

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

In the Matter of the Appeal of:

SHEFFIELD FURNITURE
CORPORATION
2100 East 38th Street
Los Angeles, California 90058

Employer

Docket Nos. 00-R6D2-1322
and 3131

and 00-R6D2-1323
through 1326

and 01-R6D2-1397

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) pursuant to authority vested in it by the California Labor Code, having ordered reconsideration of the decision of the Administrative Law Judge (ALJ) in the above-entitled matter makes the following decision after reconsideration.

Background and Jurisdictional Information

Commencing on December 21, 1999, the Division of Occupational Safety and Health (the Division), through Associate Industrial Hygienist Peter Riley and Associate Safety Engineer Hank Rivera, conducted a follow-up to a programmed inspection at a place of employment maintained by Sheffield Furniture Company (Employer) at 2100 E. 38th Street, Vernon, California. On March 27, 2000, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹

***Inspection One
(Docket Nos. 00-R6D2-1322 and 3131)***

<u>Classification</u>	<u>Section</u>	<u>Citation</u>	<u>Penalty</u>
Repeat Serious	2340.23 [unguarded electrical openings]	1	\$5,000

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

Repeat Serious	2530.43 [missing automatic restarting device]	2	5,000
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Inspection Two
(Docket Nos. 00-R6D2-1323 through 1326)

<u>Classification</u>	<u>Section</u>	<u>Citation</u>	<u>Penalty</u>
Willful	5185(k) [missing battery charging vents]	4	\$ 25,000
Repeat Serious	4475(a) [unguarded nip point]	3	5,000
Repeat Serious	3382(a) [eye & face protection]	2	10,000
Repeat General	2500.9(a) [spliced flexible cord]	1	1,500

Inspection Three
(Docket No. 01-R6D2-1397)

<u>Classification</u>	<u>Section</u>	<u>Citation</u>	<u>Penalty</u>
Willful	5185(l) [missing eye & body splash protection in battery charging area]	7	\$ 57,000

Employer filed timely appeals contesting the reasonableness of the proposed civil penalties for all citations.

A hearing was held on January 13, 2004, before an ALJ of the Board. Employer was represented by Charles Kosh, President. Peter Riley, District Manager, represented the Division. The record was left open for the submission of additional documentation on the issue of penalty relief attributable to financial hardship and the matter was submitted on January 18, 2005.

Law and Motion

At the commencement of the hearing Employer moved to withdraw any challenge to the alleged violations except the penalty relief (financial hardship) issue. Employer's motion was granted.

Summary of Evidence

Employer was a major furniture manufacturer in Southern California. Charles Kosh (Kosh) was the president of the business prior to its closing on January 31, 2002.

According to Kosh's testimony, the furniture business slowed in the 1980s, causing Employer to suffer tremendously. When business dropped 65%, Employer was forced to implement cutbacks to remain open. Even as business conditions began to improve, it was still difficult to stay in business. Employer took on new customers to try to increase its business volume. Those customers, such as Levitz, Broadway, Montgomery Wards and R. B. Furniture, either went bankrupt or closed down. The Sears Company closed its west coast buying office and moved its operations to Chicago.

At the time of the 1999 inspection, it appeared the business was back on its feet. Employer had expanded to add a line of leather furniture, obtained two new customers (American Express catalogue and Rent-A-Center), and its work force increased to 120 employees. Ultimately, however, American Express discontinued the catalogue division and Rent-A-Center was bought out by Renter's Choice. With the loss of those 2 accounts, representing 50% of the sales volume, business plummeted. At the same time, Chinese imports began to flourish in the local furniture business.

In May 2001, Employer decided to close. By then, owner Ernie Warsaw (Warsaw) was 81 years old and no longer wanted to fight to stay in business. Employer kept all employees on the payroll until all work in progress was completed. Employer worked with all employees to help them find new jobs. Employer held a going-out-of-business sale instead of filing for bankruptcy protection. All employees were paid everything they were owed and their 401(k) accounts were turned over to them. The suppliers were also paid in full. By July, Employer sold the building. All assets were liquidated between May 2001 and December 2001, and Employer vacated the cleaned-out premises in January 2002.

Kosh also testified that Employer lost \$105,182 in 1999 and \$108,202 in 2000. In 2001, the company lost \$1,664,000. By the time the plant closed, Warsaw had lost over \$4,000,000 and had not drawn a salary for over 10 years. As of June 30, 2003 the business had accumulated losses of \$8,229,999.

According to Kosh's unrefuted testimony, all of the violations, with the exception of the eyewash and shower for the forklift battery charging area, were immediately corrected. The others were abated on May 31, 2001, once Employer fully understood the applicability of the cited sections to its business operations. Except for the instant citations, Kosh opined that Employer had an

excellent safety record, maintained a safe operation and ran a clean business. He emphasized that the closed business will not reopen. Kosh opined that the proposed civil penalties are exorbitant and should be set aside in light of Employer's overall good faith efforts.

ALJ's Findings and Reasons for Decision

Since Employer waived all issues relating to the existence of the alleged violations the ALJ properly held that the violations were established by operation of law. (*Delta Excavating, Inc.*²; § 361.3)

The ALJ recognized that the Appeals Board is vested with the authority to determine the reasonableness of civil penalties proposed by the Division under Labor Code Section 6602 et. seq. and *Capri Manufacturing Co.*³.

In denying the petition for financial relief, the ALJ cited *Dye & Wash Technology*⁴, *Eagle Environmental, Inc.*⁵, and *DPS Plastering, Inc.*⁶. The ALJ acknowledged that Employer suffered very substantial losses, but found that Employer had failed to carry its burden of proving it was entitled to penalty relief under the criteria those decisions articulated. Because *Dye & Wash, supra*, and the other cases stemming from it were overruled by the Board subsequent to the ALJ's decision below, we reverse.

DECISION AFTER RECONSIDERATION

On March 27, 2006 we issued our ruling in *Stockton TRI Industries, Inc.*, Cal/OSHA App. 02-4946, Decision after Reconsideration. In the decision, we reviewed and disapproved *Dye & Wash* and its progeny, holding that the *Dye & Wash* line of Decisions set a nearly insurmountable "extraordinary circumstances" standard for obtaining penalty relief and that the accompanying criteria did not serve the purposes of the Act.

Stockton, supra, stated:

We hold that the Appeals Board, in specific circumstances, using reasonable discretion may reduce proposed penalties that exceed the levels necessary to encourage employers to seek out

² Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999)

³ Cal-OSHA App. 83-869, Decision After Reconsideration (May 17, 1985)

⁴ Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration (July 11, 2001)

⁵ Cal/OSHA App. 98-1640, Decision After Reconsideration (Oct. 19, 2001). In *Eagle Environmental, supra*, the Board held that closure of an employer's business was insufficient to justify any penalty relief. The Board proceeded to deny penalty relief based on *Dye & Wash* and its progeny, stating that the financial distress was not caused by the employer's expenses to correct the cited safety violations.

⁶ Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003) In *DPS Plastering, supra at p. 5*, the Board created an imposing policy intended to bind the Board and its Administrative Law Judges in future decisions by stating: "[w]e find that, as a matter of public policy, only under extraordinary circumstances should the Board deviate from penalty amounts calculated pursuant to criteria and formulae contained in the Director's penalty regulations. [emphasis added]"

and eliminate hazardous conditions and maintain safe and healthful work places. [citations] The Board may also reduce or eliminate penalties that are shown to be purely punitive or not consistent with the spirit or intent of the Act.[citation])

Consistent with these principles, the 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 (Sept. 24, 1997); *Paige Cleaners*, Cal/OSHA App. 96-1144, Decision After Reconsideration (Oct. 15, 1997); and *Specific Plating Co., Inc.*, *supra*).

...the Board also recognized that penalties served no legitimate purpose if the employer was out of business. See, *Lefty's Pizza Parlor*, Cal/OSHA App. 74-580, Decision [After Reconsideration] (Feb. 25, 1975) and *Arcade Meats and Deli*, Cal/OSHA App. 76-320, Decision After Reconsideration (Apr. 7, 1978).

We therefore re-affirm the principle in *Lefty's Pizza Parlor*, *supra*, and *Arcade Meats and Deli*, *supra*, that penalties serve no legitimate purpose if the cited employer is genuinely out of business for bona fide reasons.

We find that under the facts of this case Employer sustained severe financial losses that ultimately caused closure of the business. Employer does not claim payment of penalties or the cost of abating the cited safety violations caused its closure. The record shows the business did not, and will not, reopen.

Prior to its closure, Employer completed abatement of the violations even while it was incurring operating losses. That action shows a concern for the safety of employees even under difficult financial circumstances. Such efforts are to be rewarded not punished. (See, e.g., *Liberty Vinyl Corp.*, *supra*; *Veterans in Community Service*, *supra*; *Paige Cleaners*, *supra*; and *Specific Plating Co., Inc.*,⁷.)

The California Occupational Safety and Health Act [the Act] of 1973 (Labor Code section 6300 and following) is intended to encourage Employers to assure safe and healthful working conditions for employees. This Board holds that correction of unsafe working conditions should be encouraged, and punishment as the sole inducement for change is disfavored.

The situation here presents a reasonable basis for eliminating all proposed penalties. It would not further the purposes of the Act to make an example of Employer just to show that all penalties must be paid regardless of circumstances.

⁷ Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997)

DECISION

The decision of the ALJ is reversed, Employer's appeal is granted, and all proposed penalties are reduced to zero for the reasons above stated.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 8, 2006