

**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

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by McGrath Contracting, Inc. (Employer).

JURISDICTION

Commencing on July 29, 2010 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 30, 2010 the Division issued three citations to Employer alleging a total of nine violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing. At hearing a number of motions were made and granted, the net result of which was that Employer admitted all violations (as amended by Division's motion) and limited its appeal to seeking a reduction, on the grounds of financial hardship, of the penalties proposed by the Division

On November 5, 2014, the ALJ issued a Decision (Decision) which denied Employer the requested penalty reduction.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration.

The Division did answer the petition.

ISSUE

Did Employer establish that it was entitled to a reduction of penalties due to financial hardship?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition contends the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances. We affirm the Decision with modifications, and therefore deny Employer's petition for reconsideration.

The Decision imposed civil penalties of \$76,925 payable in 24 monthly installments of approximately \$3,205 each. In doing so the ALJ denied a penalty reduction because she found that Employer's income is sufficient to make those payments. The Decision noted that Employer had been ordered to pay a criminal fine of \$152,000 as a result of the incident giving rise to the citations at issue here. The ALJ stated in the Decision that Employer had indicated that the criminal fine might be reduced for lack of inability to pay, and therefore held that it would be speculation to grant relief on the assumption that the fine would *not* be reduced.

Employer's petition points out that the ALJ misconstrued a comment about a possible reduction in the criminal fine, and further states that in any event the fine is not subject to reduction. Although the misunderstanding may have been the result of Employer's counsel's explanation of the situation, we give Employer the benefit of the doubt here and have assumed the fine is not subject to reduction in reaching our decision.

According to the evidence in the record, Employer had after tax income from all sources of \$125,569 in 2011, \$108,734 in 2012, and \$115,995 in 2013. The average of those amounts is \$116,776 per year.

The Decision established a 24-month payment period for the civil penalty. As noted earlier, the payment would be about \$3,205 per month.

The Decision states the criminal fine of \$152,000 must be paid on or before May 9, 2019. There is nothing in the Decision indicating that Employer has the option to pay it in installments. Nonetheless, for our purposes here we make the assumption that Employer will monthly set aside sufficient funds between the present and May 2019 to fully pay the criminal fine. So amortizing the fine would result in a monthly "payment" of about \$2,868.

The total of those two amounts, \$3,205 and \$2,686 is \$5,891. Employer's average after tax income for the three years 2011 through 2013 equates to a monthly after tax income of \$9,730.50. Thus, under the conditions imposed by the Decision and resulting from our assumption of how Employer would defray the criminal fine, he would be obligated to devote over 60 percent of his after tax income to pay the fine and penalty.

Although there is no legal standard applicable to this situation, we will exercise our equitable authority to alter that outcome by reducing the amount of the monthly payment.² (Labor Code § 6602.) We do so by extending the period for payment of the civil penalty to 36 months from 24 months. Doing so reduces the payment to about \$2,137 per month, and Employer's total monthly obligation to about \$4,823, or slightly under 50 percent of his after tax income.³ Consistent with the approach taken in the Decision, the first payment is due on February 1, 2015.

The Decision pointed out that Employer took non-taxable cash distribution or "draws" from the corporation in the amounts of \$75,103 in 2011; \$52,352 in 2012 and \$119,925 in 2013. Employer's petition argues that this double-counts income since the business is a Subchapter S corporation. Our approach above need not resolve that dispute or the tax and accounting

² In other contexts, such as garnishment of wages, we understand there to be statutory limits on the percent of one's income which can be taken.

³ The record indicates that Employer waived the statute of limitation in Labor Code § 6651 pertaining to collection of the assessed penalties, hence we are able to extend the payment period.

issues raised. We have decided this case on Employer's after tax income, and have not based it on the assumption that he had additional income resources not reported in his and the corporations tax returns. We therefore do not need to decide whether he has enjoyed additional non-taxable income averaging over \$82,000 per year over that period.

DECISION

For the reasons stated above, the petition for reconsideration is denied except to the extent that we modify the ALJ's Decision by increasing the payment period for the civil penalties from 24 months to 36 months, beginning on February 1, 2015. The first 35 payments shall be \$2,136.81, and the final payment shall be \$2,136.65. One late payment renders the entire unpaid balance immediately due and payable.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 31, 2014