenses at the Hearing, which included debt for student loans (See Exhibits K and L).

In following the Board's holding in *Paige Cleaners, supra*, Employer has the burden of proof on all issues pertaining to its financial condition, and must present sufficient, credible evidence to establish financial hardship. Employer bears the burden of proof by a preponderance of evidence³ on all issues pertaining to financial hardship.

³ Evidence Code § 115 – "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof is by the preponderance of the evidence.

The mandate of the California Occupational Safety and Health Act of 1973 (the Act) is to assure safe and healthful working conditions for all California workers. (*Delta Transportation, Inc.*, Cal/OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012), see also, *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) In order to promote the purposes of the Act, “the Division, like other public agencies, including its federal counterpart, justifiably relies on the deterrent effect of monetary penalties as a means to compel compliance with safety standards.” (*Delta Transportation, Inc.*, *supra.*) Because of the large number of workplaces which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement. “[T]he threat of civil penalties serves as ‘pocket-book deterrence’ against violations of occupational safety and health standards.” (*Miller/Thompson J.D. Steel, Harris Rebar, a Joint Venture*, Cal/OSHA App. 99-3121, Decision After Reconsideration (Sep. 26, 2001), citing, *Atlas Roofing Co., Inc. v. OSHRC* (5th Cir. 1975) 518 F.2d 990, 1001.)

In *Maria De Los Angeles Colunga dba Mercer Farms*, Cal/OSHA App. 08-3093 (Feb. 26, 2015) where the Employer’s trucking company made a plea of financial hardship, the Board recently held the grant of financial hardship relief, given the lack of any showing that it would benefit worker safety, would diminish the deterrent effect of civil penalties. The Board held that affirming the ALJ’s decision to grant a financial hardship reduction could inappropriately provide employers “an economic incentive to avoid a penalty [or have a penalty significantly reduced] by going out of business, and, perhaps reincorporating under a different name” without due regard for worker safety. (*Delta Transportation, Inc.*, Cal/OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012), citing, *Reich v. Occupational Safety and Health Com’n* (OSHRC) (11th Cir. 1997) 102 F.3d 1200, 1203.)

Here, the Employer has not made any showing that a reduction in civil penalties would further the purpose of the Act. At the Hearing Employer’s financial hardship stemmed from his inability to work. Further, the outstanding debt is personal debt and not debt from the operation of the business. Employer does not have any employees and has relied upon the work of day laborers without insurance, which does not show concern for worker safety. A reduction in penalties under such circumstances does nothing to protect employees or to make the workplaces safe.

The grant of financial hardship relief in the present circumstances, given the lack of any showing that it would benefit worker safety, would diminish the deterrent effect of civil penalties. Therefore, the civil penalties are affirmed in their reduced amount reached by the parties’ stipulation, *supra.* However,

given Employer's current personal financial circumstances, the ALJ asserts discretionary authority pursuant to Labor Code §6602 to fashion relief by allowing payment of the total penalties over 24 months.

The total assessed penalties of \$5,100 may be paid in 24 monthly installments, with the first installment of \$224 due on July 1, 2015 and \$212 due on the first of each subsequent month. Failure to pay by the fifteenth of each month will immediately cause the entire remaining balance to be due in full. Notwithstanding the foregoing, Employer may make a payment arrangement approved by the Department of Industrial Relations Accounting Office. Employer waives the statute of limitations for commencement of the collection of any civil penalty pursuant to Labor Code section 6651(a).

Conclusion

Therefore, the Employer's plea of financial hardship is denied. Citation 1, Item 1, is assessed and Citation 1, Items 2 and 3 are affirmed as indicated in the Stipulation of the parties *supra*.

Decision

It is hereby ordered that the citations are established as indicated above and set forth in the attached Summary Table.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

IT IS SO ORDERED.

Dated: May 1, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**SAM'S GARDENING
Dockets 13-R4D4-2769**

DATE OF HEARING: September 17, 2014

DIVISION'S EXHIBITS - Admitted

- 1 Jurisdictional documents

EMPLOYER'S EXHIBITS- Admitted

Exhibit Letter

Exhibit Description

A	Profit & Loss Statement 2014
B	Profit and Loss Statement 2013
C	Profit and Loss Statement 2012
D	Personal Tax Returns 2013
E	Personal Tax Returns 2012
F	Corporate Tax Returns 2013
G	Corporate Tax Returns 2012
H	Social Security Insurance Benefits Statement
I	Personal Checking Account Statement
J	Southern California Gas Bills
K	Sun Trust Loan Statement
L	Direct Loan and Collection Privacy Notice

Witnesses Testifying at Hearing

1. Samuel Gwon
2. Kyung Gwon

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge, duly assigned to hear the above entitled matter, hereby certify there were no recorded testimonies pursuant to the parties' stipulation, *supra*, taking the November 7 – 8, 2013 hearing off calendar.

Clara Hill-Williams
Administrative Law Judge

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**SAM'S GARDENING
DOCKET 13-R4D4-2769**

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 316347228

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R4D4-2769	1	1	342(a)	Re g	ALJ does not find evidence of financial hardship	X		\$5,000	\$5,000	\$5,000
		2	3203(a)	G	DOSH reduced extent and likelihood	X		\$310	\$50	\$50
		3	3395(f)	G	DOSH reduced extent and likelihood	X		\$310	\$50	\$50

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL AND REASON	APPEALED	REVOKED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	FINAL PENALTY ASSESSED BY BOARD
								\$5,620	\$5,100	\$5,100
Sub-Total								\$5,620	\$5,100	\$5,100
Total Amount Due*										**\$5,100

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
 Department of Industrial Relations
 PO Box 420603
 San Francisco, CA 94142
 (415) 703-4291, (415) 703-4308 (payment plans)

*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.
****The total assessed penalties of \$5,100 may be paid in 24 monthly installments, with the first installment of \$224 due on July 1, 2015 and \$212 due on the first of each subsequent month. Failure to pay by the fifteenth of each month will immediately cause the entire remaining balance to be due in full. Notwithstanding the foregoing, Employer may make a payment arrangement approved by the Department of Industrial Relations Accounting Office. Employer waives the statute of limitations for commencement of the collection of any civil penalty pursuant to Labor Code section 6651(a).**

**ALJ: CHW/ao
 POS: 05/01/15**

