

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

In the Matter of the Appeal of:

**ABEL GARCIA DBA ABEL & BROTHERS
CUSTOM IRON WORKS**

Employer

Inspection No.

1055209

DECISION

Statement of the Case

Abel Garcia dba Abel & Brothers Custom Iron Works (Employer) designs and manufactures custom metal products such as iron gates and fencing. Beginning March 25, 2015, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Vicky Albano, conducted an inspection at a place of employment maintained by Employer 1405 Descanso Avenue, San Marcos, California (the site). On May 20, 2015, the Division cited Employer for six violations of California Code of Regulations, title 8.¹

Employer filed a timely appeal contesting the existence of the alleged violations, the classifications, the abatement requirements and the reasonableness of the proposed penalties. Prior to hearing, however, Employer stipulated to withdraw all of its grounds for appeal, reserving only a plea of financial hardship. The parties also stipulated to lower penalties for all appealed citations and items, and stipulated to a payment plan. The terms of the parties' settlement are more fully described below. (See Exhibit 1.)

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on September 1, 2016. Abel Garcia, Owner, represented Employer². Zohra Ali, District Manager, represented the Division. The matter was submitted on September 1, 2016.

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8. Citation 1, item 1 alleged that Employer failed to post operating permits on or near air tanks that were in use. Citation 1, item 2 alleged that Employer failed to develop, implement or maintain an effective Injury and Illness Prevention Plan (IIPP). Citation 1, item 3 alleged that Employer failed to guard unused circuit breaker openings. Citation 2 alleged that Employer failed to guard a foot-operated device to prevent unintended operation where such operation presented a hazard. Citation 3 alleged that Employer failed to guard an air hammer or press (a machine not specifically covered in Group 8) at its point of operation. Citation 4 alleged that Employer failed to provide a hood to guard two circular metal-cutting saws to at least the depth of the teeth.

² At hearing, Abel Garcia was assisted by, and testified through, certified court interpreter Patricia Portillo, certification number 301379. Ms. Portillo was deemed competent by the undersigned based on her credentials.

Issue

1. Does Employer warrant penalty relief based on financial hardship?

Findings of Fact³

1. Employer violated the safety orders identified in Citation 1, items 1 through 3, Citation 2, Citation 3, and Citation 4.
2. Citations 1, items 1 through 3, Citation 2, Citation 3 and Citation 4 were all correctly classified by the Division.
3. It is feasible for Employer to abate the cited violations, nor was the time proscribed by the Citations for abatement unreasonable.
4. The proposed penalty for Citation 1, item 1 is properly assessed at \$100. The proposed penalty for Citation 1, item 2 is properly assessed at \$110. The proposed penalty for Citation 1, item 3 is properly assessed at \$75. The proposed penalty for Citation 2 is properly assessed at \$4,050. The proposed penalty for Citation 3 is properly assessed at \$4,050. The proposed penalty for Citation 4 is properly assessed at \$4,050.
5. Employer has abated the violations alleged in the citations, and further penalty relief would not directly benefit employee safety at the site.
6. A 60 month payment plan will help ensure that Employer can make full payment of the penalties assessed by the Division, while also permitting Employer to continue to make payment to obligees such as vendors and employees, and to implement a safer working environment at the site. Employer shall make an initial payment of \$635, and thereafter shall make payments of \$200, payable every thirty days, until the total amount of \$12,435 is paid in full. Employer waives the statute of limitations for collection of penalties in exchange for the payment plan.

Analysis

1. Does Employer warrant penalty relief based on financial hardship?

Prior to hearing, Employer settled with the Division and withdrew all grounds for appeal except for financial hardship. The Appeals Board most recently addressed financial hardship in *Maria de Los Angeles Colunga dba Merced Farm Labor*, Cal/OSHA App. 08-3093-3098, Decision After Reconsideration (Feb. 26, 2015). There, the Appeals Board held that the employer was not entitled to financial hardship relief, despite a showing of financial distress, inability to obtain gainful employment, and family health issues, because the employer failed to prove that a reduction in civil penalties would further the purposes of the Occupational Safety and Health Act. The Appeals Board stated:

Penalty relief is not warranted merely because Employer lost her business due to failure to comply with the Act, and suffered concomitant financial hardship. A reduction in penalties under such circumstances does nothing to protect employees or to make workplaces safer.

³ Findings 1 through 4 are stipulations of the parties. Findings 5 and 6 result from the evidence at hearing.

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.” (Citations omitted.)
[. . .]

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. (Emphasis added.)

Here, Employer offered numerous documents to establish his business financial condition. (Exhibits A through K.) Witness Iris Cortez (Cortez) credibly testifies that Employer currently employs four employees, including herself and Abel Garcia. Exhibit A shows that Employer spends \$710.78 per week on salaries for two of those four employees. Employer has been assessed penalties in the amount of \$117,528.82 by the State of California, Division of Labor Standards Enforcement (DLSE). (Exhibit C.) Employer is currently attempting to obtain a payment plan from DLSE to pay the aforementioned penalties. Employer’s business has various expenses including rent of \$5,070 per month (Exhibit E) and recurring vendor expenses (Exhibit G) and other miscellaneous expenses (Exhibit K).

Abel Garcia (Garcia) testified that he reported approximately \$140,000 in income to the IRS for tax year 2014 and expects to report roughly the same amount for 2015. Garcia testified that his business is his sole source of income, which he uses to pay his home mortgage and to support his four children (including Cortez), his wife and his four grandchildren.

During the hearing, neither Cortez nor Garcia testified as to how further penalty relief would benefit worker safety. The Appeals Board has made it clear that financial hardship relief shall only be granted where there is such a showing. Here, it appears from the record that Employer has abated all of the violations cited by the Division. It appears to the undersigned based on the record that Employer’s financial hardship plea is premised out of fear of not being able to pay penalties to the Division as well as to DLSE. The total amount of the penalties assessed by both the Division and DLSE is so high that, without further relief or generous payment plans, Employer could be put out of business.

Given the circumstances of this case, and consistent with the Appeals Board’s decisional law, the undersigned is unable to further reduce the penalties assessed by the Division beyond what the parties previously agreed to as part of their settlement. The undersigned, however, does retain jurisdiction to assess a reasonable payment plan, in order to ensure that Employer has the means and the time needed to make full payment of the agreed penalty amount to the Division. (See *Maria de Los Angeles Colunga dba Merced Farm Labor*, Cal/OSHA App. 08-3093-3098, supra [Noting that This decision does not affect the ALJ’s order allowing installment payments.”].) Cortez and Garcia both credibly testified that Employer could pay the full agreed-to amount if allowed to do so in payments of up to \$200 per month. Garcia further testified credibly that Employer could afford a balloon payment of up to \$700. In order to further the

intent of the Occupational Safety and Health Act, as well as the parties' prehearing settlement, the undersigned finds that a 60 month payment plan is justified. Employer will make a first payment of \$635, followed by monthly payments of \$200 per month each month until the full amount of \$12,435 is paid in full.

Conclusions

Employer's plea of financial hardship is granted in part, and is denied in part. Employer failed to demonstrate that further penalty reductions would further the purposes of the Occupational Safety and Health Act. Employer, however, did demonstrate financial hardship warranting relief in the form of a 60-month payment plan.

Orders

It is hereby ordered that the citations are established and the penalties are assessed as indicated above and as set forth in the attached Summary Table. Total penalties are assessed in the amount of \$12,435, payable in 60 installments as indicated above, and as set forth in the attached Summary Table.

Dated: 10/11/2016



Howard I. Chernin
Administrative Law Judge

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

Inspection No.: **1055209**

Employer: **ABEL GARCIA DBA ABEL & BROTHERS CUSTOM IRON WORKS**

Date of hearing(s): September 1, 2016

DIVISION'S EXHIBITS

| Exhibit Number | Exhibit Description | Status |
|----------------|--------------------------|------------------------|
| 1 | Jurisdictional Documents | Admitted Into Evidence |

EMPLOYER'S EXHIBITS

| Exhibit Letter | Exhibit Description | Status |
|----------------|--|------------------------|
| A | Monthly Payroll Records dated 8/26/16 | Admitted Into Evidence |
| B | Quarterly Statement from State Board of Equalization, for period 4/1/16 to 6/30/16 | Admitted Into Evidence |
| C | Page 23 of Order dated 12/15/15 re DLSE Penalty Assessments | Admitted Into Evidence |
| D | Wells Fargo Business Card Visa Statement dated 8/23/16 | Admitted Into Evidence |
| E | Tenant Ledger re Unit 1405, dated 8/31/16 | Admitted Into Evidence |
| F | State of California FTB Notice of State Income Tax Due, dated 8/8/16 | Admitted Into Evidence |
| G | Invoice from Cardinal Paint and Powder, dated 6/16/16 | Admitted Into Evidence |
| H | Invoice from State Compensation Insurance Fund, for 7/15/16 through 8/15/16 | Admitted Into Evidence |
| I | Mortgage Account Statement dated 8/18/16 | Admitted Into Evidence |
| J | Invoice from Los Alamitos Supply, Inc., dated 6/16/16 | Admitted Into Evidence |
| K | Invoices (Various) (6 pages) | Admitted Into Evidence |

Witnesses testifying at hearing:

Iris Cortez
Abel Piedras Garcia

Employer's adult daughter
Employer

**APPENDIX A
CERTIFICATION OF HEARING RECORD**

Inspection No.: **1055209**

Employer: **ABEL GARCIA DBA ABEL & BROTHERS CUSTOM IRON WORKS**

I, Howard I. Chernin, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.



Howard I. Chernin
Administrative Law Judge

10/11/2016

Date

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

| | |
|---|----------------------------------|
| In the Matter of the Appeal of: ABEL GARCIA DBA ABEL & BROTHERS CUSTOM IRON WORKS | Inspection No. 1055209 |
|---|----------------------------------|

Citation Issuance Date: **May 20, 2015**

| C I T A T I O N | I T E M | SECTION | T Y P E | CITATION/ITEM RESOLUTION | A F F I R M E D | V A C A T E D | PENALTY PROPOSED BY DOSH IN CITATION | FINAL PENALTY ASSESSED |
|--------------------------------------|------------------|-------------|------------------|------------------------------------|--------------------------------------|---------------------------------|---|------------------------------|
| 1 | 1 | 461 (c) | Reg | Affirmed as set forth in Decision. | A | | \$175.00 | \$100.00 |
| 1 | 2 | 3203 (a) | G | Affirmed as set forth in Decision. | A | | \$195.00 | \$110.00 |
| 1 | 3 | 2340.12 (a) | G | Affirmed as set forth in Decision. | A | | \$130.00 | \$75.00 |
| 2 | 1 | 4185 | S | Affirmed as set forth in Decision. | A | | \$6,750.00 | \$4,050.00 |
| 3 | 1 | 4184 (b) | S | Affirmed as set forth in Decision. | A | | \$6,750.00 | \$4,050.00 |
| 4 | 1 | 4231 (a) | S | Affirmed as set forth in Decision. | A | | \$10,800.00 | \$4,050.00 |
| Sub-Total | | | | | | | \$24,800.00 | \$12,435.00 |

Total Amount Due* **\$12,435.00**

PAYMENT PLAN

The total penalty is **\$12,435.00**. The first installment of **\$635.00** is due on **12/01/2016** and the remaining **59** installment payments of **\$200.00** are due every thirty days thereafter. Failure to make an installment when due shall cause the remaining balance to become payable *immediately* without further order.

**You may 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.*

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:
Department of Industrial Relations
2. Write the **Inspection No.** on your payment
3. Mail payment to:
 Department of Industrial Relations (Accounting)
 Cashier Accounting Office
 P.O. Box 420603
 San Francisco CA 94142-0603

Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

-DO NOT send payments to the California Occupational Safety and Health Appeals Board-

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| <i>Abbreviation Key:</i> | | | |
| G=General | Reg=Regulatory | Er=Employer | R=Repeat |
| S=Serious | W=Willful | Ee=Employee | A/R=Accident Related |