

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

In the Matter of the Appeal of:

**VAN EVERY CONSTRUCTION, INC.**  
277 Park View Terrace, #12  
Oakland, CA 94610

Employer

Dockets. 11-R1D4-0936 and 0937

**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 ordered reconsideration of the matter on its own motion, renders the following decision after reconsideration.

**JURISDICTION**

On October 25, 2010, the Division of Occupational Safety and Health (Division) commenced an accident inspection at a place of employment in Oakland, California maintained by Van Every Construction, Inc. (Employer). On March 17, 2011, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in Title 8 California Code of Regulations.<sup>1</sup>

Employer timely appealed both citations. Prior to the evidentiary hearing, Employer entered into a settlement agreement<sup>2</sup> whereby it withdrew its appeals of both citations in exchange for a reduction of the penalty amount for Citation 1 from \$1,200 to \$340. The settlement did not reduce the penalty for Citation 2, a serious violation, which remained at the originally proposed amount of \$13,500.

An evidentiary hearing was held on July 10, 2012, with the only issue being Employer's claim for financial hardship regarding Citation 2. In a Decision dated September 26, 2012, the ALJ ruled that Employer had established financial hardship and reduced the penalty for Citation 2 from \$13,500 to \$6,750. The ALJ also allowed for the total penalty (\$7,090) to be paid in 12 monthly installments.

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

<sup>2</sup> Citation 1 was a General violation for failing to train employees. Citation 2 was a Serious violation for failing to provide fall protection to two employees working on the roof.

On October 25, 2012, the Board ordered reconsideration of the Decision in order to verify whether Employer established financial hardship. The Division filed an Answer to the Board's Decision. Employer did not file an answer.

### **ISSUE**

Was the ALJ's grant of financial hardship relief correct given the evidence in the record?

### **EVIDENCE**

Donna Gianoullis (Gianoullis) and Brad Van Every (Van Every) are the owners of Van Every Construction. Gianoullis submitted the following documents in support of Employer's claim of financial hardship: profit and loss statements from 2009 to 2011; profit and loss sheet comparing first half of 2012 to first half of 2011; employee salaries from 2010 to 2012; Employer's checking account statements from January to May 2012; S-Corporation business income tax returns from 2009 to 2011; and W-2 wage statements from 2009 to 2011 showing the salaries paid to owners Gianoullis and Van Every.<sup>3</sup> (Exs. A-J.)

### **REASONS FOR DECISION AFTER RECONSIDERATION**

The Board has discretion to "reduce or eliminate a proposed penalty due to proven financial distress." (*Stockton Tri. Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The employer seeking reduction of a proposed penalty has the burden of establishing by a preponderance of the evidence that its financial condition is such as to warrant relief. (*Szemenyei Construction, Inc.*, Cal/OSHA App. 10-0008, Denial of Petition for Reconsideration (Mar. 4, 2011), citing *Stockton Tri, supra*; *Precision Designs*, Cal/OSHA App. 00-4164, Decision After Reconsideration (Nov. 13, 2003).) The financial condition of an employer is evaluated up to the time of the hearing, and not continually re-evaluated. (*NF Robbie Robinson dba Robinson's Remodeling, Repair & Home Inspection*, Cal/OSHA App. 09-1106, Denial of Petition for Reconsideration (Dec. 10, 2012) citing *Central Valley Contracting*, Cal/OSHA App. 05-2351, Decision After Reconsideration (Jun. 1, 2009).)

After an independent review of the record, we find that Employer has not established financial hardship. Employer had net business income of \$42,000 in 2009 and \$23,000 in 2011. (Ex. J.) These net incomes were realized after taking into account all salaries paid out by Employer, including combined salary draws of \$88,500 (2009) and \$80,000 (2011) that were paid out to owners Gianoullis and Van Every. Furthermore, Employer was able to realize these gains while deducting its 401k expenses, advertising and marketing fees, cell phone expenses, health insurance fees, dues and subscriptions, general office expenses, travel and entertainment expenses, and vehicle expenses. (Ex. J, profit and loss

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<sup>3</sup> Personal income tax returns were not provided.

statements.) Additionally, Employer's checking account statements from January to May 2012 (the most current statements before the July 2012 hearing) show healthy ending balances each month of \$16,108; \$16,039; \$23,907; \$3,786; and \$21,491, respectively. Funds deposited into Employer's checking account over this same time period average over \$30,000 per month, with the most recent account statement showing over \$44,000 deposited. (Exs. F, G, H, I, K.)

Although Employer's 2010 profit and loss statement shows a loss of \$79,000, that was also the year that Employer's owners chose to increase their combined salary from \$88,500 to \$105,000. (Ex. J, 2010 W-2.) Employer's profit and loss for 2010 also shows that Employer contributed to its employees and owners' 401k accounts, with such contributions continuing until at least May 2012. (Exs. C, D, E; Ex. J, 2010 P & L.) Employer also gave out bonuses in 2010. (Ex. C.) Furthermore, Employer had \$58,000 more in business income for 2010 versus 2009, which indicates that although it showed a loss, such loss was not necessarily due to a lack of work coming in. (Ex. J.) Finally, and perhaps most importantly, there is no evidence that Employer was placed in financial distress due to its 2010 loss. There is no evidence of any unpaid or late bills, nor is there any evidence of collections or liens filed against Employer. Additionally, Employer rebounded the following year by achieving a net profit of \$23,000, with the owners continuing to draw a salary while having the business contribute to their own and their employee's 401k accounts. (Exs. C, D, J.)

### **DECISION**

For the above reasons, we find that Employer has not established financial hardship. The Board reverses the decision of the ALJ dated September 26, 2012, to the extent that no financial relief will be accorded to Employer. Employer is to pay a penalty of \$340 for Citation 1, Item 1, and a penalty of \$13,500 for Citation 2, Item 1. The total penalty amount of \$13,840 can be paid over 12 monthly installments: an initial payment of \$1,157 is due on April 1, 2013, followed by 11 monthly payments of \$1,153, due on the first of each month thereafter. One late payment causes the entire remaining balance to be due in full immediately. (See attached revised summary table.)

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MARCH 5, 2013