

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

MCGRATH CONTRACTING, INC.
7702 Balboa Blvd. #3
Van Nuys, California 91406

Employer

DOCKETS 11-R4D1-0274
through 0276

DECISION

Statement of the Case

McGrath Contracting, Inc. (Employer) is a construction contractor. Beginning July 29, 2010, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Zulfiqar Merchant, conducted an accident inspection at a place of employment maintained by Employer at 602 N. Palisades Drive, Pacific Palisades, California (the site). On December 30, 2010, the Division cited Employer for nine violations of Title 8, California Code of Regulations.¹

Employer filed a timely appeal contesting the existence of the alleged violations, the classifications, the abatement requirements for Citations 2 and 3, and the reasonableness of the proposed penalty. Employer alleged the affirmative defenses of lack of Employer knowledge and independent employee action.

This matter came regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on September 23, 2014. Ian M. Wallach, Attorney, of Feldman & Wallach, represented Employer. William Cregar, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. The

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

matter was submitted on September 24, 2014. The ALJ extended the submission date to October 14, 2014 on her own motion.

The Division moved, without objection, to amend the name of the city alleged for the site of the violation from Los Angeles to Pacific Palisades to correctly reflect the facts.

The Division moved, without objection, to amend the alleged violation description for Citation 1, Item 6, to correctly reflect the facts:

On 07/29/10, the employer's foreman and field supervisor did not conduct adequate inspections and remove an employee from working in an 11-foot deep trench. All shoring had been removed. While measuring in the trench, the soil collapsed and the employee was completely buried.

The Division moved, without objection, to amend the alleged violation description for Citation 2, Instance 2 in reference to § 3203(a), to correctly reflect the facts:

On 07/29/2010, a 25-year-old male worker sustained fatal injuries while measuring inside an L-shaped trench which collapsed and completely buried him. All shoring had been removed. The foreman and the supervisor did not remove the accident victim from the trench and ensure that adequate protective systems were utilized to prevent cave-in.

The Division moved, without objection, to amend the alleged violation description for Citation 2, last paragraph, to correctly reflect the facts:

On 07/29/2010, an employee was measuring a trench for the installation of a perforated pipe. The trench was L-shaped and approximately 11 feet deep. All shoring had been removed. The soil collapsed around and he was completely buried.

The Division moved, without objection, to amend the alleged violation description for Citation 3, Instance 2, to correctly reflect the facts:

On 07/29/2010, a 25-year-old male worker sustained fatal injuries while working inside an L-shaped trench, which collapsed and completely buried him. All shoring had been removed. The

accident victim was measuring inside the trench in order to install a perforated pipe.

Good cause being found, the motions were granted.

Upon amendment of the alleged violation descriptions, Employer withdrew all issues relating to its appeals except for its written Motion for Reduction Based on Financial Hardship filed September 18, 2014. The Division did not object to the motion. The Division stipulated that Employer's current financial condition is such that installment payments over 24 months are warranted.

Employer agreed to waive the statute of limitations for collection under Labor Code § 6651 in the event that penalty relief in the form of monthly installment payments for more than 12 consecutive months were granted.

Issue

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

Findings of Fact

1. Employer is an S corporation. In 2014, Paul McGrath (McGrath) became its sole shareholder. Prior to that date, McGrath and his wife, Catherine, were both the only shareholders. McGrath and his wife are no longer together.
2. Employer has abated all violations.
3. Employer is still in business and had 12 employees as of the hearing date.
4. Employer had gross receipts of \$1,228,102 in 2011, \$1,064,901 in 2012, and \$1,332,637 in 2013. Employer had ordinary income after all deductions of \$58,845 in 2011, \$65,253 in 2012, and \$99,943 in 2013.
5. McGrath had total income from all sources, including income from Employer of \$143,316 in 2011, \$132,635 in 2012, and \$179,378 in 2013.
6. McGrath received non-taxable cash distributions (also known as a draw) from Employer of \$75,103 in 2011, \$52,352 in 2012, and \$119,925 in 2013.
7. As of June 30, 2013, McGrath and his wife had a personal investment account with LPL Financial in the amount of \$4,357.77.
8. McGrath is obligated to pay \$8,986 to the California Franchise Tax Board by October 15, 2014.
9. On May 9, 2014, Employer and McGrath entered a plea agreement with the County of Los Angeles regarding criminal charges based on the same incident on which the instant violations are based. Under the plea agreement, they are jointly and severally liable to pay the County of Los Angeles a fine of \$152,000 by May 9, 2019. The \$152,000 fine is subject to a hearing regarding ability to pay.

10. A worker's compensation case (ADJ7861296) has been filed based on the July 29, 2010 accident which gave rise to the instant citations. The case is not final and may result in additional liability.
11. Employer does not have a steady monthly income. It receives cash in lump sums. As of December 31, 2013, Employer had a cash balance of \$3,806. Employer's most recent bank statements of May 2014 show that Employer has a cash balance of \$19,471.
12. As of December 31, 2013, Employer had a negative working capital of \$19,985 (current assets minus current liabilities) and total assets of \$17,239.
13. Employer does not have the cash, working capital, assets, or income at this time to pay the entire \$76,925 penalty proposed by the Division. Payment of the entire \$76,925 penalty in a lump sum would cause Employer to declare bankruptcy and cease operations.
14. Employer is able to pay approximately \$3,250 per month without going out of business. Payment of installments over 24 months is required to prevent Employer from going out of business.

Analysis

1. Does Employer's current financial situation warrant reduction of the penalties?

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).)

The employer has the burden of proof on all issues pertaining to its financial condition and must provide credible, convincing evidence to support relief from the proposed penalties. (*Szemenyei Construction, Inc.*, Cal/OSHA App. 10-0008, Denial of Petition for Reconsideration (Mar. 4, 2011); *Paige Cleaners*, Cal/OSHA App. 96-1144, Decision After Reconsideration (Oct. 15, 1997).) 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).)

The purpose of the Occupational Safety and Health Act of 1973 (the Act) is to assure safe and healthful working conditions for all employees. (Labor Code § 6300) Penalty relief must be consistent with this purpose. (*Delta Transportation, Inc.*, Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012); *Stockton Tri Industries, Inc.*, *supra.*) Where a willful violation is established, penalty reduction is disfavored as such a violation is evidence of lack of concern for providing a safe work place. (*Witeg Scientific*, Cal/OSHA App. 97-3115, Decision After Reconsideration (May 21, 2002).)

In *Stockton Tri Industries, Inc.*, *supra*, the Appeals Board provided guidance with respect to the determination of financial hardship appeals on the merits of each 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 (Oct. 15, 1997) and *Paige Cleaners*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997). Labor Code § 6602 provides the authority for the Board to make such penalty reductions.

Abatement of all violations is a pre-requisite to granting financial hardship relief. (*Stockton Tri Industries, Inc.*, *supra*; *Specific Plating Co., Inc.*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997).)

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)) and where the proposed penalties could force an employer to go out of business. (*Specific Plating Co. Inc.*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997).) Completely eliminating penalties is unwarranted merely where business is slowing, profits are diminishing, and the workforce is decreasing. (See *Tzeng Long USA, Inc.*, Cal/OSHA App. 91-300, Decision After Reconsideration (April 30, 1992).) To warrant complete elimination or reduction of proposed penalties, an employer's income must be inadequate to sustain its ongoing operations (*Id.*), and payment of the penalties must be such that it could cause the employer to cease operations, even if paid in installments over a reasonable period of time. (*Specific Plating Co. Inc.*, *supra*.)

The financial condition of a corporation or corporations and their shareholders are considered together where the alter ego doctrine applies. The alter ego doctrine applies to a corporation and an individual sole owner where there is such unity of interest and ownership that the separate personalities of the individual no longer exist and if acts are treated as those of the corporation alone, an inequitable result will follow. (*840 The Strand, LLC*, Cal/OSHA App. 13-3355, Denial of Petition for Reconsideration (Sep. 25, 2014), citing *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300, citing *Automotriz etc. de California v. Resnik* (1957) 47 Cal.2d 792, 796.)

Pursuant to the above precedent, the Appeals Board has established the following principles:

1. Before the Appeals Board will grant any relief based on financial hardship, Employer must show that it has abated all violations.
2. To establish that complete elimination or reduction of the proposed penalties is warranted, an employer must show that its income is inadequate to sustain its ongoing operations and that payment of the proposed penalties could cause it to cease operations, even if the proposed penalties were paid in installments over a reasonable period of time.

First, Employer has abated all violations, which allows relief to be granted based on financial hardship.

Second, Employer is still in business, has not filed for bankruptcy, and is not behind in paying any obligations. Employer has made a profit for the last three years. For the last three years Employer has had substantial yearly gross receipts, yearly net income and yearly draw by its shareholders. From 2011 through 2013, the combined average net income and shareholder draw for was \$157,140. When evaluating Employer's ability to pay, Employer's finances are considered together with McGrath's personal finances due to the unity of interest of an S corporation and a sole shareholder. From 2011 through 2013, McGrath's annual average receipts from total personal income plus non-taxable draws from Employer was \$235,236.

Thus, it must be found that Employer's income is adequate to sustain its ongoing operations. Consequently, elimination or reduction of the penalties is not warranted.

Employer's liability to the County of Los Angeles and possible future workers' compensation liability do not change this result. Employer has five years to pay the \$152,000 and it is subject to reduction. Thus, this amount does not support elimination or reduction of the proposed penalty amount.

Employer also has a potential liability due to the workers' compensation action against it. Since this liability is speculative, it cannot be considered at this time.

Employer requested installment payments. McGrath testified that if Employer were required to pay the entire amount in a lump sum, Employer would be forced to declare bankruptcy, but that a payment plan would be helpful for any penalty assessed. McGrath testified that Employer does mostly small jobs, under \$10,000, and has 12 employees. McGrath further testified that Employer's income is "feast or famine." The financial documents corroborate McGrath's testimony. Employer's monthly income is not steady. Employer had a cash balance of \$19,471 as of May 2014. As of December 31, 2013, Employer had a cash balance of \$3,806, a negative working capital of \$19,985, and assets of \$17,239. These numbers verify that Employer has an

erratic cash flow and lacks substantial cash reserves, working capital, and assets on a monthly basis. Because of Employer's unpredictable cash flow, Employer would be forced to cease operations if forced to pay the entire amount of penalties in a lump sum as the necessary cash would more likely than not be available in any one given month.

Accordingly, it is found Employer is able to pay the total proposed penalties of \$76,925, but they are sufficiently large so that they could cause Employer to declare bankruptcy if Employer were required to pay them immediately in one lump sum. It is further found that installments would allow Employer to pay the entire penalties without going out of business. Payments over 24 months would achieve this objective in view of McGrath's annual average receipts.

There being no objection from the Division, the Administrative Law Judge hereby asserts discretionary authority pursuant to Labor Code § 6602 to allow payment of the total penalties over 24 months.

Conclusion

Employer has not met its burden to establish that the penalties should be reduced, but presented sufficient evidence to warrant a payment plan.

Order

It is hereby ordered that the citations are established as amended 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 \$76,925.

It is further ordered that the penalty total is payable in 24 monthly installments. The first payment of \$3,210 is due on January 1, 2015, and then \$3,205 is due on the first of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.

Nothing in this Decision shall prohibit Employer from arranging a different payment plan with the Accounting Office, Department of Industrial Relations.

Dated: November 5, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
MCGRATH CONTRACTING, INC.
Dockets 11-R4D1-0274 through 0276**

Date of Hearing: September 23, 2014

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Form C-10	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A-1	2013 Tax Returns for McGrath Contracting, Inc.	Yes
A-2	2013 Individual Tax Returns	Yes
A-3	2012 Tax Returns for McGrath Contracting, Inc.	Yes
A-4	2012 Individual Tax Returns	Yes
A-5	2011 Tax Returns for McGrath Contracting, Inc.	Yes
A-6	2011 Individual Tax Returns	Yes
A-7	McGrath Contracting, Inc. Corporation Status	Yes
A-8	McGrath Contracting, Inc. B of A acct 3584 statement Jan 2014	Yes
A-9	McGrath Contracting, Inc. B of A acct 3584 Statement Feb 2014	Yes
A-10	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement Feb 2014	Yes
A-11	McGrath Contracting, Inc. Inc. B of A acct 3584 Statement Mar 2014	Yes

A-12	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement Mar 2014	Yes
A-13	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement April 2014	Yes
A-14	McGrath Contracting, Inc. B of A acct 3584 Statement Apr 2014	Yes
A-15	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement May 2014	Yes
A-16	McGrath Contracting, Inc. B of A acct 3584 Statement May 2014	Yes
A-17	McGrath Contracting, Inc. B of A acct 3584 Statement June 2013	Yes
A-18	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement June 2013	Yes
A-19	McGrath Contracting, Inc. B of A acct 3584 Statement July 2013	Yes
A-20	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement July 2013	Yes
A-21	McGrath Contracting, Inc. B of A acct 3584 Statement Aug. 2013	Yes
A-22	Paul McGrath Contracting, Inc. B of A acct 9439/7692 Statement Aug. 2013	Yes
A-23	Catherine and Paul McGrath B of A acct 3467 Statement June/July 2013	Yes
A-24	Catherine and Paul McGrath B of A acct 3467 Statement July/Aug 2013	Yes
A-25	Catherine and Paul McGrath B of A acct 3467 Statement Aug/Sept 2013	Yes
A-26	Catherine McGrath Loan Statement Nov 2013	Yes

A-27	Catherine and Paul McGrath Investment Statement LPL Financial June 30, 2013	Yes
A-28	McGrath Contracting, Inc. General Ledger 2011	Yes
A-29	McGrath Contracting, Inc. General Ledger 2012	Yes
A-30	McGrath Contracting, Inc. General Ledger 2013	Yes
B	Declaration of Michael Spindler	Yes
C	Michael Spindler CV	Yes
D	Affidavit of Jerod Gunsberg, Esq.	Yes
E	Waiver of Statute of Limitations on Collection	Yes

Witnesses Testifying at Hearing

1. Michael Spindler
2. Paul McGrath

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.

DALE A. RAYMOND

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

McGRATH CONTRACTING, INC.
Dockets 11-R4D1-0274 through 0276

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 126157387

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	AVOIDED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
11-R4D1-0274	1	1	341(c)(2)(B)	WR	Er withdrew its appeals except for the issue of financial hardship. ALJ affirmed all proposed penalty amounts.	X		\$5,000	\$5,000	\$5,000
		2	341.4	Reg		X		350	350	350
		3	1509(c)	Reg		X		350	350	350
		4	1509(e)	Reg		X		350	350	350
		5	1541(c)(2)	G		X		525	525	525
		6	1541(k)	G		X		700	700	700
		7	3395(e)(1)	G		X		350	350	350
11-R4D1-0275	2	1	1509(a)	S		X		6,300	6,300	6,300
11-R4D1-0276	3	1	1541.1(a)	WS		X		63,000	63,000	63,000
Sub-Total								\$76,925	\$76,925	\$76,925

Total Amount Due*

\$76,925**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board. All penalty payments should be made to:*

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

****The total penalty is payable in 24 installments. The first installment of \$3,210 is due January 1, 2015, and then \$3,205 is due on the first day of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.** Nothing in the Decision or Summary Table shall prohibit Employer from arranging a different payment plan with the Accounting Office, Department of Industrial Relations. Please call **(415) 703-4291** or **(415) 703-4308** (payment plans) if you have any questions.

ALJ: DAR/ml
POS: 11/07/14