

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

AYALAZ AG SERVICES
PO Box 684
Lemoore, CA 93245

Employer

DOCKETS 11-R2D5-1001
through 1003

DECISION

Introduction

Ayalaz Ag Services (Employer) is a farm labor contractor. On October 25, 2010, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ronald Chun, conducted a safety inspection at a place of employment maintained by Employer at 42095 25th Avenue, Kettleman City, California. On March 30, 2011, the Division cited Employer for violations of Title 8, California Code of Regulations, §3203(a)(4), failure to establish adequate inspection program to ensure safe operation of tractors, §3328(a), failure to ensure tractor not operated under conditions of speeds, stresses, or loads which endanger employees, and §3653(a), failure to ensure use of seatbelt assembly on tractor with rollover protection.¹

Employer filed timely appeals for Citation 1, Citation 2, and Citation 3, contesting the existence of the violation, the classification, the reasonableness of abatement requirements, and the reasonableness of the proposed penalty, on each citation.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Fresno, California on February 7, 2014. Alfredo Ayala represented Employer. Tuyet-Van Tran, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. The matter was submitted for decision on February 7, 2014. The submission date was extended to April 15, 2014, by the ALJ.

Stipulations and Pre-Hearing Determinations

At the hearing the parties stipulated to terms of settlement for Citations 1, 2, and 3. Upon acceptance of those terms by the Administrative Law Judge,

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

Employer withdrew all issues relating to its appeals, and proceeded solely on the issue of financial hardship. As such, the violations relating to all three citations are established by operation of law.

The parties stipulated to the following:

1. No issues remain relating to abatement as Employer is no longer in business.
2. The parties agree to settle Citation 1 as follows: the violation will be reclassified to a General violation based on evidence provided by Employer and re-evaluation of the evidence regarding substantial probability of serious injury. A new penalty of \$300 is proposed based on high severity, low extent, low likelihood, good safety program, good history, and abatement.
3. The parties agree to settle Citation 2 as follows: the violation will remain as issued. A new penalty of \$12,600 is proposed pursuant to stipulation of the parties.
4. The parties agree to settle Citation 3 as follows: the Accident-related characterization will be removed based on evidence provided by Employer and re-evaluation of the evidence regarding the Accident-related characterization and Employer knowledge. A new penalty of \$1,100 is proposed pursuant to stipulation of the parties.
5. It is further stipulated by and between the parties that the stipulated agreements to settle Citations 1, 2, and 3, and the order herein, and the terms and conditions set forth therein, are not intended to be and shall not be construed by anyone as an admission of any wrongdoing whatsoever by Appellant, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board, and that those stipulated agreements will not be used in any other proceeding between the parties or involving any other person, whether said proceeding be legal, equitable, or administrative in nature.

Good cause being found, the terms of settlement for Citations 1, 2, and 3, as proposed by the parties in the above stipulated agreements, are approved. The total penalty pursuant to the settlement agreement is \$14,000. Employer seeks a further reduction of this penalty amount based on a claim of financial hardship.

Issue

1. Does Employer warrant relief based on financial hardship?

Findings of Fact:

1. Employer did not establish financial hardship to warrant reduction of the penalty. Employer's current financial condition warrants payment of the penalties over a period of time.

Analysis:

- 1. Employer failed to provide evidence sufficient to sustain its claim of financial hardship. Employer's current financial condition does, however, warrant a payment plan.**

In *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006), the Appeals Board provided guidance with respect to the determination of financial hardship appeals on the merits of each case. In that case, it held that the Board can reduce or eliminate a proposed penalty due to proven financial distress, citing *Veterans in Community Service*, Cal/OSHA App. 96-624, Denial of Petition for Reconsideration (Sep. 24, 1997) and *Paige Cleaners*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997).

Penalties proposed by the Division are presumptively reasonable, but this presumption may be rebutted by sufficient, credible evidence of financial hardship. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Financial hardship is shown in situations where an employer's income is inadequate to sustain its business operations, i.e., to pay its ongoing debts, such as payroll taxes, vendors, and so forth. (*Sree Construction, Inc.*, Cal/OSHA App. 06-1527, Denial of Petition for Reconsideration (Sep. 9, 2009); *Sheffield Furniture Corporation*, Cal/OSHA App. 00-1322, Decision After Reconsideration (June 8, 2006).) The Board has held that when a financial hardship claim is made, an employer's financial strength is examined at the time of hearing. (*Central Valley Contracting*, Cal/OSHA App. 05-2351, Decision After Reconsideration (June 1, 2009).)

Alfredo Ayala (Ayala) has owned Ayalaz Ag Service since 2004. His business is a sole proprietorship. Ayala had triple by-pass surgery on his heart in 2006 and has faced heart problems ever since. In 2013 Ayala had additional surgery to place a stent in his heart.

Ayala closed his business in 2012 due to his heart condition and a poor business environment. As such, Employer needs no reduction of the penalties in order to sustain any business operations. Ayala sold off or loaned most of his equipment to friends. Ayala sold two tractors for \$2,500 each and loaned \$1,000 worth of equipment, all to friends. Ayala has not worked for 14 months

due to his poor health. In 2013 Ayala lived on his savings, which have now been exhausted.

In 2010 and 2011 Employer employed six to eight hundred seasonal workers. In 2011 Employer was down to 300 workers, and in 2013 Employer had no workers.

Employer owns approximately 80,000 pomegranate trees on 40 to 45 acres of land. The land with trees is worth approximately \$600,000, of which Ayala owes \$400,000.

The only financial document Employer submitted at the hearing was its 2012 Form 1040 Federal Individual Income Tax Return (Exhibit A). Schedule C in Exhibit A reflects gross receipts of \$7.9 million for 2012, with a net profit of \$45,652. Ayala had \$24,923 in income from his the pomegranate crop in 2012 (Exhibit A, page 1, line 17).

At the time of the hearing Ayala had not yet filed his 2013 tax returns. Ayala claims to have received \$26,000 from his pomegranate crop in 2013, which was his only source of income for that year. Ayala expects the same income or a little more, from his pomegranate crop in 2014 and 2015.

Ayala also claims 25 percent ownership in 200 acres of almond trees. Each acre contains approximately 70 trees. Ayala's 2012 tax return reflects no income from the almond trees (Exhibit A, Schedule E, page 2, item C).

Ayala currently has no interest in opening another farm labor contractor business. Ayala cannot find full-time work due his heart condition. He will, however, try to find work in the farm labor field. Ayala's personal living expenses amount to approximately \$2,200 per month. Ayala testified that a 24 month payment plan would be helpful for any penalty amount assessed.

Although Employer's monthly income approximately matches his monthly personal living expenses, Employer does have other resources at its disposal which it may use to pay the penalties. Employer has \$200,000 equity in 40 to 45 acres of land containing 80,000 pomegranate trees. Employer has not met its burden to establish that the penalties should be reduced based on financial hardship.

Therefore, the Administrative Law Judge hereby asserts discretionary authority pursuant to Labor Code § 6602 to fashion relief by allowing payment of the total penalties over 24 months.

Conclusions and Order

In regard to Citation 1, pursuant to the parties' stipulations, a violation of §3203(a)(4) is affirmed and a penalty of \$300 is assessed as set forth in this Decision and in the attached Summary Table.

In regard to Citation 2, pursuant to the parties' stipulations, a violation of §3328(a) is affirmed and a penalty of \$12,600 is assessed as set forth in this Decision and in the attached Summary Table.

In regard to Citation 3, pursuant to the parties' stipulations, a violation of §3653(a) is affirmed and a penalty of \$1,100 is assessed as set forth in this Decision and in the attached Summary Table.

Total penalties are assessed in the amount of \$14,000.

The penalty total set forth in this Decision and in the attached summary table is payable in twenty-four (24) installments. The first payment of \$660 is due June 1, 2014, and then \$580 each is due on the 1st of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.

Dated: April 22, 2014

KEVIN J. REEDY
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

Ayalaz Ag Services

Dockets 11-R2D5-1001 through 1003

Date of Hearing – February 7, 2014

Division's Exhibit – Admitted

Exhibit Number	Exhibit Description
1.	Jurisdictional documents

Employer's Exhibit – Admitted

Exhibit Number	Exhibit Description
A.	2012 Form 1040 Individual Income Tax Return

Witness Testifying at Hearing

1. Alfredo Ayala

CERTIFICATION OF RECORDING

I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE 11-R2D5-1001 – 1003 PAGE 2 OF 2										
11-R2D5-1003	3	1	3653(a)	S	Failure to ensure use of seatbelt assembly on tractor with rollover protection. Accident-related characterization removed based on evidence provided by Er and re-evaluation of the evidence regarding the accident-related characterization and Er knowledge. Penalty assessed pursuant to stipulation of the parties.	X		\$18,000	\$1,100	\$1,100
								\$42,750	\$14,000	\$14,000
										\$14,000

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: <i>Please do NOT send payments to the Appeals Board.</i> ALL penalty payments must be made to:	*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.
Accounting Office (OSH) Department of Industrial Relations PO Box 420603 San Francisco, CA 94142 (415) 703-4291, (415) 703-4308 (payment plans)	*The penalty set forth on this table is payable in twenty-four (24) installments. The first payment of \$660 is due June 1, 2014, and then \$580 each is due on the 1st of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.
	ALJ: KR POS: 04/22/14

