

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MARIA DE LOS ANGELES COLUNGA
dba MERCED FARM LABOR
P.O. Box 2393
Merced, CA. 95340

Employer.

Dockets 08-R2D1-3093
through 3098

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code ordered reconsideration of the Decision of the Administrative Law Judge in the above-entitled matter. After considering the matter, the Board renders the following Decision After Reconsideration:

JURISDICTION

Maria De Los Angeles Colunga dba Merced Farm Labor (Employer) was engaged in the business of farm labor staffing. On May 14, 2008, an employee of Employer was working outdoors in a field when she collapsed from heat stroke and dehydration on the job around 3:40 p.m., after working approximately 9.5 hours in the sun. The employee was taken to a hospital and admitted for treatment. The employee died while in the hospital two days later. Employer did not notify the Division of the heat-related illness until May 16, 2008.

The Division conducted an investigation and issued multiple citations. The Division issued the following citations: Citation 1/1 alleges a regulatory violation of section 342(a)¹ [failure to timely report workplace illness], with a penalty of \$5,000. Citation 1/2 alleges a general violation of 3203(a)(7)(B) [failure to provide training and instruction to new employees], with a penalty of \$1,350. Citation 1/3 alleges a general violation of 3395(e)(3) [failure to provide all required heat illness prevention procedures in writing], with a penalty of \$1,350 fine. Citation 2 alleges a Serious violation of 3395(c) [failure to provide readily accessible drinking water], with a penalty of \$22,500. Citation 3 alleges a Serious violation of 3395(d) [failure to provide access to shade], with a

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

penalty of \$22,500. Citation 4 alleges a Serious Willful violation of 3395(e)(1) [failure to provide required heat illness training to employees], with a penalty of \$70,000. Citation 5 alleges a Serious Willful violation of 3395(e)(2) [failure to provide required heat illness training to supervisors], with a \$70,000 penalty. Citation 6 alleges a Serious Willful violation of 3439(b) [failure to make provisions in advance for prompt medical attention], with a \$70,000 penalty.

Employer appealed the citations. A hearing was held on May 29, 2013 before an Administrative Law Judge of the Board (ALJ). At the hearing Employer withdrew her appeal of the citations and they were therefore affirmed by operation of the law. Employer solely requested a reduction in penalties based on financial hardship. The ALJ granted a penalty reduction based on Employer's showing of financial hardship, reducing the penalties to \$15,000. The ALJ also initiated a payment plan allowing her to pay \$500 a month for 30 months. The Division filed a Petition for Reconsideration.

ISSUES

1. Does the evidence warrant a financial hardship reduction for Employer?
2. If the answer to the first question is in the affirmative, to what extent is a financial hardship reduction warranted?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issues presented:

Employer was a licensed farm contractor. She testified that the State of California closed her business permanently on July 3, 2008 and took away her license. Employer no longer has any income from that business. Evidence was introduced indicating that Employer's business bank accounts were closed in 2008, with all monies being disbursed to payroll, taxes, and creditors. Employer also stated that her business and personal taxes were audited by the IRS, and records indicate that she owes significant unpaid taxes.

Employer also testified that she received a misdemeanor conviction as a result of the employee's death, and she is currently on probation.

Employer testified that she and her husband lost their home through foreclosure. They subsequently filed for bankruptcy. The United States Bankruptcy Court for the Eastern District of California entered an Order discharging Employer from her debt.

Employer stated that she is a licensed vocational nurse (LVN), and she is going to school to be registered nurse (RN). She worked as an LVN from 2009

to 2011, when she was laid off. She states that she has been unable to subsequently find work as a nurse. She states her criminal misdemeanor conviction, stemming from the death in this case, has made finding work as nurse difficult due to background checks, and she does not believe that the conviction will ever be fully expunged from her record. Following her lay-off she received some unemployment benefits, although they subsequently expired.

Employer's husband was a truck driver, but he is unable to work due to health problems. He had surgery for colon resection. He also had surgery on his neck. He continues to suffer from various health issues and needs additional treatments, but they do not have insurance and they do not qualify for any governmental health programs. Her husband leased his truck to another truck driver due to his inability to work.

Multiple records were entered into evidence at the hearing, including: records from her husband's truck business, bankruptcy records, tax records, and other pertinent financial forms. These documents showed the couple to be without any significant assets. Employer's joint tax returns, filed with her husband, reveal the following information: the 2012 tax return showed an adjusted gross income of \$30,376; the 2011 tax return showed an adjusted gross income of \$31,297; the 2010 tax return showed an adjusted gross income of \$39,820; and, the 2009 tax return showed an adjusted gross income of \$36,035.² Their 2012 income primarily consisted of Colunga's unemployment benefits, which ran out, and limited income from the lease of her husband's truck. She is also currently paying \$210 a month for another Cal/OSHA penalty, which was resolved.

Employer states that she and her husband now operate entirely on a cash basis and have no savings or credit.

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter, including the Division's Petition. In making this decision, the Board has taken no new evidence.

As noted, Employer sought and the ALJ granted a reduction of penalties based on her financial circumstances. In reviewing the ALJ's decision we start by considering the purpose of the California Occupational Safety and Health Act (the Act). Labor Code section 6300 states:

² Profit and Loss Statements were also introduced for Joel Colunga Trucking. For the 12 months ending December 31, 2009, the statement reflected a net income of \$12,367, which is also reflected in Colunga's 2009 tax return. For the 12 months ending December 31, 2012, the statement reflects a net income of \$7,835, which is also reflected in Colunga's 2012 tax return. There are no profit and loss statements for 2010 and 2011.

The California Occupational Safety and Health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health.

The mandate of the Act is to assure safe and healthful working conditions for all California workers. (*Delta Transportation, Inc.*, Cal./OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012), *see also*, *Stockton Tri Industries, Inc.*, Cal./OSHA App. 02-4946, Decision After Reconsideration (March 27, 2006).)³ The primary goal of the occupational safety and health program in California is to prevent injuries from taking place. (*Miller/Thompson J.D. Steel, Harris Rebar, a Joint Venture*, Cal./OSHA App. 99-3121, Decision After Reconsideration (Sept. 26, 2001); *see also*, *Underground Construction, Inc.*, Cal./OSHA App. 98-4104, Decision After Reconsideration (Oct. 30, 2001).) The Act establishes various mechanisms for achieving its goal, for example authorizing the creation of workplace safety standards and imposing civil penalties on employers which are found to have violated such standards. The act also allows the Appeals Board to adjust penalties consistent with the Act's enacted purpose, which is worker safety.⁴

The Employer here has not made any showing that a reduction in civil penalties would further the purpose of the Act. Penalty relief is not warranted merely because Employer lost her business due to failure to comply with the Act, and suffered concomitant financial hardship. A reduction in penalties under such circumstances does nothing to protect employees or to make workplaces safer.

In order to promote the purposes of the Act, "the Division, like other public agencies, including its federal counterpart, justifiably relies on the deterrent effect of monetary penalties as a means to compel compliance with safety standards." (*Delta Transportation, Inc.*, Cal./OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012), *citing*, *Reich v. Occupational Safety and Health Com'n* (OSHRC) (11th Cir. 1997) 102 F.3d 1200, 1203, *Atlas Roofing Co., Inc. v. OSHRC* (5th Cir. 1975) 518 F.2d 990, 1001, *affd.* (1977) 430 U.S. 442.) As noted in *Reich v. OSHRC*, (11th Cir. 1997) 102 F.3d 1200, 1203:

³ "In establishing an employer's duty to maintain a safe working environment, the relevant Labor Code provisions speak in the broadest possible terms and have been interpreted in the broadest possible terms even before the adoption of the Act." (*Miller/Thompson J.D. Steel, Harris Rebar, a Joint Venture*, Cal./OSHA App. 99-3121, Decision After Reconsideration (Sept. 26, 2001), *citing*, *Carmona v. Division of Industrial Safety*, (1975) 13 Cal.3d 303.)

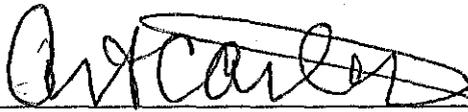
⁴ *See*, *Stockton Tri Industries, Inc.*, Cal./OSHA App. 02-4946, Decision After Reconsideration (March 27, 2006.)

Because of the large number of workplaces which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement. We accept that OSHA must rely on the on the threat of money penalties to compel compliance by employers.

“[T]he threat of civil penalties serves as a ‘pocket-book deterrence’ against violations of occupational safety and health standards.” (*Miller/Thompson J.D. Steel, Harris Rebar, a Joint Venture*, Cal./OSHA App. 99-3121, Decision After Reconsideration (Sept. 26, 2001), citing, *Atlas Roofing Co., Inc. v. OSHRC* (5th Cir. 1975) 518 F.2d 990, 1001.)

The grant of financial hardship relief in the present circumstances, given the lack of any showing that it would benefit worker safety, would diminish the deterrent effect of civil penalties. If we were to affirm the ALJ’s decision to grant a financial hardship reduction here, it could inappropriately provide employers “an economic incentive to avoid a penalty [or have a penalty significantly reduced] by going out of business, and, perhaps reincorporating under a different name” without due regard for worker safety. (*Delta Transportation, Inc.*, Cal./OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012), citing, *Reich v. Occupational Safety and Health Com’n* (OSHRC) (11th Cir. 1997) 102 F.3d 1200, 1203.) It would lessen the incentive for an Employer that is going out of business for normal commercial reasons to comply with the Act. (*Ibid.*) It “would [also] lessen protection for other workers who may eventually find themselves under the employ of the former owner, should the owner go into business in a different industry,” or should that owner be in a position to influence the safety program in another business. (*Delta Transportation, Inc.*, Cal./OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012).) Employer would not be incentivized to comply with the Act in her future employment, knowing that merely going out of business could afford significant penalty relief. Allowing for such things to pass would be inconsistent with the purpose of the Act and it would undermine the deterrent value of penalties on other employers.

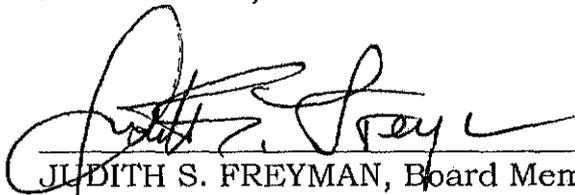
Therefore, the civil penalties are affirmed in their full amount. This decision does not affect the ALJ's order allowing installment payments.



ART CARTER, Chairman



ED LOWRY, Board Member



JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: FEB 26 2015



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**AMENDMENT TO
DECISION AFTER
RECONSIDERATION**

The Decision After Reconsideration (DAR) issued on February 26, 2015 is amended to incorporate the attached Summary Table.

This amendment to the DAR in the above referenced docket numbers relates back to the original date of issuance: February 26, 2015, and is effective as of that date.



ART CARTER, Chairman



ED LOWRY, Board Member



JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON:

MAR 05 2015

DH



SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

MARIA DE LOS ANGELES COLUNGA dba MERCED FARM LABOR
Docket No(s). 2008-R2D1-3093 through 3098

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

IMIS No. 310551346

Site: Sonora Rd & Hwy 4, Farmington, CA 95230
Date of Inspection: 05-19-2008 ~ 07/23/2008

Date of Citation: 07/23/2008

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
08-R2D1-3093	1	1	342(a)	Reg	Failure to timely report serious injury. ER w/drew appeal to proceed solely on the claim of financial hardship. ALJ reduced penalty based on financial hardship for all Citations & Items.	x		\$5,000	\$400	\$5,000
08-R2D1-3093	1	2	3203(a)(7)(B)	G	Failure to provide training as required by IIPP.	x		\$1,350	\$400	\$1,350
08-R2D1-3093	1	3	3395(e)(3)	G	Failure to provide required written IIPP procedures.	x		\$1,350	\$400	\$1,350
08-R2D1-3094	2	1	3395(c)	S	Failure to provide access to drinking water.	x		\$22,500	\$1,200	\$22,500
08-R2D1-3095	3	1	3395(d)	S	Failure to provide access to shade.	x		\$22,500	\$1,200	\$22,500
08-R2D1-3096	4	1	3395(e)(1)	WS	Failure to provide required Heat Illness training to employees.	x		\$70,000	\$3,800	\$70,000
08-R2D1-3097	5	1	3395(e)(2)	WS	Failure to provide required Heat Illness training to supervisors.	x		\$70,000	\$3,800	\$70,000
08-R2D1-3098	6	1	3439(b)	WS	Failure to make provisions in advance for prompt medical attention.	x		\$70,000	\$3,800	\$70,000
Sub-Total								\$262,700	\$15,000	\$262,700

Total Amount Due*

\$262,700

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount 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. Please call (415) 703-4291 if you have any questions.

The penalty set forth on this table is payable in thirty (30) installments. The first payment of \$8,747 is due May 1, 2015, and then \$8,757 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.

POS: 3/5/2015