

BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

In the Matter of the Appeal of:

**AGPRIME**

16347 Breunig Road  
Los Banos, CA 93635

Employer

DOCKETS 12-R2D5-0156  
through 0162

**DECISION**

**Introduction**

AGPRIME (Employer) operates a farm labor contracting business, furnishing laborers to various types of growers throughout the California Central Valley. Beginning July 11, 2011, the Division of Occupational Safety and Health (Division) through Efren Gomez, Compliance Officer, conducted an investigation at a place of employment maintained by Employer at the south west corner of Panama Lane and Old River Road in Bakersfield, California. On January 3, 2012, the Division cited Employer for the following violations<sup>1</sup>: failure to complete Cal/OSHA Form 300; failure to provide potable water in extreme heat temperatures; failure to maintain a shaded area; failure to train employees regarding hot weather conditions; failure to equip a table saw with an anti-kickback device and with a spreader.

Employer filed a timely appeal contesting the existence of the alleged violations, their classifications, the abatement requirements and the reasonableness of all proposed penalties. Employer alleged several affirmative defenses.

The matter scheduled for hearing on November 7 and November 8, 2013, at Bakersfield, California before Clara Hill-Williams, Administrative Law Judge for California Occupational Safety and Health Appeals Board was taken off calendar. Attorney Kristina Seward represented Employer. Staff Attorney Melissa Peters, represented the Division. The Employer submitted documents in support of its plea of financial hardship. The matter was submitted on December 20, 2013 and extended by Order of the undersigned ALJ to February 1, 2014.

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

## **Stipulations and Pre-Hearing Determinations**

The parties reached a partial stipulated settlement based upon additional evidence presented by the Employer.

1. The Division agreed to withdraw Citation 1, Item 2. Employer waived any claim to reasonable costs pursuant to section 397 as a result of the Division's withdrawal of Citation 1, Item 2.
2. Based on section 336(k)<sup>2</sup>, the Division agreed to amend the proposed penalty for Citation 6 from \$10,125 to \$0, as duplicative of the proposed penalty for Citation 7.
3. No changes were proposed to Citation 1, Item 1 or Citations 2, 3, 4, 5, and 7.
4. The employer agreed to withdraw its appeal of all citations in its entirety, with the exception of submitting a written 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 and Law:**

- 1) Employer has not established financial hardship.
- 2) Employer is not entitled to a penalty reduction.

### **Reasons or Grounds for Decision<sup>3</sup>:**

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

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<sup>2</sup> Section 336(k) provides that when a single hazard is the subject matter of multiple violations resulting in civil penalties, the Division may, in its discretion, depart from preceding criteria to mitigate the cumulative effect of such penalties.

<sup>3</sup> Exhibits received are listed in Appendix A. Certification of the Record is signed by the ALJ.

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 § 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 Stipulations and Pre-Hearing Determinations, *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 § 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 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.

Employer's President, Troy Johnson (Johnson) on or about August 2013, decided to shut down Employer's operation because the business was no longer profitable. Throughout its existence Employer operated under the Farm Labor Contractor's (FLC) license issued to Johnson by California's Division of Labor Standards Enforcement. Johnson allowed his FLC license to expire on September 29, 2013, and had made no effort to renew the license and has no intention of

renewing the license. Johnson has represented that he intends to explore employment with Pacific Gas & Electric. Johnson has no intention of employing any other individuals in the future, nor does he intend to hold a managerial position with any company that would require him to address employee safety.

The Board had previously followed its holding in *Lefty's Pizza Parlor* (“*Lefty's*”), Cal/OSHA App. 74-580, Decision After Reconsideration (Feb. 24, 1975), as sound policy that furthered the goal of the California Occupational Safety and Health Act of 1973 (the Act). *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.”<sup>4</sup> 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.<sup>5</sup>

Recently, in *Delta Transportation* Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012) the Board concluded 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.)

In *Delta* the Board held 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”) (11<sup>th</sup> Cir. 1997) 102 F.3d 1200, 1203, citing *Atlas Roofing Co., Inc. v. OSHRC* (5<sup>th</sup> 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 standards for patient care and to deter conduct which may endanger the well-being of patients].)

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<sup>4</sup> 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).)

<sup>5</sup> *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.”

### **Employer's Plea of Financial Hardship**

Pursuant to the Board's ruling in *Delta*, Employer's penalties cannot be eliminated based upon its present status and intentions of not continuing Employer's operations. Johnson has not renewed his contractor's license for 2013, which allows Employer to hire employees to provide labor; however, Employer has not dissolved the company with California Secretary of State, which would show a clear dissolution of the business.

To substantiate a claim of financial hardship Employer presented documentation showing outstanding debt of \$257,124 to its creditors. In addition Employer also owes the California Employment Development Department (EDD) \$175,316 in outstanding payroll taxes and penalties dating back from September 2011 through December 31, 2012. Employer's unpaid bills list various creditors without explanation of the purpose of the outstanding debt.

Employer's Collections Report, generated December 2, 2013, showed Employer is owed \$77,026 by its customers. (See Exhibit H). Employer has sent letters and outstanding invoices demanding payment to its customers, and reported nonresponsive customers to a collection's agency (See Exhibit I). In reviewing Employer's 2011 and 2012 tax returns, Employer's 2011 Federal tax return showed income of \$12,482,615, a net loss of \$167,666 without any taxes owed; while the 2012 Federal tax return indicated income at \$15,174,748 with taxable income of \$167,666 and \$6,266 taxes owed<sup>6</sup>. Correspondingly, the 2011 Profit and Loss (P&L) showed a net loss of income of \$174,931, while the P&L for 2012 showed net income of \$23,574.

Employer asserted in its brief that as of the date of its submission of the documentary evidence in this matter, Employer's only remaining assets are two older vehicles, the combined value of which is approximately \$2,000. Employer has approximately \$30,000 remaining in its operating budget, all of which will be exhausted to pay outstanding payroll taxes and to satisfy the Employer's other financial obligations. Johnson projected that the business would be entirely non-operational by the end of 2013 based upon Employer's debts exceeding its current assets and expected income, which may cause Employer to file bankruptcy.

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 evidence<sup>7</sup> on all issues pertaining to financial

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<sup>6</sup> See Exhibit F – As of November 11, 2013, Employer received a notice from the Internal Revenue Service \$6,755 for the tax period ending December 31, 2012, of its intent to seize Employer's property or rights to property to the amount owed.

<sup>7</sup> 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

hardship. Here, the evidence Employer submitted is insufficient to establish financial hardship conditions required for a reduction of penalties. Employer failed to show the salaries of its officers in its P&L statements. Furthermore, Employer did not show whether and how many employees remained on its payroll. Other than the \$257,124 debt owed to creditors and outstanding accounts receivable of \$77,026, there is no indication of what caused Employer's financial operating issues and caused Employer to suspend operation of the business. Employer did not provide a P&L for 2013, which might more clearly show Employer's present financial status. Nor did Employer show bank account balances or the loss of clients to generate future income. Thus, Employer has not met its burden of establishing financial hardship sufficient to justify further reduction of penalties proposed by the Division in its stipulated settlement (See Stipulations and Pre-Hearing Determinations, *supra*).

For all the foregoing, Employer's plea of financial hardship must be DENIED. Nothing herein shall be construed to prevent Employer from arranging an installment payment plan with Department of Industrial Relations' accounting.

**Conclusion:**

Therefore, the Employer's appeal is denied. Citation 1, Item 1, and Citations 2 through 7 are affirmed, and the penalties proposed are assessed.

Dated: March 3, 2014

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**CLARA HILL-WILLIAMS**  
Administrative Law Judge

CHW:ao

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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.



## SUMMARY TABLE DECISION

*In the Matter of the Appeal of:*

**AGPRIME CORP  
DOCKETS 12-R2D5-0156 through 0162**

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

IMIS No. 315070292
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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
12-R2D5-0156	1	1	14300.29(a)	Reg	Citation remains as issued	X		\$450	\$450	<b>\$450</b>
	1	2	3439(b)	G	DOSH withdrew citation based upon evidence presented by ER.		X	\$225	\$0	<b>\$0</b>
12-R2D5-0157	2	1	3395(c)	S	Citation remains as issued	X		\$10,125	\$10,125	<b>\$10,125</b>
12-R2D5-0158	3	1	3395(d)	S	Citation remains as issued	X		\$10,125	\$10,125	<b>\$10,125</b>
12-R2D5-0159	4	1	3395(f)	S	Citation remains as issued	X		\$10,125	\$10,125	<b>\$10,125</b>
12-R2D5-0160	5	1	3395(f)(2)	S	Citation remains as issued	X		\$10,125	\$10,125	<b>\$10,125</b>
12-R2D5-0161	6	1	3203(a)	S	DOSH applied 336(k) same hazard as Cit. 7.1	X		\$10,125	\$0	<b>\$0</b>
12-R2D5-0162	7	1	3395(c)	S	Citation remains as issued	X		\$10,125	\$10,125	<b>\$10,125</b>
<b>Sub-Total</b>								\$61,425	\$51,075	<b>\$51,075</b>
<b>Total Amount Due*</b>										<b>\$51,075</b>

(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.

**ALJ:CHW  
POS: 03/03/2014**

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD  
AGPRIME CORP  
Dockets 12-R2D5-0156/0162**

**DATES OF HEARING: November 7 – 8, 2013**

**DIVISION'S EXHIBITS – Admitted**

None

**EMPLOYER'S EXHIBITS- Admitted**

<b><u>Exhibit Letter</u></b>	<b><u>Exhibit Description</u></b>
A.	Business Entity Detail, dated December 9, 2013
B.	Emails regarding stipulated settlement terms and ALJ Hill-Williams' approval and brief scheduling.
C.	Creditor Letter IAT Specialty, Dated November 13, 2013
D.	Division of Labor Standards Enforcement \$6,500 assessed Dated April 12, 2013
E.	Employment Development Department, State of California Employment tax, penalties assessed, Issued February 15, 2013
F.	NOTICE of intent to levy – "Intent to seize your property or rights to property –Amount due immediately \$6,755.96
G.	Unpaid Bills Detail as of December 8, 2013
H.	Collections Report as of December 2, 2013
I.	Agprime Corp letter to client regarding "Outstanding Invoices, dated November 31, 2013
J.	Profit & Loss, January through December 2011 and 2012
K.	Agprime Corp U.S. Corporation Income Tax Returns 2012 And 2011

**Witnesses Testifying at Hearing**

Pursuant to the parties' stipulation, *supra*, the matter was submitted solely upon the documentary evidence.

**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.

Dated: March 3, 2014

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Clara Hill-Williams  
Administrative Law Judge