

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

In the Matter of the Appeal of:

MICROWAVE ANTENNA SPECIALTIES,
A NEVADA CORPORATION
39650 Liberty Street, Suite 250
Fremont, CA 94538

Employer

Docket No. 12-R1D4-3132

**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 Microwave Antenna Specialties, a Nevada Corporation (Employer).

JURISDICTION

Commencing on July 26, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 28, 2012, the Division issued seven citations to Employer alleging various 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 contested evidentiary hearing on the issue of whether the penalties for the violations should be reduced on the basis of Employer's financial hardship.

On September 11, 2014, the ALJ issued a Decision (Decision) which denied Employer the financial relief sought except to allow Employer to pay the penalties in twelve monthly installments.

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

Employer timely filed a petition for reconsideration.

The Division answered the petition.

ISSUE(S)

Did Employer establish that it was entitled to a penalty reduction 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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) Liberally construed, Employer's petition may be deemed to argue that the evidence does not justify the findings of fact and/or that 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 make note that at hearing the Division proposed to reduce the penalties it sought to impose by about \$3,500, reducing the total to \$32,015. Employer did not oppose the reduction.

Employer claims that the business had been losing money consistently since at least 2010, that the business closed in 2013, and will cease its corporate existence upon conclusion of ongoing tax matters. Given the owner's age (80+), poor health, and the antiquated nature of the business and technology involved (microwave data transmission) there is little doubt the business is not viable and will not be resurrected in another guise.

In *Delta Transportation, Inc.*, Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012) the Board held that going out of business is not grounds for penalty relief, and articulated policy considerations underlying our decision in that proceeding. Employer's petition argues that none of the policy considerations stated in *Delta, supra*, are present in this matter. Specifically, it is asserted that (1) Employer has not ceased operations to avoid penalties; (2) the appeal was not delayed to gain tactical or financial advantage; (3) there is no evidence that closing the business was intended to avoid paying penalties; (4) there is no likelihood, given age and infirmities, that owner will reopen the business or open another one; (5) violations were corrected timely.

What Employer's petition does not do, however, is offer a rationale which we should apply here, that is, a basis upon which to say in the circumstances here present Employer is entitled to or, at the least, should be granted penalty relief. We can think of no sound reason to do so, though we are not unsympathetic to Employer's principle and the vicissitudes of his stage in life. Thus, lacking a basis to depart from or define an exception to our reasoning in *Delta, supra*, we decline to do so.

Further, an employer seeking a penalty reduction on the basis of financial hardship has the burden of proving its financial condition is such as to warrant some reduction. (*Pacific Messenger Records Storage, Inc.*, Cal/OSHA App. 08-2263, Denial of Petition for Reconsideration (Sep. 8, 2010).) There is a dearth of evidence in the record of Employer's actual financial condition and ability to pay. We cannot on this record, therefore, find that Employer is entitled to a penalty reduction or other financial relief in addition to the payment plan established in the Decision.

There is a misstatement of our precedent in the Decision which we will take this occasion to point out in order to provide appropriate guidance to the stakeholder community. The Decision misquotes *Stockton TRI Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006) as stating "financial hardship is shown in situations where an employer's income is inadequate to sustain its business operations[.]" That language does not appear in *Stockton, supra*, or any of our decisions and is not an accurate statement of a criterion for granting penalty relief. Penalties may be reduced from the level proposed by the Division if the evidence establishes that the proposed penalties would jeopardize its ability to remain in business. (*Specific*

Plating Co., Inc., Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997) and authorities cited therein.)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: NOVEMBER 24, 2014