

BEFORE THE
CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD
STATE OF CALIFORNIA

In the Matter of:

RAUL G. and NORMA C. MONREAL,
Owners/Operators,

and

CARLOS DUENAS,
Operator,

allegedly doing business as Border Tires
Waste Tire Facility,

Respondents.

Agency Case No. 2003-010629

OAH No. L2004040059

DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on July 19, 2004.

Wendy Breckon, Staff Counsel, represented Complainant California Integrated Waste Management Board.

Respondent Raul G. Monreal, one of the owners of the real property referred to herein as the storage site, was present. He represented himself and Norma C. Monreal, his wife, who was the other owner of the property.

Respondent Carlos Duenas, the tenant of the real property referred to herein, was present and represented himself.

The matter was submitted on July 19, 2004.

ISSUES

Did Raul G. Monreal, Norma C. Monreal and Carlos Duenas unlawfully store waste tires on real property located in Calexico, Imperial County, California?

If so, what civil penalty, if any, should be imposed against Raul G. and Norma C. Monreal, the owners of the storage site?

If so, what civil penalty, if any, should be imposed against Carlos Duenas, the operator of a tire service on the storage site?

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant California Integrated Waste Management Board (the CIWMB) has the statutory and regulatory authority to inspect, permit, regulate and prosecute legal actions against Waste Tire Facilities (WTF) within California under Public Resources Code section 42800 et seq. and under Title 14, California Code of Regulations.

2. On February 5, 2004, Wendy Breckon, Staff Counsel, CIWMB, signed an Administrative Complaint for Civil Penalties (the Administrative Complaint).

The Administrative Complaint alleged Raul G. Monreal and Norma C. Monreal (the Monreals) owned and operated Border Tires Waste Tire Facility, an enterprise that stored waste tires¹ on real property described as Assessor's Parcel Number 058-823-08, West of the All-American Canal on Anza Road Calexico, Imperial County, California 92231 (the storage site). The Administrative Complaint alleged Carlos Duenas (Duenas) was an operator of the storage site.

The Administrative Complaint alleged, among other matters, that the Monreals and Duenas operated a WTF without a waste tire facility permit, that the Monreals failed to comply with regulations related to the operation of a WTF and, finally, that the Monreals and Duenas failed to comply with Cleanup & Abatement Order 2003-010451-CAO issued on April 9, 2003. The CIWMB requested the imposition of \$40,000 civil penalty against the Monreals and the imposition of a \$20,000 civil penalty against Duenas.

The Administrative Complaint was personally served on the Monreals and on Duenas.

On April 2, 2004, the CIWMB requested the Office of Administrative Hearings, State of California, San Diego Regional Office (OAH-SD), set an administrative hearing in the matter, indicating the statutory deadline for the hearing was April 25, 2004.

¹ Public Resources Code section 42807 defines a "waste tire" as a "tire that is no longer mounted on a vehicle and is no longer suitable for use as a vehicle tire due to wear, damage, or deviation from the manufacturer's original specifications. A waste tire includes a repairable tire, scrap tire, and altered waste tire, but does not include a tire derived product, crumb rubber, or a used tire that is organized for inspection and resale by size in a rack or a stack in accordance with Section 42806.5."

On April 2, 2004, Presiding Administrative Law Judge Steven V. Adler (PALJ Adler), OAH-SD, notified the CIWMB and the Monreals that the matter was set for hearing on April 21, 2004, at 1350 Front Street, Sixth Floor, San Diego, CA 92101.

On April 20, 2004, OAH-SD received CIWMB's request for a continuance based on counsel's inability to attend the hearing set for April 21, 2004.

On April 20, 2004, PALJ Adler issued the following order:

"On April 20, 2004, the Office of Administrative Hearings received a continuance request from complainant. Counsel for complainant has had a severe illness in the family requiring her to take a leave of absence, and complainant apparently has no other counsel or other representative available. The Office of Administrative Hearings made several unsuccessful attempts to contact respondents, so it could not be ascertained whether respondents objected to the continuance.

Good cause is established; the matter is CONTINUED to July 19, 2004, at 9:00 a.m. at the Office of Administrative Hearings in San Diego. Complainant is directed to file and serve a Notice of Hearing."

The Continuance Order was served on the CIWMB, on the Monreals and on Duenas by mail on April 20, 2004.

On July 19, 2004, the record in the administrative matter was opened. Jurisdictional documents were presented. Opening statements were given. Sworn testimony and documentary evidence was received. Official notice was taken. Closing arguments were given, the record was closed and the matter was submitted.

The January 8, 2003, Decision

3. Administrative Law Judge Stephen E. Hjelt (ALJ Hjelt) heard "In the Matter of: RAUL G. MONREAL AND NORMA C. MONREAL, OWNERS/OPERATORS, d.b.a. Border Tires Waste Tire Site, Respondents," on January 8, 2003.

On January 13, 2003, ALJ Hjelt signed a Decision in that matter. Relevant portions of that Decision, which is now final, are set forth below.²

² The doctrine of res judicata precludes the relitigation of certain matters which have been resolved in a prior proceeding under certain circumstances. Its purpose is to preserve the integrity of the judicial system, promote judicial economy and protect litigants from harassment by vexatious litigation. The doctrine has two aspects. It applies to both a previously litigated cause of action, referred to as claim preclusion, and to an issue necessarily decided in a prior action, referred to as issue preclusion. The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.

- Raul G. Monreal and Norma C. Monreal owned real property described in Assessor's Parcel Number 058-823-08, in Calexico, Imperial County, California (the storage site). Mr. Monreal inherited the property from his mother in 1993. This site, which is approximately two acres in size, was not a permitted waste tire facility (WTF).
- On July 9, 2001, Vance Tracy (Tracy) of the CIWMB conducted an inspection at the storage site and observed approximately 4,500 waste tires on site. The tires were stored in a manner violating standards for storage, fire prevention and vector control. A written report of the inspection and a "Letter of Violation" dated October 2, 2001, was sent to Raul G. and Norma C. Monreal, notifying them that waste tires at the storage site had be removed to a legal waste tire facility by a registered waste tire hauler by November 1, 2001.
- On December 5, 2001, Tracy conducted another site visit. Tracy determined that none of the waste tires previously on site had been removed from the facility. Additionally, waste tires were still stored in a manner violating standards for storage, fire prevention and vector control.
- On January 10, 2002, Cleanup & Abatement Order 2001-010224CAO was issued to Raul G. and Norma C. Monreal, directing them to remove all waste tires from the site by February 28, 2002. The Monreals were directed to submit copies of all destination receipts and waste tire manifests to the CIWMB on or before March 14, 2002.
- On March 6, 2002, Tracy conducted another site visit. He determined over 4,000 waste tires were still on site. During the site visit, Tracy met with Raul Monreal, who explained that his tenant, Carlos Duenas (Duenas), was operating a business known as R-1 tires. Monreal said he would make sure the storage site and Duenas complied with the laws and regulations concerning waste tire facilities. Monreal agreed to provide Duenas with a registered waste tire hauler application package and a copy of relevant standards (including the Public Resources Code definition of "Used Tire"). Monreal said he would have Duenas remove waste tires from the storage site to an authorized location. In exchange, CIWMB staff agreed that CIWMB would not pursue an administrative complaint if the waste tires on site were cleaned up in a couple of months.
- A check of CIWMB records in July 2002 revealed that no manifests had been received; nor was there any record that Monreal, Duenas or R-1 Tires or any other entity (located at the storage site) was registered to haul waste tires.
- On July 16, 2002, Tracy conducted another site visit. He determined none of the previously estimated 4,500 tires on site had been removed. Although some waste tires were staged in the back of the facility, many waste tires continued to be stored in a manner that violated standards for storage, fire prevention, and vector control.

- It was not until the Monreals were served with the administrative complaint on December 18, 2002, that serious efforts at compliance were initiated. On the day of first hearing (January 8, 2003), Monreal testified there were approximately 600 tires remaining at the storage site. Monreal testified the other waste tires were removed by or at the direction of Duenas. It was not established that Duenas had applied for any waste tire hauler permit or that the waste tires were removed in accordance with Board regulations.
- Monreal was married with two children. Monreal worked as a special agent for the United States Department of Transportation (USDOT) in the Federal Motor Carriers Safety Administration, with that federal employment beginning in March 2002. Monreal was assigned to border areas and was generally charged with determining compliance with the provisions of the North American Free Trade Agreement (NAFTA) related to trucking companies. Before his employment with the USDOT, Monreal was a correctional support staff person for the Imperial County Sheriff and was assigned to the county jail for eight years.
- In the mid-1990s, Fernando Lara started Border Tire on the storage site. Lara brought waste tires onto the property, stored them and sold them, then stopped paying rent to the Monreals. Lara ultimately abandoned the property in 1997. In late 1998, Felipe Gonzales (Gonzales) wanted to rent storage containers on site. The storage containers were left there by Monreal's father, who had been in the trucking business. Through Gonzales, the Monreals met Duenas in 1999. Duenas ultimately rented the entire two-acre parcel from the Monreals with the intent to conduct a business involving the storage and sale of tires. The initial rent was \$650 per month, which increased to \$1,000 per month by January 2003.
- The Monreals were solid citizens who did not make a substantial amount of money from the rental of the two-acre site. Monreal appeared to be under the mistaken belief that he did not have responsibility or control over his tenant and, therefore, he did not have any potential liability for the violations that were clearly shown. Monreal attempted to get Duenas to comply, but Monreal's efforts proved ineffectual.
- The Board and its staff were models of restraint and made reasonable efforts to assist the Monreals and/or Duenas to comply with pertinent laws and regulations. They were patient and issued the administrative complaint only as a last resort.
- Ownership of the parcel brought with it certain obligations that existed irrespective of whether the Monreals rented the parcel to another. The Monreals had a non-delegable duty to insure their storage site complied with CIWMB laws and regulations. Despite many good faith efforts, the property remained in violation, even as late as the day of the first administrative hearing. At no time did the Monreals comply with CIWMB regulations related to fire prevention measures, vector control or safe storage.

- Monreal testified honestly about his attempts to gain compliance. Duenas, who was present at the first administrative hearing, testified he wanted to comply with the law and said he would register as a waste tire hauler. ALJ Hjelt found it significant and mitigating that in the three weeks before the first hearing, approximately 3,000 tires were removed from the site. ALJ Hjelt found it significant but not mitigating that a permitted waste tire hauler did not remove the waste tires. Neither the Monreals nor Duenas applied to be permitted in any capacity by the CIWMB.
- In determining the civil penalty, ALJ Hjelt read, considered and applied the factors set forth in Public Resources Code section 42852. The civil penalty ALJ Hjelt imposed was intended to harmonize the various elements in the statute.

ALJ Hjelt concluded:

- The Monreals were liable for civil penalties under Public Resources Code section 42850.1, subdivision (b).
- CIWMB’s authority to assess civil penalties against the respondents was found in Public Resource Code section 42850.1, subdivision (b)(1), which stated:

“Any person who intentionally violates any provision of this chapter, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter is liable for a civil penalty not to exceed ten thousand dollars (\$10,000) for each violation of a separate provision or, for continuing violations, for each day that violation continues.”
- In determining the reasonableness and propriety of a civil penalty, Public Resources Code section 42852 required the hearing officer to:

“. . . take into consideration the nature, circumstances, extent, and gravity of the violation, the violator’s past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator’s ability to pay the proposed penalty, and the prophylactic effect that imposition of the proposed penalty will have on both the violator and on the regulated community as a whole.”
- Under Public Resources Code section 42846.5, the imposition of penalties in the first administrative action could form the basis for a subsequent Board order permitting the CIWMB or its contractors to enter the storage site to perform cleanup, abatement and/or remedial work under Public Resources Code section 42846.
- The Monreals violated Public Resources Code section 42834, which made it unlawful to accept waste tires at a waste tire facility unless the operator had obtained a waste tire permit. Under Title 14, California Code of Regulations, section 18422(i), “operator” meant owner if there was no operator.

- The Monreals violated Title 14, California Code of Regulations, section 18420, which required the owner or operator of a waste tire facility to obtain a permit from the CIWMB unless exempted. The Monreals did not obtain such a permit.
- The Monreals violated Title 14, California Code of Regulations, section 17351 (Fire Prevention Measures), which set forth specific requirements related to equipment and water supply available at a waste tire facility. The Monreals did not have such equipment, nor did they have a water supply at the site.
- The Monreals violated Title 14, California Code of Regulations, section 17353 (Vector Control Measures), which set forth requirements related to the prevention of breeding and harborage of mosquitoes, rodents and other vectors at a waste tire facility.
- The Monreals violated Title 14, California Code of Regulations, section 17354 (Storage of Waste Tires), which set forth requirements for the storage of waste tires at a waste tire facility.
- The Monreals violated Public Resources Code section 42845 by failing to comply with Cleanup & Abatement Order 2001-010224CAO, which required them to clean up, abate and otherwise take remedial action at a waste tire facility.

ALJ Hjelt imposed a civil penalty of \$5,000, which was payable within 30 days from the date the Monreals were served with a copy of this Decision. There was no appeal.

The Second Hearing

4. The following factual matters were established at the administrative hearing conducted on July 19, 2004.

5. On January 15, 2003, less than a month after the first administrative hearing, Derlene Bringle (Bringle), an Imperial County Waste Tire Specialist trained by CIWMB to estimate the number of waste tires at a storage site, visited the Monreals' storage site. She observed numerous truck trailers on the site, each loaded with waste tires. Two of the trailers had waste tires stored on top of the trailers. Bringle estimated there were about 7,000 waste tires on site, an estimate that was established to be too high. Bringle observed an area where tires had burned, as evidenced by steel remnants and other characteristic detritus. Bringle took numerous photographs.

6. On January 28 and 29, 2003, less than a month after the first administrative hearing, Tracy, an experienced CIWMB investigator, conducted another site visit.

Tracy estimated approximately 5,500 tires were stored in the various trailers and containers on site, as well as on the ground. Tracy testified his estimate could have been

20% too high (meaning there might be as few as 4,400 tires on site) or it might have been 20% too low (meaning there may have been as many as 6,600 tires on site).

Tracy's best estimate of the number of tires on site caused him to believe that the storage site was as a "major" WTF because there were more than 5,000 waste tires on site.³

Tracy observed some tires were stored within 10 feet of the storage site property line. He also observed that some tires were stored in dried vegetation, which was flammable.

Tracy took many photographs of the waste tires he observed.

7. On April 9, 2003, Cleanup & Abatement Order 2003-010451-CAO was issued to Raul G. and Norma C. Monreal, Owner/Operator, and to Duenas, Operator, of the storage site.

The Cleanup & Abatement Order required all waste tires be removed from the site by a registered waste tire hauler by April 30, 2003, and copies of waste tire manifests for each load of waste tires removed from the site be provided to the CIWMB no later than May 14, 2003. H. James Lee, Jr., Deputy Director, Special Waste Division, California Integrated Management Board signed the order.

On April 9, 2003, the Cleanup & Abatement Order 2003-010451-CAO was served by certified mail on Raul G. and Norma C. Monreal, Owners/Operators, and on Duenas, Operator.

8. On April 22, 2003, Tracy spoke with Monreal about the Monreals' and Duenas' likely compliance with Cleanup & Abatement Order 2003-010451-CAO.

Monreal asked Tracy for a 90-day extension to complete cleanup at the site, representing he did not have sufficient finances to meet the upcoming April 30 deadline.

³ Public Resources Code section 42808 provides in part:

“Waste tire facility’ means a location, other than a solid waste facility permitted pursuant to this division that receives for transfer or disposal less than 150 tires per day averaged on an annual basis, where, at any time, waste tires are stored, stockpiled, accumulated, or discarded. ‘Waste tire facility’ includes all of the following:

(a) ‘Existing waste tire facility’ means a waste tire facility which is receiving, storing, or accumulating waste tires, or upon which waste tires are discarded, on January 1, 1990.

(b) ‘Major waste tire facility’ means a waste tire facility where, at any time, 5,000 or more waste tires are or will be stored, stockpiled, accumulated, or discarded.

(c) ‘Minor waste tire facility’ means a waste tire facility where, at any time, 500 or more, but less than 5,000, waste tires are or will be stored, stockpiled, accumulated, or discarded. However, a ‘minor waste tire facility’ does not include a tire dealer or an automobile dismantler, as defined in Sections 220 and 221 of the Vehicle Code, who stores waste tires on the dealer's or dismantler's premises for less than 90 days if not more than 1,500 total used or waste tires are ever accumulated on the dealer's or dismantler's premises.”

Monreal represented (and later faxed proof) that some waste tires on site had been removed since February 2003. Tracy advised Monreal the request for a 90-day extension of time to comply with Cleanup & Abatement Order 2003-010451-CAO was granted.

Monreal (and his wife and Duenas) reasonably relied on Tracy's representation that a 90-day extension was granted in which to comply with the Cleanup & Abatement Order. Assuming the extension was granted on the date it was requested, and then the cleanup should have been completed in late July 2003.

9. On September 10, 2003, Tracy conducted another site visit. Tracy estimated about 3,300 waste tires were present on site. The waste tires were stored in a manner violating standards for storage, fire prevention and vector control. Tracy took photographs of what he observed.

10. On February 5, 2004, the Administrative Complaint giving rise to the second administrative hearing was filed. It was served on the Monreals on February 25, 2004, and was personally served on Duenas on March 8, 2004.

11. On April 20, 2004, the day originally set for the second administrative hearing (which was ultimately continued to July 19, 2004), Bringle visited the storage site. All but about 70 waste tires had been removed from the site. The only other tires on the site were used tires being stored for resale.

12. Bringle was given statements from Lucky Tire, Inc., a permitted waste disposal facility located in El Centro, California, indicating "junk tires" were picked up for disposal from "Duenas Service" on April 13, 15 and 19, 2004. The total charge for the removal of the waste tires, which was paid in full, was about \$11,460.

Lucky Tires, Inc. charged \$150 per ton to remove waste tires from the storage site, indicating approximately 76.5 tons of waste tires were removed. According to Tracy, approximately 100 waste passenger tires weigh a ton; accordingly, it appears more than 5,000 tires were removed from the storage site in the week before the administrative hearing was first scheduled.

13. Tracy last visited the site on July 13, 2004. He observed about 120 waste tires on site. According to Tracy, the site was "finally cleaned up."

14. Raul Monreal is 51 years old. He lives in Calexico with his wife and two children. The family home is located no more than three miles from the storage site. Monreal inherited the real property on which the waste tire facility was located from his mother. He estimated the property had a fair market value of \$100,000. There is no mortgage against the property.

15. Monreal described the development of the waste tire facility, which was consistent with his testimony before ALJ Hjelt. Monreal leased the real property to Lara, who started the entity known as Border Tire. Lara brought used and waste tires onto the

property, stopped paying rent to Monreal and ultimately abandoned the property (and about 1,000 tires) in 1997. Thereafter, Felipe Gonzales (Gonzales) rented several storage containers left on the site by Monreal's father. Through Gonzales, the Monreals met Duenas.

Sometime in the late 1990s, Duenas rented the entire two-acre parcel from the Monreals to conduct his business, which involved the acquisition, storage and sale of used tires. Many of the "used" tires were, in fact, "waste tires." The initial rent was \$650 per month, which increased to \$1,000 per month by January 2003. The lease arrangements were oral. The number of waste tires stored on the facility increased fivefold.

16. Monreal testified he was unable to pay for the removal of the waste tires until very recently. Monreal testified he was "pressured" to remove the waste tires as a result of a threatened criminal prosecution and as a result of the filing of the second administrative action.

17. By the time of the second administrative hearing, Monreal had paid \$4,000 of the \$5,000 civil penalty imposed in the prior administrative proceeding.

18. Monreal said he understood he had to suffer some consequences for his failure to comply with pertinent rules, regulations and orders, and he suggested the imposition of a \$2,000 civil penalty was most appropriate given his financial circumstances.

19. Duenas is 48 years old. His primary language is Spanish. Duenas testified through an interpreter.

Duenas repairs and sells used tires and provides roadside services. He has rented the two-acre parcel from the Monreals for four or five years. Duenas subleases part of the parcel and receives approximately \$650 per month rent from his subtenant. Duenas previously permitted Gonzales to store tires in trailers on the property, but he stopped doing so after "having all these problems."

Duenas admitted that some waste tires at the storage site caught on fire on one occasion, but he did not intentionally burn the tires. Duenas testified he reported the fire to the local authorities (Bingle could not confirm Duenas' testimony in that regard).

Duenas testified he did not have the waste tires removed in compliance with the cleanup order because of his dire financial situation. Very recently he managed to borrow about \$15,000 from several friends in Mexico, and he used the proceeds of the loan to remove waste tires from the storage site.

20. Duenas believed he has suffered sufficient economic sanctions as a result of having to clean up the storage site. He testified there will be no problems in the future.

21. The CIWMB requested the hearing officer to impose a \$40,000 civil penalty against the Monreals and a \$20,000 civil penalty against Duenas.

LEGAL CONCLUSIONS

The Integrated Waste Management Act of 1989

1. In 1989, the California Legislature enacted the Integrated Waste Management Act of 1989 (Pub. Resources Code § 40000 et seq.).

The purpose of the new Act was “to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement waste management programs.” (Pub. Resources Code § 40052.)

The Act created the California Waste Management Board (Pub. Resources Code § 40400 et seq.). It requires local agencies to prepare integrated waste management plans that promote source reduction, recycling and composting (Pub. Resources Code § 40900 et seq.).

The Act requires the Board to institute a plan to stimulate market demand for certain post-consumer and industrial waste material (Pub. Resources Code § 42000 et seq., added in 1993), it regulates solid waste facilities (Pub. Resources Code § 43000 et seq.), it provides for the division of authority over solid waste disposal between the Board and the state and regional water boards (Pub. Resources Code § 43100 et seq., added in 1993), and it provides for enforcement (Pub. Resources Code § 45000 et seq.).

Administrative Enforcement

2. Public Resources Code section 42850.1 provides:

“(a) Any person who intentionally violates any provision of this chapter, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter, shall, upon conviction, be punished by a fine not to exceed ten thousand dollars (\$10,000) for each day of violation, by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment.

(b)(1) Any person who intentionally violates any provision of this chapter, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter, is liable for a civil penalty not to exceed ten thousand dollars (\$10,000), for each violation of a separate provision or, for continuing violations, for each day that the violation continues.

(2) Liability under this subdivision may be imposed in a civil action or may be imposed administratively pursuant to this article.”

3. Public Resources Code section 42851 provides in part:

“(a) The board may issue a complaint to any person on whom civil liability may be imposed pursuant to this article. The complaint shall allege the acts or failures to act that constitute a basis for liability and the amount of the proposed civil liability. The complaint shall be served by personal service or certified mail and shall inform the party so served that a hearing shall be conducted within 60 days after the party has been served, unless the party waives the right to a hearing . . .”

4. Public Resources Code section 42852 provides in part:

“(a) Any hearing required under this section shall be conducted by an independent hearing officer . . . In making a determination, the hearing officer shall take into consideration the nature, circumstances, extent, and gravity of the violation, the violator’s past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator’s ability to pay the proposed civil penalty, and the prophylactic effect that imposition of the proposed penalty will have on both the violator and on the regulated community as a whole.

(b) After conducting any hearing required under this section, the hearing officer shall, within 30 days after the case is submitted, issue a decision, including an order setting the amount of civil penalty to be imposed, if any.”

Burden and Standard of Proof

5. Evidence Code section 115 provides:

“‘Burden of proof’ means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court . . .

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”

6. With respect to the standard of proof, a violation of statutory laws designed to protect the public through the imposition of civil penalties is met by the usual preponderance of the evidence standard. In contrast, an award of punitive damages requires clear and convincing evidence of oppression, fraud, or malice. See, *People v. First Fed. Credit Corp.* (2002) 104 Cal.App.4th 721, 732.

7. A court must impose civil penalties based upon the relevant evidence before the court. Evidence of a party’s financial condition is merely one factor to be considered and either party to the action may present such evidence. See, *People v. First Fed. Credit Corp.* (2002) 104 Cal.App.4th 721, 729.

Regulatory Authority re Amount of Civil Penalty

8. Title 14, California Code of Regulations, section 18429 sets forth a penalty schedule for administrative complaints. It provides in part:

“(a) Unpermitted Waste Tire Facilities:

(1) Determine in Table 1 whether or not this act is negligent or intentional, and whether is it the first, second, or third offense (intentional only). Match it up to the amount of tires at the site, and determine the base fine. Table 1 is to be used for violations of Public Resources Code, sections 42823, 42824, 42833, 42834, and California Code of Regulations, section 18420, subdivision (a). Multiply the base fine by the applicable risk factor in Table 2A or Table 2B, dependent upon whether it is negligent or intentional, and determine the total fine/day that will be set. Multiply the total fine/day by the number of days past due with the Clean Up & Abatement Order deadline.”

Table 1

Type Of Site/Operation	500-4,999 Tires	5,000-9,999 Tires	10,000-19,999 Tires
Negligent-Capacity			
Unpermitted WTF	\$ 500	\$ 1,000	\$ 1,500
Unpermitted WTF (2nd Offense, etc.)	\$ 2,000	\$ 2,500	\$ 3,000
Intentional-Capacity			
Unpermitted WTF	\$ 1,000	\$ 2,000	\$ 3,000
Unpermitted WTF (2nd Offense)	\$ 4,000	\$ 5,000	\$ 6,000
Unpermitted WTF (3rd Offense, etc.)	\$ 6,000	\$ 7,000	\$ 8,000
Type Of Site/Operator	20,000-49,999 Tires	50,000 or More Tires	
Negligent-Capacity			
Unpermitted WTF	\$ 2,000	\$ 3,000	
Unpermitted WTF (2nd Offense, etc.)	\$ 3,500	\$ 4,000	
Intentional-Capacity			
Unpermitted WTF	\$ 4,000	\$ 6,000	
Unpermitted WTF (2nd Offense)	\$ 7,000	\$ 8,000	
Unpermitted WTF	\$ 9,000	\$ 10,000	

(3rd Offense, etc.)

Total amount of penalty not to exceed maximum amounts specified in PRC sections 42825 and 42835.⁴

Table 2A

Enhancement Issue-Negligent Act	Risk Factor
Serious threat to Public Health and Safety, or the Environment. Residential homes, freeway/major roads, lakes, rivers, waterways and airports within 1,000 feet.	1.00
Moderate threat to Public Health and Safety, or the Environment. Residential homes, freeway/major roads, lakes, rivers, waterways and airports within one mile, but more than 1,000 feet.	0.75
No potential threat to Public Health and Safety, or the Environment.	0.50

Appellate Authority re Civil Penalties

9. This matter is somewhat similar to unfair competition and false advertising actions brought under the Business and Professions Code, where statutes require a court to impose a penalty for each unlawful act. While the duty to impose a penalty for each violation

⁴ Public Resources Code section 42825 provides in part:

“(a) Any person who accepts waste tires at a major waste tire facility that has not been issued a permit or an authorization to operate from the board, or who knowingly directs, transports, or abandons waste tires to or at a major waste tire facility that has not been issued a permit or an authorization to operate from the board shall, upon conviction, be punished by a fine of not less than one thousand dollars (\$1,000) or more than ten thousand dollars (\$10,000) for each day of violation . . .

(b) For purposes of subdivision (a), ‘each day of violation’ means each day on which a violation continues. In any case where a person has accepted waste tires at a major waste tire facility, or knowingly directed or transported waste tires to a major waste tire facility, that has not been issued a permit, in violation of subdivision (a), each day that the waste tires remain at the facility and the person has knowledge thereof is a separate additional violation, unless the person has filed a report with the board disclosing the violation and is in compliance with any order regarding the waste tires issued by the board, a hearing officer, or a court of competent jurisdiction.”

Public Resources Code section 42835 provides in part:

“(a) Any person who accepts waste tires at a minor waste tire facility that has not been issued a permit or an authorization to operate from the board, or who knowingly directs, transports, or abandons waste tires to or at a minor waste tire facility that has not been issued a permit or an authorization to operate from the board shall, upon conviction, be punished by a fine of not less than five hundred dollars (\$500) or more than five thousand dollars (\$5,000) for each day of violation . . .

(b) For purposes of subdivision (a), ‘each day of violation’ means each day on which a violation continues . . . ”

is mandatory, the amount of the penalty lies within the trial court's discretion and will not be overturned unless there is an abuse of discretion. See, *People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 127.

10. A review of three recent appellate cases reviewing the trial court's imposition of civil penalties demonstrates the manner in which trial courts have properly exercised discretion in imposing civil penalties.

- *People v. Murrison* (2002) 101 Cal.App.4th 349 involved the review of a trial court's \$10,000 civil penalty in a matter in which a property owner unlawfully placed rocks and gravel across a creek in Trinity County, California, diverting most of its flow into a ditch for use on his ranch. Potential environmental damage was established. The People requested the imposition of a \$75,000 civil penalty (the operative statute, Fish & G. Code § 1603.1, provided a civil penalty of not more than \$25,000 for each violation).

In determining the amount of any civil penalty, the court was required to take into consideration the nature, circumstance, extent, and gravity of the violation including the degree of toxicity and volume of the discharge, whether the effects of the violation could be reversed or mitigated, the violator's ability to pay any civil penalty and its impact on the violator's ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the gravity of the behavior, the economic benefit, if any, resulting from the violation, and any other matters the court determined justice might require.

The trial court did not abuse its discretion in imposing a civil penalty of \$10,000 rather than the requested \$75,000 civil penalty.

- *People v. First Fed. Credit Corp.* (2002) 104 Cal.App.4th 721 involved the review of a trial court's \$200,000 civil penalty in a matter related to a credit corporation's violation of the unfair competition and false advertising laws involving more than 300 separate violations of the unfair competition law and 400 separate violations of the false advertising law. Had the trial court imposed the maximum penalty of \$2,500 for each statutory violation, defendants would have been liable for \$1.75 million.

After considering defendants' financial status, the trial court reduced the total penalty to \$200,000 - a reduction of more than 88% - even though the defendant corporation's financial statements showed fee income over a 12-month period of \$1,916,468 on loan volume of \$58 million and the evidence showed the two individual defendants lived in a house worth at least \$600,000, with title to the property held in the name of one principal's mother, consistent with defendants' practice of shielding assets by not holding title in their own names while continuing to fully enjoy such assets.

The trial court did not abuse its discretion in imposing a \$200,000 civil penalty rather than the \$1.75 million civil penalty that could have been imposed.

- *People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102 the trial court ordered restitution of \$525,000 and a civil penalty of \$525,000 in a matter in which landlords illegally made long-term leases with mobile home dealers who, in turn, sold the mobile homes and required the purchasers to assume the dealers' lease or sign a new long-term lease with similar terms (the purchaser was not protected by the rent control provisions of a municipal ordinance). More than 14,000 violations were established, providing a theoretical maximum civil penalty of \$35 million.

On appeal it was noted that in assessing a civil penalty for unfair business practices, a trial court must manifestly act reasonably in light of all pertinent factors. Each violation of the unfair practices law and each violation of the false advertising law was punishable by a civil penalty in the maximum amount of \$2,500 under Business and Professions Code sections 17206 [unfair practices law] and 17536 [false advertising law].

The trial court's approach in imposing civil penalties was thorough, considered and measured. The resulting penalty was reasonable and well within the trial court's discretion.

Evaluation

11. As early as October 2001, the CIWMB contacted the Monreals and placed them on actual notice their real property was being used unlawfully as a waste tire storage facility. The Monreals were, first, informally directed to get rid of the waste tires on site by November 15, 2001, and, then, were formally directed to get rid of the waste tires on site by February 28, 2002 through a Cleanup & Abatement Order issued January 10, 2002.

There was minimal evident progress in cleaning up the site. In the administrative hearing conducted on January 8, 2003, Monreal advised ALJ Hjelt in his sworn testimony that there were only approximately 600 tires left on site according to his tenant. Monreal said the delay in removing the tires was due to his belief his tenant was responsible for removing the tires, his inability to enter the property to remove waste tires, his attendance at a six-week training academy, the possibility that he did not receive some notices directing him to remove waste tires, his belief that his tenant was making an effort to remove waste tires, and the busy holiday season.

In fact, contrary to Monreal's sworn testimony, no tires had been removed. Some tires had been moved into storage containers on site, but there remained on site – both in the storage containers and on the ground – about 4,500 tires. This finding that no tires had been removed is consistent with Tracy's inspections in late January 2003 and thereafter, and this finding is further corroborated by the fees charged by Lucky Tires and the weight of the tires removed from the facility. Monreal said he did not have the money to finance the removal of the waste tires.

Between the first administrative hearing conducted on January 8, 2003, and April 19, 2004, when Lucky Tires removed the last shipment of waste tires (a period of about 15 months), nothing substantial was done to ensure tires were removed from the real property. The real property remained an unpermitted major waste tire facility. On April 9, 2003, the second Cleanup & Abatement Order was issued. Monreal asked the CIWMB for additional time to respond to the order that the waste tires removed, which was given. Nevertheless, no real progress was made in removing any waste tires from the real property until April 2004, the date of the second administrative hearing. Monreal testified he did not have the money to finance the removal of the waste tires.

However, between January 8, 2003 and April 19, 2004, the Monreals continuously leased the real property to Duenas, who paid the Monreals \$15,000 over that period of time. For an undetermined period of time, Duenas rented a portion of the leasehold estate to a subtenant for \$650 per month (essentially two-thirds of what Duenas paid to the Monreals). Duenas also operated his tire business from the rental property.

The matters just referred to indicate the serious nature, the circumstances, the extent and gravity of the violations. Before early April 2004, the Monreals and Duenas made no real effort to prevent, abate or clean up the unpermitted waste storage facility. The storage of waste tires on the real property was more than an eyesore – it presented a health and safety hazard to residents of Calexico and Imperial County.

While no direct proof was offered concerning the ability of the Monreals or Duenas to pay the civil penalty proposed by the CIWB, none of them appear to be wealthy. The real property appears to be the most significant asset that any of them own. Imposing a drastic civil penalty will not have a prophylactic effect in that the real property is no longer an unpermitted waste tire facility, but a substantial civil penalty should be imposed to ensure that the Monreals and Duenas will not profit by knowingly violating the law. The imposition of a substantial civil penalty will have a salutatory effect on the regulated community as a whole.

12. Under Public Resources Code section 42825, the fine for a major unpermitted WTF cannot be less than \$1,000 nor more than \$10,000 “for each day of violation,” which means for each day a violation continues.

Under the calculus set forth in Title 14, California Code of Regulations, section 18429, the base fine is \$7,000 per violation since the operation involved 5,000-9000 tires, because the conduct described in the most recent Amended Administrative Complaint was knowing and intentional and since it was a second offense as to the Monreals. The base fine would be \$7,000 per violation.

Under relevant statutes and regulations, the maximum theoretical civil penalty that could be imposed against the Monreals would be approximately \$3,150,000.

13. Cause exists under Public Resources Code sections 42850, 42850.1 and 42850 to impose a civil penalty against Raul G. and Norma C. Monreal. It is concluded that an

appropriate civil penalty as to the Monreals would be \$10,000, an amount that is twice the civil penalty that was awarded in the first action and about two-thirds of the gross rentals during the period the unpermitted waste tire facility was most recently operated on their real property.

This conclusion is based on all Factual Findings and on Legal Conclusions 1-12.

14. Cause exists under Public Resources Code sections 42850, 42850.1 and 42850 to impose a civil penalty against Carlos Duenas. It is concluded that an appropriate civil penalty as to Duenas would be \$6,500, about two-thirds of the civil penalty imposed against the Monreals, a figure which corresponds to the percentage of the rent Duenas received from his tenant that Duenas paid in total rent to the Monreals for the period in question.

This conclusion is based on all Factual Findings and on Legal Conclusions 1-12.

ORDERS

A civil penalty of \$10,000 is imposed against Raul G. Monreal and Norma C. Monreal. The civil penalty shall be paid to the CIWMB within 30 days of the date they are served with this Decision.

A civil penalty of \$6,500 is imposed against Carlos Duenas. The civil penalty shall be paid to the CIWMB within 30 days of the date he is served with his Decision.

DATED: _____

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings