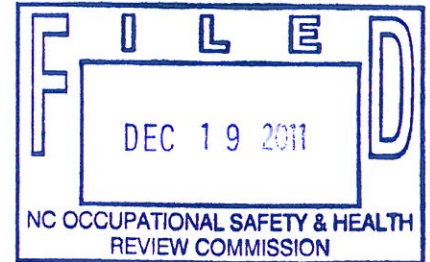


BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

RALEIGH, NORTH CAROLINA



COMMISSIONER OF LABOR FOR)
THE STATE OF NORTH CAROLINA)
)
COMPLAINANT,)
)
v.)
)
J P GREEN MILLING CO. INC,)
)
)
RESPONDENT.)
_____)

ORDER

OSHANC NO. 2011-5191
INSPECTION NO. 315301432
CSHO ID NO. V0776

THIS MATTER was heard by the undersigned on December 7, 2011 in Charlotte, North Carolina.

The complainant was represented by Linda Kimbell, Assistant Attorney General; the respondent appeared through its president Ralph Naylor.

Through discussions prior to the taking of testimony, the parties and the undersigned worked to identify and clarify the issues to be decided. There were a number of matters that were not in dispute. The original inspection of respondent's facility was a general scheduled inspection, which resulted in the assertion of three standard violations, with total proposed penalties of \$1,100.00. The respondent and the complainant entered into a settlement agreement which required the respondent to acknowledge the violations, abate the violations and pay a reduced penalty amount of \$800.00. The respondent ultimately abated the violations, but not before a reinspection by the complainant occurred because abatement was not timely pursuant to the settlement agreement. The respondent also paid the \$800.00 in settlement penalties, but at that point the respondent was facing \$72,000.00 in failure to abate penalties. There is no issue about the original violations existing both at the time of the original inspection and the reinspection. The issues before the undersigned relate to the appropriateness of the failure to abate penalties and the respondent's ability to pay such penalties.

After hearing and receiving the evidence and hearing the arguments and contentions of the parties, the undersigned makes the following

FINDINGS OF FACT

1. The complainant as Commissioner of Labor is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a corporation located in Mocksville, North Carolina which employs 14 persons.
3. The respondent is a manufacturer of animal feed and of corn meal and flour for human consumption.
4. In August, 2010, the respondent was cited with the following violations:
 - a) Failure to have a written lockout-tagout program in violation of 29 CFR 1910.147(c)(4)(i);
 - b) Unguarded pulleys in violation of 29 CFR 1910.219(d)(1); and
 - c) Failure to maintain the OSHA 200 log in violation of 29 CFR 1904.29(b)(3).
5. The respondent requested an informal conference with the complainant and on August 24, 2010 the parties entered into a settlement agreement which reduced the proposed penalties from \$1,100.00 to \$800.00 and required the respondent to abate the violations.
6. The complainant through its safety compliance officer Aisha Holloman followed up with the respondent to obtain abatement verification when complainant received no abatement information from the respondent. Ms. Holloman contacted Mr. Ralph Naylor by telephone twice and sent twice to the respondent a late abatement notice. These contacts occurred in October, 2010.
7. After receiving nothing from the respondent regarding abatement, the complainant through Ms. Holloman conducted a follow up inspection on March 7, 2011. The respondent acknowledged through Ralph Naylor that no abatement had occurred on any violations at that time. Failure to abate continued for a period exceeding 30 days.
8. During the course of the reinspection, Ms. Holloman advised the respondent through Mr. Naylor that the failure to abate penalties could be from two times to five times higher.
9. On June 8, 2011, the complainant issued failure to abate citations as follows:

a) Citation 1, Item 2, alleging a violation of 29 CFR 1910.219(d)(1) based on pulleys with unguarded parts less than seven (7) feet from the floor or work platform; and

b) Citation 2, Item 1 alleging a violation of 29 CFR 1904.29 (b)(3) in that the respondent did not maintain a log of recordable occupational injuries and illnesses for the years 2007-2009.

10. The proposed penalties for each citation time were calculated pursuant to complainant's Field Operations Manual.

a) Regarding Citation 1, Item 2, the gravity based penalty for a high severity, low probability violation of the standard is \$5,000.00. The respondent was given a 60% credit for size and the adjusted penalty of \$2,000.00 was multiplied by 30, the maximum number of days the respondent can be penalized for its failure to abate. This made the total penalty for this Item \$60,000.00.

b) Regarding Citation 2, Item 1, this is an administrative item, carrying a standard penalty of \$1,000.00. After applying the size credit of 60% and multiplying by 30 for the maximum number of days for failure to abate, the total penalty for this Item was \$12,000.00.

11. Mr. Ralph Naylor was pleasant and nice to the complainant's representatives when any visited the respondent's facility.

12. The respondent attempted to obtain the pulley guards after the initial inspection by the complainant but learned that the guards needed to be custom-fabricated. The respondent undertook some effort to identify a fabricator to make the guards and ultimately was able to engage a machine shop to make and install the covers. This installation occurred after the second inspection.

13. The respondent through Mr. Naylor and otherwise did not maintain contact with the complainant in order to advise the complainant of any difficulties or delay in obtaining the pulley guards.

14. The respondent did not believe there was any urgency to the requirement to abate the violations, despite the fact that the settlement agreement between the parties required the respondent to abate the violations by the dates in the original citations.

15. The respondent submitted its 2010 federal and state income tax returns, which show a tax loss of \$413,054.00 on revenues of \$2,632,387.00. Review of the tax returns indicated that no shareholder, officer or director, including Mr. Naylor, was receiving a significant salary or payment from the respondent due to any such position. The tax returns of the respondent also indicated that the depreciated book value of the

assets is \$2,318,260.00 and the liabilities are \$4,185,016.00, exceeding the assets by over \$1.8 million.

16. The respondent also submitted a legal demand letter dated October 31, 2011 from an attorney for SunTrust Bank demanding full payment due to default on a \$1,399,691.33 loan secured by the assets of the respondent. The respondent also has a SBA loan with a balance over \$900,000.00.

17. The respondent contends that it is insolvent and the records provided by the respondent support that contention.

18. The respondent seeks a reduction in the penalties asserted against it based on financial incapacity.

Based on the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The respondent is subject to the provisions of the Act.

3. The respondent failed to timely abate the violations with which it was originally cited and which it acknowledged by entering into the settlement agreement with the complainant.

4. The proposed penalties were properly calculated, but the undersigned has presented persuasive evidence of financial incapacity. *See, Brooks v Triple I Industries, 2 NCOSHD 793 (1986).*

5. Based on this financial incapacity, the penalties shall be reduced as provided below, which is calculated by taking the proposed penalties in the original inspection, multiplying them by five (5) based on respondent's own testimony of the failure to abate enhancement, less the \$800.00 payment by respondent.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Citation 1, Item 2 is affirmed as a failure to abate violation of 29 CFR 1910.219 (d)(1), with an adjusted penalty of \$4,700.00. ($\$1,100.00 \times 5 = \$5,500.00 - \$800.00 = \$4,700.00$).

2. Citation 2, Item 1 is affirmed as a failure to abate violation of 29 CFR 1904-29 (b)(3), with a penalty grouped with the above stated penalty.

3. This adjusted penalty shall be paid within twenty (20) days of the filing date of this Order.

4. All violations not previously abated shall be immediately abated.

This 15th day of December, 2011.



RICHARD M. KOCH
HEARING EXAMINER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

RALPH NAYLOR
JP GREEN MILLING CO INC
PO BOX 187
MOCKSVILLE NC 27028

LINDA KIMBELL
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

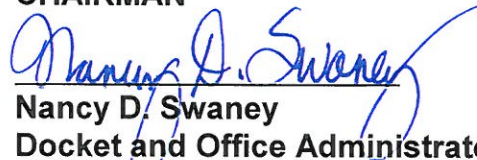
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 20th DAY OF December 2011.

OSCAR A. KELLER, JR.
CHAIRMAN



Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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