

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

DELTA TRANSPORTATION, INC.
P.O. Box 1310
Walnut Grove, CA 95690

Employer

Docket No. 08-R2D1-4999

**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 taken this matter under reconsideration on its own motion, hereby renders the following decision after reconsideration.

JURISDICTION

On October 3, 2008, the Division of Occupational Safety and Health (Division) commenced an accident inspection at a place of employment in Walnut Grove, California maintained by Delta Transportation, Inc. (Employer). On November 24, 2008, the Division issued one citation to Employer alleging a general violation of Title 8, California Code of Regulations, section 3203(a)(7)(C) [failure to provide training prior to employee performing new job assignment, resulting in serious injury to employee]. A penalty of \$14,400 was proposed.

Employer timely appealed the citation, and a stipulation was reached wherein the parties agreed that Employer met the criteria for penalty relief pursuant to *Wm. L. and Marion Ornes, dba Lefty's Pizza Parlor*, Cal/OSHA App. 74-580, Decision After Reconsideration (Feb. 24, 1975). On January 5, 2012, based on the stipulations of the parties and the guidelines for penalty relief under *Lefty's Pizza, supra*, the Administrative Law Judge (ALJ) issued an order vacating the proposed penalty of \$14,400.

On January 26, 2012, the Board ordered reconsideration of the ALJ's order on its own motion, specifically to address whether *Lefty's Pizza* "applies to this case and justifies the result of vacating the penalty."

On March 1, 2012, the Division answered the Board's Order of Reconsideration. Employer did not file an answer.

ISSUE

Does *Lefty's Pizza Parlor* ("*Lefty's*"), Cal/OSHA App. 74-580, Decision After Reconsideration (Feb. 24, 1975), remain sound policy that furthers the goal of the California Occupational Safety and Health Act of 1973 (the Act)?

REASONS FOR DECISION AFTER RECONSIDERATION

Lefty's concluded that assessment of a civil penalty against an employer whose establishment is no longer in existence does not promote the purposes of the Act; such a penalty was considered to be "purely punitive" and "not constructive."¹ The rule was thereby set that elimination of all penalties is proper when the former owner of a cited business (1) completely divests its interest in the business, and (2) does not contemplate future participation in the same type of business. (*Lefty's, supra.*) Since that Decision was rendered in 1975, the Board has granted full penalty relief to employers who met the *Lefty's* criteria.²

We now conclude that the doctrine of complete penalty relief under *Lefty's* is based on a weak premise, and, more importantly, is counterproductive to the Act's mandate of assuring safe and healthful working conditions for all California working men and women. (Lab. Code § 6300.)

First, we note that imposing a penalty on an out-of-business employer is not "purely punitive"; it has a powerful deterrent effect that applies to all employers subject to the Act. In this regard, *Lefty's* doctrine of complete penalty relief focused on the one former employer and failed to consider that the Act was created to assure a safe working environment for *all* California workers. (Lab. Code § 6300.) In order to promote this goal, 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. (*Reich v. Occupational Safety and Health Review Com'n.* ("OSHRC") (11th Cir. 1997) 102 F.3d 1200, 1203, citing *Atlas Roofing Co., Inc. v. OSHRC* (5th Cir. 1975) 518 F.2d 990, 1001, *affd.* (1977) 430 U.S. 442 [OSHA must rely on the threat of money penalties to compel compliance by employers]; see *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 150 [penalty provisions serve to encourage compliance with state mandated

¹ More recently, the Board went so far as to state that "penalties serve *no legitimate purpose* if an employer is out of business." (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006) citing *Lefty's, supra*, and *Arcade Meats and Deli*, Cal/OSHA App. 76-320, Decision After Reconsideration (Apr. 7, 1978).)

² *Sheffield Furniture*, Cal/OSHA App. 00-1322, Decision After Reconsideration (Jun. 8, 2006), affirmed *Lefty's* and added a requirement that the employer needed to be out of business for "bona fide reasons."

standards for patient care and to deter conduct which may endanger the well-being of patients].)

This deterrent effect on employers would be significantly eroded if employers were immunized from all penalties by ceasing their operations. (*Reich v. OSHRC, supra*, 102 F.3d at p. 1203 [“Employers in violation of OSHA could become complacent in the knowledge that future civil penalties could be avoided by ceasing operations on the eve of the [] hearing.”].) Complete relief under *Lefty’s* would encourage employers to delay litigation for as long as possible, knowing that they would escape liability as long as operations ceased at the time of hearing, and “could create an economic incentive to avoid a penalty by going out of business and, perhaps, reincorporating under a different name.” (*Ibid.*) In addition, any employer that is going out of business for normal commercial reasons would have little incentive to comply with safety regulations given that it would not be responsible for any penalties upon termination of the business. (*Ibid.*) Allowing for such a situation to exist is inconsistent with the Act, as safety regulations apply in equal force and meaning from a business’s opening day through to the very last day of operations.

Additionally, *Lefty’s* assertion that a penalty levied against a former employer is “not constructive as intended by the Act” is void of supporting authority or analysis. The term “constructive” means to serve a useful purpose or “leading to some improvement.”³ As discussed above, assessing a penalty against a former employer who violated safety standards (including violations that result in serious injury or death) does indeed serve a useful purpose in that it maintains the deterrent force of penalties in order to promote compliance with the Act.

Finally, *Lefty’s* requirement that an employer promise not to reenter or continue in a specific industry does little to protect employees. Assuming that the Board is able to monitor and enforce such an assurance in the first place, we believe an employer who violated OSHA regulations – yet was relieved of all penalties that is commensurate with such a violation – would not have the same incentive to follow safety regulations as an employer who carries the weight of such penalties with it. This would lessen protection for other workers who may eventually find themselves under the employ of the former owner, should the owner go into business in a different industry. Indeed, former owners would not necessarily have to reenter the economy as employers or owners; they need only be in a position to influence the safety program of the business. Such a situation is counterproductive to the Act’s goal of ensuring a safe environment for all California working men and women.

³ Webster’s New World Dictionary (2nd ed. 2002) at p. 133.

DECISION

For the above reasons, the Board hereby disapproves the granting of complete penalty relief for an out-of-business employer as first articulated in *Lefty's* and modified by *Sheffield Furniture*. The ALJ's order dated January 5, 2012, is vacated, and the case is remanded to the ALJ to determine if the parties wish to proceed to hearing.

ART R. CARTER, Chairman
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 15, 2012