

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

In the Matter of the Appeal of:

THE BUMPER SHOP, INC.  
828 East Florence Avenue  
Los Angeles, CA 90001

Employer

Docket No. 98-R6D2-3466

**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 granted the petition for reconsideration<sup>1</sup> filed in the above-entitled matter by The Bumper Shop, Inc. (Employer) makes the following decision after reconsideration.

**JURISDICTION**

From February 22, 1995 through June 15, 1995, Kim Knudsen, Associate Industrial Hygienist for the Division of Occupational Safety and Health (the Division) conducted a high hazard inspection at a place of employment maintained by Employer at 828 East Florence Avenue, Los Angeles, California (the site).

On June 15, 1995, the Division cited Employer for serious violations of sections 3480(a) [Citation No. 3; hazardous substance containers], and 5096(b) [Citation No. 4; excessive sound levels] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>2</sup> Employer filed a timely appeal and the matter was settled by written order issued September 25, 1997.

The case before the Board is based on a re-inspection of the site by Knudsen on May 22, 1998. Pursuant to that inspection, Knudson issued on September 15, 1998, a Notification of Failure to Abate Citation Nos. 3 and 4, and proposed additional penalties of \$35,435 and \$98,435, respectively.

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<sup>1</sup> The caption of the Order Granting Petition for Reconsideration erroneously refers to Docket Nos. 98-R6D2-3465 and 3466. Because only Docket No. 98-R6D2-3466 is before the Board on reconsideration, the Board hereby amends the caption of the Order Granting Petition for Reconsideration to read Docket No. 98-R6D2-3466.

<sup>2</sup> Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

Employer filed a timely appeal from the Notification of Failure to Abate, contesting the proposed additional penalty for Citation No. 3 and the existence of the safety order violation for Citation No. 4. Employer expanded its appeal at the hearing to include a contest to the penalty arising from Citation No. 4.

A hearing was held and on June 1, 1999, an administrative law judge of the Board (ALJ) issued a decision finding that the alleged violations had been established. The ALJ assessed a civil penalty of \$35,435 for Citation No. 3 and a civil penalty of \$18,000 for Citation No. 4. Employer filed a petition for reconsideration on July 6, 1999. The Division filed an answer to the petition on July 29, 1999. The Board granted Employer's petition on August 10, 1999.

**Notification of Failure to Abate Alleged Violation  
and of Additional Civil Penalty**

**Citation No. 3, Serious § 3480(a)**

**EVIDENCE**

Knudsen testified that she issued the Notification of Failure to Abate when her re-inspection on May 22, 1998, revealed that the three instances of the violation identified in Citation No. 3 had not been entirely abated. At both inspections, Employer's employees routinely accessed three 31" high tanks in the plating area that contained nickel, a hazardous substance that could cause serious physical harm on contact. Because the tank was less than 36" high and there was no guard on top, she issued Citation No. 3 for a serious violation of section 3480(a) after the first inspection. Barry Burgess, Associate Safety Engineer for the Division, testified that he was present at the first inspection and took measurements of the tanks.

At the time of the re-inspection, the Division had not received a Form 161<sup>3</sup> from Employer, and the violation concerning the third tank had not been abated, so Knudsen issued a Notification of Failure to Abate Citation No. 3.

Employer called Lillian Gaitan, Office Manager, who testified that she was the owner's daughter. She was familiar with the tanks and abated the violations on the other two tanks that were out of compliance. She walks through the shop on a regular basis. The tanks are hot. Employees put the bumpers on a hook before they are dunked in the tank. Employees are in a comfortable position and do not have to lean over. The board around the perimeter of the tank keeps the employees away. Their arms are the only body part that might go over the edge of the tank. Employer has been in business 30 to 35 years, and no one had ever fallen into a tank.

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<sup>3</sup> A Form 161 is a signed statement of abatement.

Gaitan testified that Employer wants to comply with the safety order and do everything required. They have made every possible correction. The reason that the third tank had not been corrected by the second inspection is that Employer was waiting for the floor beneath the tank to be raised. Her brother was working on it. The corrections were made within a week of the second inspection.

During closing argument, Employer argued that payment of the proposed penalty would subject it to financial hardship. The record was held open for Employer to submit financial statements. The statements and proof of service on the Division were received and admitted into the record. The statements were for the five months ending February 28, 1999. Employer had a year-to-date loss of \$20,362.89, reflecting gross income of \$574,040.42, a gross profit of \$280,820.58, operating expenses of \$295,282.79, and a lawsuit settlement of \$5,105.00. Cash balances were a negative \$1,278.58. Cash flow was being provided primarily by deferring payment on its current liabilities. It had accounts payable of \$104,878.28. Uncollected accounts receivable were \$123,588.04. Payroll taxes payable were \$27,089.03. Employer had notes payable of \$231,107.87. Depreciation taken was \$1,368,189.83.

The Division objected to any reduction of the proposed penalties.

### **ISSUE**

Has Employer established sufficient facts to qualify for penalty reductions due to financial hardship?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

Employer asks for a reduction of the penalty assessed by the ALJ for the notification of failure to abate alleged violation and of additional civil penalty asserting that it would like to “present new evidence of the employer’s worsening financial condition that initially was not seen or understood by the administrative law judge.”

Employer further alleges that:

A review of the financial records of the employer presented to the administrative law judge by their accountant does not fully show the difficult financial position that the company is now faced. We find that the accountant failed to include the amount owing the Division from prior citations and hearing results from the 1995 inspection by Cal/OSHA. The amount of fines still owed to Cal/OSHA exceeds \$20,000.00 and only recently has the employer made payments toward this outstanding balance which total near

\$2,500.00 over the last 6 months, and really have not been able to afford this amount. Unfortunately, the employer has not been able to make regular payments because of their present financial condition.

Employer concludes that:

It is clear to see that the employer is in serious financial trouble and to have an excessive fine imposed on them, may end up making things much worse for them to stay in business. We can understand that some penalty must be imposed, but whatever amount that may be would not likely be paid in a short period of time as you have seen that the money really is not there.

The Division argues that: "After three years following the initial inspection, Employer still had not abated all the violative conditions respective to the height of the plating tanks when Inspector Knudsen did a follow-up inspection. ..." and that, "[t]he amount of the assessed penalty is fair and reasonable, when its purpose is remedial in nature and consistent with the Division's policies and procedures, which is undisputed here."

The ultimate criteria for assessment of a penalty by the Appeals Board is imposition of a fair and equitable penalty that assures remedial elimination of a safety or health hazard by the cited employer, and encourages other employers to meet their obligation to maintain safe and healthful places of employment. (See *Tylan Corporation*, OSHAB 85-595, Decision After Reconsideration (Oct. 9, 1986).

In this case, as noted above, the Division proposed a reduced penalty *ab initio*. Knudsen calculated the proposed penalty, which is summarized as follows:

The \$5,000 base for severity was decreased 25% for low extent, then reduced 20% for size and 10% for history, giving an adjusted penalty of \$3,000. A 50% abatement credit was given initially, which was added back when she found in the second inspection that the violation had not been abated. The \$3,000 adjusted penalty was reduced \$900 to \$2,100 by applying a 30% adjustment factor for size. Under the regulations, the \$2,100 is multiplied by the number of days Employer failed to abate, but the Division's policy limits the maximum number of days to 45, resulting in a proposed penalty of \$94,500. The proposed penalty was further reduced to \$35,435.

The investigator appears to have used prosecutorial discretion in proposing the lesser penalty. We are unaware from the record that the investigator precisely followed any established authority in reducing the

requested penalty. The \$94,500 proposed penalty was reduced by approximately two-thirds by the investigator because only one of the three tanks was still out of compliance. Because the propriety of the amount of the investigator's penalty reduction is not properly before us, we will not address that issue now.

In the instant case, Employer asserts a financial hardship defense to apparently seek either a reduction or elimination of the assessed penalties. The Board recognizes that it is possible that the financial hardship defense may present a tension between competing considerations. On the one hand, the viability of an employer in jeopardy of continuing in business may be based upon unique circumstances that are not related to neglect of safety and health issues and do not evince a disregard for sound business practices. On the other hand, the Board recognizes its primary obligation to ensure achievement of express protective legislation, the objective of which is significantly achieved through penalty assessments.

In *Dye & Wash Technology*, OSHAB 00-2327, Denial of Petition for Reconsideration (July 11, 2001), we recently provided a framework for consideration of reduction and elimination of penalties for financial hardship. We stated that “[b]y asserting financial hardship, an employer seeks to be excepted from what the Appeals Board considers presumptively reasonable penalties calculated in accordance with the penalty setting regulation promulgated by the Director of Industrial Relations (§§ 333-336).” *Id.* We noted that any penalty reduction or elimination must take into account the deterrent purposes of the penalty assessed as a primary means of achieving the purpose of the Act. Because of the presumptive reasonableness of the penalties assessed in accordance with the Act, we will only *reduce* penalties assessed, and the Division should only propose reduction of penalties, if the amount is unreasonable under the criteria set forth in *Dye & Wash*.

We also held in *Dye & Wash* that: “Even if financial hardship is established, it will only act as an inducement to the reduction of penalties if an employer can establish that it has a long history of providing safe employment and a dedicated commitment to employee safety and health. If an employer can demonstrate that it cannot pay the proposed penalties without jeopardizing its ability to continue to operate, reduction of the proposed penalties may be warranted.”

In *Conard House*, OSHAB 95-931, Decision After Reconsideration (July 27, 1999) we reiterated the principle that financial hardship must be related to the penalties assessed. In *Conard House*, we further discussed *Tzeng Long, USA, Inc.*, OSHAB 91-300 Decision After Reconsideration (April 30, 1992). In *Tzeng Long*, the Board declined to reduce civil penalties on financial hardship grounds. The employer in *Tzeng Long* presented evidence that the size of the work force at the facility where the violation occurred had been reduced, and that the facility would eventually close. While in *Tzeng Long* the employer's

business had been declining, it continued to operate its other facility, and there was no evidence that the penalties were so severe that they could force the employer out of business. The Board declined to reduce the penalties because of the lack of evidence that the penalties themselves would force the employer out of business.

“Penalties may be eliminated for financial hardship only if an employer can show that the assessment of any penalty will force it out of business or ‘will create a substantial likelihood’ of doing that.” *Dye & Wash, supra*. The principles enunciated in *Dye & Wash* apply when penalty reductions are considered. In view of the significant role of penalty assessments in achieving the clear purposes of the Act, an employer with an on-going business must have addressed and corrected the health and safety violations which are the subject of the penalty. Any claimed financial hardship must be related, both in time and costs incurred, to correcting those violations. To allow otherwise would simply and impermissibly elevate financial hardship (which may be due to any number of economic influences and conditions) over the clear purposes of the Act.

In this instance, Employer fails to show that it has abated the violation, that is has a long history of providing safe employment or that it was suffering financial hardship at the time of the citations because of its efforts to be in compliance with state or federal occupational safety laws. For those reasons, relief from the penalties is denied.

**Notification of Failure to Abate Alleged Violation  
and of Additional Civil Penalty**

**Citation 4, Serious § 5096(a)**

**EVIDENCE**

Knudsen testified that she issued the Notification of Failure to Abate when her re-inspection revealed that the June 15, 1995, violative condition identified in Citation No. 4 had not changed and the Division had not received the Form 161 from Employer indicating that the violation had been abated. Employees were exposed to noise levels in the grinding and polishing area exceeding 90 decibels as recorded by sound level meters on February 22, 1995, and May 22, 1998. Citation No. 4, issued June 15, 1995, required Employer to reduce the noise level to below 90 decibels by using feasible engineering or administrative controls.

Engineering controls consist of sound-reducing structures or fixtures. Examples include sound-absorbing partition walls, baffles, movable curtains, or ceiling mats. Administrative controls normally consist of employee rotation, or some other method to limit the amount of time that employees are exposed to the excessive noise. On her re-inspection, Knudsen did not observe any

engineering controls, and Employer told her that they had not been tried. Employer told her that administrative controls were not feasible due to the nature of their business. Therefore, Knudsen issued a Notification of Failure to Abate Citation No. 4.

Knudsen explained her calculation of the \$98,435 proposed penalty. The \$5,000 base for severity was increased by \$1,250 based upon a high rating for likelihood, giving a gravity-based penalty of \$6,250. There was almost a guarantee of hearing loss at the noise levels to which employees were exposed. A 20% adjustment factor for size was applied, resulting in a base penalty of \$5,000. A 50% abatement credit was subtracted from the original proposed penalty, then added back, followed by application of a 30% credit for size. The result was multiplied by a failure to abate period limited to 45 days. The resulting sum was \$157,500. The Division used its discretion to reduce this penalty to the \$98,435 that appeared on the citation.

On cross-examination, Knudsen testified that Employer's representative Bob D'Amato told her that no engineering controls had been implemented. D'Amato questioned the feasibility of engineering controls, and she said that Employer could install sound-absorbing partitions. She brought up other items she thought were feasible, such as hanging baffles, but she recognized that she was not an acoustical engineer. Both the grinding and polishing work areas need sound-absorbing materials. The concrete floor caused sound to reverberate. The Division does not make recommendations regarding engineering controls, but can suggest options, as she did. The noise level in Employer's grinding area was 100 to 102 decibels as originally tested and 97 on re-inspection, based upon 8-hour time-weighted averages. Noise doubles with every 3 to 5 decibels.

Gaitan testified that Employer has taken noise abatement measures. It has made sure personal protective equipment (PPE) is worn by its employees, who have top of the line hearing protection. Employer provides audiograms every 6 months to its employees to protect against their hearing loss. Employees who refuse to wear their PPE are fired. So far, no employee has lost his or her hearing. Employer considered baffles, and consulted with various people. Over the Division's standing hearsay objection, she testified that the people said that baffles would not make much difference because the noise was generated by metal-to-metal contact. If sound-absorbing materials were placed on the walls everywhere, Employer would still have a high noise level. The workers' compensation representative said that partitions between the machines would increase the probability that a bumper would hit something and injure a worker. Her father told her that engineering controls on the walls would cost \$300,000 to \$400,000 that Employer does not have.

On cross-examination, Gaitan testified that Employer had put up temporary partitions made of cloth to reduce the noise level. Dirt got on them,

so they did not work out and were removed. Employer had not told the Division that engineering controls were not working.

D'Amato, a certified safety professional with 30 years experience, testified that use of hearing protection was not the only thing that Employer considered in order to reduce the noise levels. Employer considered and rejected the use of partitions, placing materials on the walls, and putting a room around each worker.

On cross-examination, D'Amato testified that placing materials on the walls was also cost prohibitive. Employer could have installed baffles, but Employer's consideration was that baffles would not reduce noise at the source.

### **ISSUE**

Has Employer established sufficient grounds to reverse the ALJ's decision?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

Employer's argument seems to center around its belief that it presented more believable evidence at the hearing before the ALJ and that its position should be respected. In a nutshell, Employer's representative contends:

As a certified safety professional (CSP), I presented into evidence my own personal findings that indicate that to add any means of engineering controls would be frivolous and a waste of time and money. However, neither my professional standing (CSP) or my 30 years of experience in the field, part of which I received in the area of hearing conservation compliance, was respected by the Division or the administrative law judge in this proceeding. This is somewhat understandable if the Board and judges are not familiar with the CSP designation. It is a professional designation established for the safety profession which is similar to the professional engineer (PE) designation. And as part of the designation process, representative must be familiar with the various elements of the OSHA requirements for hearing conservation and engineering principles relating to the establishment of a program, sound measurement, effects on the human ear, and all basic elements needed for the proper implementing, evaluation, and establishment of a hearing conservation program.

The Division contends that:

Employer failed to demonstrate at hearing that it had made appropriate efforts of reducing noise levels to employees through engineering controls. Employer produced no credible evidence that it attempted noise reduction through engineering controls before the use of personal protection equipment was utilized.

We have independently and exhaustively reviewed the ALJ's Findings and Reasons for Decision regarding Citation No. 4 and find no flaw in that analysis.

We have reviewed the evidence in consideration of Employer's assertion that its witnesses were more credible than the Division witnesses. We decline to overturn the ALJ's findings of witness credibility.

An ALJ's findings, based on witness credibility, are entitled to great weight because he or she was present during the taking of testimony and was able to directly observe and gauge the demeanor of the witnesses and weigh their statement in light of their manner on the stand. (*Garza v. Workmen's Compensation Appeals Board* (1970) 3 Cal.3d 312, 318; *Metro-Young Construction Company*, OSHAB 80-315, Decision After Reconsideration (April 23, 1981).)

In this case, Employer was cited under section 5096(b), which requires use of feasible administrative or engineering controls when employees are subjected to sound levels exceeding those listed in Table N-1. If those controls fail to reduce sound levels to levels within the table, Employer must provide personal protective equipment.

The evidence was undisputed that employees in Employer's polishing and grinding areas were exposed to noise levels above 90 decibels over an eight hour period, which was above the level listed in Table N-1 of section 5096(b). The parties agreed that administrative controls were not feasible, and at the time of the second inspection, there were no engineering controls in effect. Gaitan's unrefuted testimony that Employer provided its employees with effective PPE between the first and second inspections is credited.

Employer must exhaust the possibility of bringing noise levels into compliance through administrative or engineering controls. (*PDM Strocal, Inc.*, OSHAB 97-3436, Decision After Reconsideration (Nov. 18, 1998).) Knudsen's testimony that engineering controls were feasible was credited. Employer did not attempt to hang baffles or to put sound-absorbing materials on the walls. Gaitan and D'Amato testified that both of these engineering controls were technologically possible and would reduce the sound level. Employer believed that the noise level would not be reduced very much, but this is not relevant. To be feasible, engineering controls do not have to reduce the sound levels to the levels called for in the safety order. (*Western Can Company*, OSHAB 83-741, Decision After Reconsideration (Dec. 22, 1987).)

Employer contended that the high cost of placing the sound-reducing materials on the walls made the controls infeasible. The evidence, however, was insufficient to establish this affirmative defense. Employer has the burden of proof to establish economic infeasibility. (*Golden State Engineering, Inc.*, OSHAB 85-1231, Decision After Reconsideration (Sep. 21, 1987).) Here, Employer's estimates were speculative and not based on a substantial foundation. The testimony of the office manager was hearsay based upon hearsay statements of her father based upon his conversations with others. Since the Division objected to the hearsay statements, and they do not fall under a recognized exception, a finding may not be based upon them.

While D'Amato also testified to the great cost of installing materials on the walls, there was no evidence that he obtained estimates or was qualified to make estimates himself. Employer did not present any specific design and installation cost figures or other economic analyses of the operational impact resulting from noise control installation. Regardless, Employer did not allege that baffles were economically infeasible. Therefore, it is found that engineering controls were feasible. A preponderance of the evidence established that Employer failed to abate Citation No. 4.

Employer offers two additional reports in its petition for reconsideration to buttress its position. The evidence contained in those reports could have been produced at hearing had Employer been so inclined. Those reports were generated after the ALJ's decision and will not be considered here. See e.g. *Anastasi Construction Company, Inc.*, OSHAB 98-3669, Denial of Petition for Reconsideration (Aug. 11, 2000).

A review of the penalty calculation indicates that the proposed penalty is consistent with the regulations. The Division must calculate the proposed penalty in accordance with its internal regulations (*Gal Concrete Construction Co.*, OSHAB 89-317, Decision After Reconsideration (Sep. 27, 1990)).

In this case, since Employer made some attempt at abatement the ALJ found that reduction of the proposed penalty was appropriate. Since the propriety of the ALJ's reduction of penalties was not addressed by either party we will not address that issue here.

As discussed in the ALJ's decision Employer established that the penalty in this case, in addition to other penalties it had not paid, would cause Employer further financial strain. We have previously recognized that payment of penalties in installments may be appropriate under some circumstances. In this case the ALJ held that the penalty may be paid in installments in order to ease the financial burden. We will not disturb that order.

## **DECISION AFTER RECONSIDERATION**

**Notification of Failure to Abate Citation No. 3**

The Board affirms the ALJ's decision and the assessment of a \$35,435 civil penalty.

**Notification of Failure to Abate Citation No. 4**

The Board affirms the ALJ's decision and the assessment of an \$18,000 civil penalty.

MARCY V. SAUNDERS, Member

GERALD P. O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: September 27, 2001