

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

In the Matter of the Appeal of:

REGINO AMILCAR RODRIGUEZ

1241 West 47th Street
Los Angeles, CA 90037

Employer

**DOCKETS 14-R4D3-1423
Through 1425**

DECISION

Statement of the Case

Regino Amilcar Rodriguez (Employer) has operated a plumbing business for approximately ten years. Beginning on October 31, 2013, Maurice Fernandez (Fernandez), Associate Safety Engineer with the Division of Occupational Health and Safety (the Division), conducted an investigation at 2237 North Laurel Way, Upland, California. On March 20, 2015, the Division cited Employer for the following violations¹: Citation 1, Item 1, failure to obtain a permit to conduct excavations; Citation 1, Item 2 failure to have a written Injury and Illness Prevention Program; Citation 1, Item 3, failure to have a Code of Safe Practices posted; Citation 1, Item 4, failure to train its employees in the heat illness prevention designated topics; Citation 1, Item 5, failure to have a written heat illness prevention plan; Citation 2, failure to designate someone to inspect excavations for cave-ins; and Citation 3, failure to protect each employee in the excavation from cave-ins by an adequate protective system.

Employer filed a timely appeal contesting the reasonableness of all proposed penalties and made a plea for financial hardship.

The matter was heard on December 18, 2014 at West Covina, California, before Clara Hill-Williams, Administrative Law Judge (ALJ) for California Occupational Safety and Health Appeals Board. Regino Amilcar Rodriguez (Rodriguez) represented Employer. Fernandez represented the Division. The Employer submitted documents in support of its plea of financial hardship. The matter was submitted on December 18, 2014 and submission date was extended by Order to July 8, 2015.

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

At the September 22, 2014 Prehearing Conference, ALJ Hill-Williams issued a Prehearing Order² wherein: Employer withdrew its appeal to Citation 1, Items 1, 2, 3, 4, and 5, and Citations 2 and 3. The Division reduced the proposed penalties from \$7,570 to \$3,425³ Employer reserved a plea of financial hardship regarding the reduced penalty of \$3,425 to be heard at the hearing herein. The parties reached a partial stipulated settlement⁴ based upon additional evidence presented by the Employer as follows:

1. The Division gave maximum Good Faith credit for all citations.
2. Citation 2 was reclassified from Serious to General based upon lack of a realistic possibility of serious physical harm.
3. The Division reduced the Likelihood for Citation 3 to low.

Issues

1. Does Employer's financial condition warrant further penalty reduction and/or application of a payment plan?

Findings of Fact

1. Regino and Ericka Rodriguez U.S. Individual Income Tax Returns were filed jointly as husband and wife⁵ for 2011. Ericka's wages totaled \$21,340. Regino's income from plumbing work totaled \$1,880. Their gross income totaled \$22,659. (Exhibit A).

² See Prehearing Order, Issued on October 14, 2014. See Attachment A.

³ At the Hearing the Prehearing Order issued on October 14, 2014 was amended on the record to correct the reduced penalty from \$3,225 to \$3,425. See Attachment B.

⁴The 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.

⁵ Erika's wages combined with Regino's business income is the joint income as reflected as husband and wife's individual Income tax (Exhibits A, B and C). Regino's business income or loss adds or reduces the couple's total tax liability.

2. Regino and Ericka Rodriguez U.S. Individual Income Tax Returns were filed jointly as husband and wife for 2012. Ericka's wages totaled \$28,155. Regino's income from plumbing work totaled \$1,354. Their gross income totaled \$29,967 (Exhibit B).
3. Regino and Ericka Rodriguez U.S. Individual Income Tax Returns were filed jointly as husband and wife for 2013. Ericka's wages totaled \$29,878. Regino's income from plumbing totaled \$1,509. Their gross income totaled \$31, 387 (Exhibit C).
4. The Home Depot "Account Statement" submitted for the month of October 2013 had two entries for plumbing supplies totaling \$50.97 (Exhibit D).
5. Employer expected to earn \$4,500 with a net profit of \$2,000 from the excavation project at the work site.
6. October 31, 2013, was the first time Employer had ever engaged in excavation work.
7. Employer hires day laborers on an as needed basis.
8. Employer does not have any outstanding expenses for the business.
9. Employer can make \$100 monthly payments toward penalties owed.

Analysis

1. Does Employer's financial condition warrant further penalty reduction and/or application of a payment plan?

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, above).

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 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, Regino, Employer's owner testified that the business started having financial hardship three years prior to the issuance of the citation. Regino attributed the financial hardship to the competitive environment of the plumbing business. Normally Regino worked alone but the day Employer was cited the work site's property owner suggested that he get some help, so Regino hired day laborers to assist him at the work site. Employer expected to earn \$4,500 with a net profit of \$2,000 from the excavation project at the work site. Generally Employer's income was based upon cleaning drains. Employer's fee was \$75 to clean drains but recently due to the competition, plumbers can only charge \$40 to clean drains. From December through March business is usually profitable, but in the past week he only worked two days and earned \$200. During the summer there is hardly any work at all.

At the hearing Regino submitted Federal Income tax returns for 2011, 2012 and 2013, which included the following: the wages of Erica, Regino's wife totaled \$21,340. Regino's income from plumbing work totaled \$1,880 with a total gross income of \$22,659 for 2011 (Exhibit A); in 2012 Ericka's wages totaled \$28,155. Regino's income from plumbing work totaled \$1,354 with a total gross income of \$29,967 (Exhibit B); and for 2013, Ericka's wages totaled \$29,878. Regino's income from plumbing totaled \$1,509 with a total gross income of \$31, 387 (Exhibit C).

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.*, *supra.*) 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 the competition in the plumbing industry with the prices driven down from \$75 to \$40 per drain cleaning projects. Further, Employer does not appear to have any outstanding business debt from the operation of the business other than \$50.97 for plumbing supplies from Home Depot. Employer does not have any regular employees and has relied upon the work of day laborers. The Division's inspection at the work site

and the resulting citations for unsafe excavation demonstrates that Employer did 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. Here, in applying the Board's holding, as discussed in *Maria De Los Angeles Colunga, supra*, the Board is concerned with worker safety. Employer failed to demonstrate safety concern for the day laborers he hired. Employer did not have any previous excavation experience and appeared to be motivated by the amount of profit for accepting the excavation assignment.

Employer failed to provide evidence sufficient to warrant a reduction in penalties based on a claim of financial hardship. Therefore, the civil penalties are affirmed in their reduced amount of \$3,425 reached by the parties' stipulation above.

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 36 months.

The total assessed penalties of \$3,425 may be paid in 36 monthly installments, with the first installment of \$100 due on September 1, 2015 and \$95 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

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.

Citation 1, Items 1 through 5 and Citation 2 and 3 are affirmed as indicated in the Stipulation of the parties above.

Order

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 penalties are assessed in the amount of \$3,425 as set forth in the attached "Amended" Pre-Hearing Order (Attachment B) and Summary Table and will be paid in 36 installments as indicated above. The penalty indicated above and as set forth in the attached Summary Table is assessed.

IT IS SO ORDERED.

Dated: August 6, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

REGINO AMILCAR RODRIGUEZ
Dockets 14-R4D3-1423-1425

DATE OF HEARING: December 18, 2014

DIVISION'S EXHIBITS – Admitted

- 1 Jurisdictional documents

EMPLOYER'S EXHIBITS- Admitted

Exhibit Letter

Exhibit Description

A	1040 U.S. Individual Income Tax Return 2011
B	1040 U.S. Individual Income Tax Return 2012
C	1040 U.S. Individual Income Tax Return 2013
D	Home Depo Account Statement, December 2014

Witness Testifying at Hearing

1. Regino Amilcar Rodriguez

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:

**REGINO AMILCAR RODRIGUEZ
DOCKET 14-R4D3-1423/1425**

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

IMIS No. 316671627

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
14-R4D3-1423	1	1	341(c)(2)(A)	Reg	ALJ affirmed parties stipulation and denied financial hardship			\$435	\$250	\$250
		2	1509(a)	G	"			\$85	\$50	\$50
		3	1509(c)	G	"			\$85	\$50	\$50
		4	3395(f)(1)	G	"			\$130	\$75	\$75
		5	3395(f)(3)	G	"			\$85	\$50	\$50
14-R4D3-1424	2	1	1541(k)(1)	S	"			\$2,700	\$250	\$250
14-R4D3-1425	3	1	1541.1(a)(1)	S	"			\$4,050	\$2,700	\$2,700

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL AND REASON	AF FIRMED	VA CATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	FINAL PENALTY ASSESSED BY BOARD
								\$7,570	\$3,425	\$3,425
					Sub-Total			\$7,570	\$3,425	\$3,425
					Total Amount Due*			\$7,570	\$3,425	\$3,425
										**\$3,425

NOTE: Please do not send payments to the Appeals Board.
All penalty payments must 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 \$3,425 may be paid in 36 monthly installments, with the first installment of \$100 due on September 1, 2015 and \$95 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: 08/06/2015**

