

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

In the Matter of the Appeal of:

SMA OFFICE FURNITURE LAMINATED, INC.  
SMA OFFICE FURNITURE MFG, INC.  
9332 Holly Road  
Adelanto, CA 92301

Employer

Docket Nos. 00-R6D2-4113/14  
and 00-R6D2-4121

AND

00-R6D2-4115/16  
and 00-R6D2-4117/20

**CONSOLIDATED 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 the petition for reconsideration filed in the above entitled consolidated matter by SMA Office Furniture Laminated, Inc./SMA Office Furniture Mfg., Inc. (Employer) under submission, makes the following decision after reconsideration.

**JURISDICTION**

On May 9, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted a planned program inspection at a place of employment maintained by Employer at 9332 Holly Road, Adelanto, California (the site).

On November 1, 2000, the Division issued citations to Employer alleging five serious, 20 general, and two regulatory violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup> and proposed civil penalties totaling \$44,680.

Employer filed timely appeals contesting the reasonableness of both the abatement requirements and the proposed civil penalties.

On August 30, 2001, a hearing was held before Dale Raymond, Administrative Law Judge (ALJ), in San Bernardino, California. Rolando Ramirez, Jr., Accountant, represented Employer. Phil F. Valenti, Regional Senior Engineer, represented the Division.

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

On October 10, 2001, the ALJ issued a decision denying Employer's appeals.

On November 14, 2001, Employer filed a petition for reconsideration. The Division filed an answer on December 18, 2001. The Board took Employer's petition under submission on December 28, 2001.

### **EVIDENCE**

At the hearing, Employer moved, without objection to limit the scope of its appeal to the reasonableness of the proposed penalties.

Employer stipulated that all violations existed and that the proposed penalties were calculated in accordance with the Division's policies and procedures which are based on the Director's penalty setting regulations.

After the hearing, the ALJ ruled that, "A claim of financial hardship justifying a penalty reduction was not established. The full amount of proposed penalties is assessed. Employer may pay the proposed penalties in installments."

### **ISSUE**

Has Employer established sufficient grounds to have penalties reduced because of financial hardship?

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

Employer contends in its petition for reconsideration that it should have the penalty assessed by the ALJ lowered because:

1. Based upon its year 2000 tax returns Employer barely broke even, and
2. Employer immediately abated all violations.

The Board disagrees that Employer is entitled to further penalty reduction in this case. As noted in *Dye & Wash Technology*, Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration (July 11, 2001) penalties calculated in accordance with the Director's regulations pursuant to Labor Code section 6319(c) are presumptively reasonable. Under those regulations, credits may be given for several factors including:

1. The size of the business of the employer being charged,
2. the gravity of the violation,
3. the good faith of the employer, including timely abatement, and

4. the history of previous violations.

Employer does not contend, nor is it found from an independent review of the record that the Division failed to produce evidence regarding the calculation of the penalties by the Division. As an independent quasi-judicial agency, the Appeals Board affords deference to the penalty calculations proposed by the Division made in accordance with the penalty regulations promulgated by the Director—with the proviso that the Division only proposes a penalty while the Appeals Board reviews the reasonableness of the proposed penalty *if contested* by the employer, and ultimately assesses the penalty pursuant to its authority under Labor Code section 6602.

In this case, Employer stipulated that all violations were established. Employer does not contend that the Division failed to prove the existence of the factors they considered in proposing the penalties. Rather, Employer seems to suggest, that based on the case of *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668, Decision After Reconsideration (Oct. 14, 1987), reduction of penalties by more than the abatement credit of 50% of the adjusted penalty under section 336(e) is warranted. To the extent that *Mladen Buntich Construction Co.* suggests that there may be a reduction in penalties beyond that recognized in the Director's regulations for merely abating existing violations, that holding is disapproved.

The Board does not find that Employer in this case did anything more than abate existing violations.

The Board also rejects Employer's claim that it should be entitled to further relief under concepts of financial hardship. The Board notes that there are two employers involved and further discusses them separately.

**Docket Nos. 00-R6D2-4113, 4114 and 4121**  
**SMA Office Furniture Laminated, Inc.**  
**(SMA Laminated)**

Here, SMA Laminated has shown that it is operating at a marginal profit. SMA Laminated had taxable income of \$1,896, \$3,384 and \$4,673 for the years 2000, 1999 and 1998 respectively while paying its shareholders \$4,800, \$24,025 and \$48,676 respectively. The Board notes that business earnings fluctuate and that a mere showing that profits may be down for a period of time does not equate to a showing that any penalty will force the company out of business.

Employer produced evidence that it spent \$7,500 in abatement costs. However, Employer has not demonstrated that its financial hardship, if any, is due to addressing those abatement expenditures. As the Board noted in *The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466 Decision After Reconsideration (Sept. 27, 2001) one of the factors to be considered is that “[a]ny claimed

financial hardship must be related, both in time and costs incurred, to correcting those violations.”<sup>2</sup> *Id.* at page 6.

**Docket Nos. 00-R6D2-4115, 4116 and 00-R6D2-4117 through 4120**  
**SMA Office Furniture Mfg., Inc.**  
**(SMA Manufacturing)**

The evidence supports the ALJ’s decision that SMA Manufacturing had sales of over \$1,000,000 in 1998, 1999 and 2000. Employer nearly broke even in 2000, if the non-cash depreciation expense is disregarded. It paid Mr. and Mrs. Agramonte wages of \$70,426 each for a total of \$140,852 in 2000 according to the W-2 forms. The Board notes that in his declaration for reconsideration, Salvador Agramonte states that he is “the owner of SMA Office Furniture Laminated, Inc., and SMA Office Furniture Mfg., Inc.” These facts do not establish that Employer suffers financial hardship within the meaning of prior Board decisions.

Employer indicated it might declare bankruptcy at some date in the future. The Board notes that business bankruptcies often result in a Chapter 11 filing with the debtor in possession and the business still in operation. Neither threats of bankruptcy in the future or a Chapter 11 bankruptcy filing satisfy the requirements for granting penalty relief based upon financial hardship.

The evidence admitted at the hearing did not establish that Employer is in jeopardy of going out of business because of the penalties imposed in this case. That is one of the elements for establishing a *prima facie* case for penalty relief enunciated by the Board in a number of cases. See *Specific Plating Co., Inc.*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997); *Dye and Wash Technology, supra*; *Bumper Shop, supra*; and *Eagle Environmental, Inc.*, Cal/OSHA App. 98-1640, Decision After Reconsideration (Oct. 19, 2001). As the Board observed in *Eagle Environmental, Inc., supra*, “financial hardship’ connote(s) an amorphous concept that is dependent upon the facts of the particular case.” *Id.* at page 5.

The facts Employer established in this case do not rise to the level of providing a sufficient basis for granting the requested relief.

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<sup>2</sup> We also find that Employer has not established any of the other criteria for granting penalty relief set forth in *Dye & Wash, The Bumper Shop, and Eagle Environmental.*

## **DECISION AFTER RECONSIDERATION**

The Board affirms the ALJ's decision and the assessment of civil penalties totaling \$44,680.

MARCY V. SAUNDERS, Member  
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: November 7, 2003