BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA, COMPLAINANT,	)	
	)	**INSPECTION NO. 315567719**
v.	)	**CSHO ID. R4959**
	)	**OSHANC: 2011-5213**
W-S Car, *(owned and operated by WilcoHess), and its successors,*	)	
RESPONDENT.	)	

ORDER

These matters came on to be heard and were heard before the undersigned Administrative Law Judge on September 17, 2012, in Winston-Salem, North Carolina. Complainant was represented by Jill Cramer, Assistant Attorney General, Labor Section, North Carolina Department of Justice (NCDOJ). Also present for complainant were: attorney Linda Kimbell of the NCDOJ; Charles Knox, Safety Compliance Officer with the North Carolina Department of Labor (NCDOL) OSHA Division; and Ben Harris, District Supervisor, NCDOL. Respondent was represented by Sherry Polonsky, Senior Vice President and Chief Financial Officer of WilcoHess, L.L.C. and W-S Car, Inc. Also present for respondent was Dan McCormick, respondent's risk manager.

AFTER REVIEWING the record file (including respondent's Statement of Position); hearing and weighing the evidence; judging the credibility of witnesses; hearing the arguments of counsel and representative(s); and, reviewing the relevant legal authorities, the undersigned makes the following:

FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §95-126 et. seq., the Occupational and Safety and Health Act of North Carolina (hereafter "the Act").

2. Respondent W-S Car is a free-standing, self-service carwash owned by, located on the property of and operated as part of a WilcoHess convenience store and gas station. WilcoHess is a North Carolina Corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, and - at the time of the inspection - was doing business in Winston-Salem, North Carolina. It is subject to the jurisdiction of the Commission.

DATABASE
10/9/12

3. At the time of the safety inspection, WilcoHess was operating a free-standing self-service car wash at a convenience store and gas station located at located at 3719 University Parkway, Winston-Salem, North Carolina (the work site).

4. On July 11, 2011, Charles Knox, a qualified and experienced safety compliance officer with NCDOL, OSH Division, (hereafter, "the CO") was dispatched to the work site pursuant to a general scheduled inspection. He went to the computer-generated, randomly-chosen work site to perform a comprehensive inspection.

5. At the time of the inspection, WilcoHess employed in excess of 251 employees nationwide. Two employees worked at the car wash site: Charles Polk and Paul Welch.

6. By telephone, the CO obtained permission to inspect from respondent's district manager, Alisia Oakely. She identified Mr. Charles Polk as the employee responsible for the maintenance of the car wash and grounds. The CO properly presented his credentials to Mr. Polk and informed him of the reason for and the scope of his inspection. He held an opening conference with Mr. Polk.

7. During the inspection, the CO took notes, photographs, and interviewed employees Charles Polk and Paul Welch.

8. The CO conducted a closing conference with Mr. Dan McCormick, respondent's risk manager on July 25, 2011.

9. To enforce the Act, on July 29, 2011, complainant issued the following citations:

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1910.151(c): The employees were exposed to corrosive materials, such as Westley Soil Away, Westley Tire & Engine Cleaner, etc (both with pH between 13.0 and 13.5) without suitable facilities for the flushing of the skin and eyes within the immediate work area.

Citation 1 Item 2a Type of Violation: Serious

29 CFR 1910.1200(g)(1): The employer did not have MSDS (material safety data sheet) for each hazardous chemical which they used, such as Clorox, Westley Pre Soak, Westley Soilaway, Blue Coral Clear Coat, Shampoo MA3, Westley Tire and Engine.

Citation 1 Item 2b Type of Violation: Serious

29 CFR 1910.1200(g)(8): The employer did not ensure that material safety data sheets were readily accessible to the employees in their work area.

Citation 1 Item 3 Type of Violation: Serious

29 CFR 1910.1200(h)(1): The employer did not provide information and training on hazardous chemicals in their work area at the time of initial assignment and whenever a new hazard was introduced into the work area.

Citation 2 Item 1 Type of Violation: Nonserious

29 CFR 1910.132(d)(2): The employer did not verify that the required workplace hazard assessment had been performed through a written certification for employees working with hazardous chemicals such as but not limited Westley Soil Away, Pre-Soak, Tire and Engine Cleaner, etc. and lawn maintenance work.

CITATION 1, ITEM 1
29 CFR 1910.151(c): SERIOUS
(Medical Services and First Aid Where Eyes or Body May Be Exposed)

10. Paragraphs 1-9 are incorporated by reference as if fully set forth herein.

11. During the CO's interview, Mr. Polk said that he is responsible for the general maintenance of the free-standing, self-serve car wash and grounds;

12. Mr. Polk explained that he maintains the 6 self-serve car washing bays; the coin-operated vacuum cleaner; the grassy areas; and, a storage room.

13. The car wash site is 150-200 feet from the WilcoHess convenience store and gas station.

14. The storage room contains a Southern Pride chemical dispensing machine drawing undiluted cleaning fluid installed directly in front of the machine. (C#1)

15. The machine draws the chemicals from the barrels through hoses and through a metering valve. The machine dispenses the chemicals to high-pressure water wands provided in the bays to customers for use in washing their cars.

16. Polk told the CO that he checks and changes out stock. He moves out spent chemical barrels and rotates in refreshed barrels. The new barrels are topped off 3 inches below the rim. He removes the valve hose from the top opening of the old barrel and places it into the refreshed chemical barrel - after removing the top cap.

17. Each industrial drum is depleted over multiple months, thus, Mr. Polk's administration of this task was infrequent.

18. At least two of the large barrels at issue are posted with "CORROSIVE" labels. (C#1-4)

19. Other infrequent aspects of Mr. Polk's job include cleaning out clogs in the valves and hoses. In performing these tasks, he handles and cleans the hoses through which the chemicals flow. He also disassembles and cleans the clogged valves, replaces the valve floats, and re-assembles the valves through which the chemicals are metered.

20. The chemicals in the drums include, but are not limited to, the following:

    a. Westley's Tire and Engine Cleaner;
    b. Westley's Soil Away; and
    c. Westley's Pre Soak.

21. All of the products rate a highly corrosive "caustic alkaline liquid, N. O. S.," with a pH between 12 and 13.5, with 14 being the most corrosive value on the scale. (C#5-6, 9)

22. Mr. Polk also washed-down the bay areas of the car wash twice a year with "Clorox." The brand Clorox rates a pH value of 11.9. (C#8)

23. The MA-3 Shampoo rates a pH of 13, also highly corrosive. (C#9)

24. The labels on the Westley products caution, among other things, that anyone having exposure to the chemicals should wear "impervious gloves, chemical splash goggles and apron." (C#3, Precautions)

25. The fresh Westley drums are very heavy, in a barrel shape, and contain liquids - making them unwieldy to move during restocking and causing the possibility of an accident, to wit: chemicals splashing out of the top of the installed drums as their caps are removed to allow for the valve hose to be inserted into the caustic chemicals.

26. The Material Safety Data Sheets (MSDS) for all of the products contain information, warnings, and instructions to the effect that the chemicals are very dangerous and could cause severe burns to the eyes and skin; that impervious personal protective equipment (PPE) should be used; and, that any exposed skin or eyes should be immediately treated with 15 minutes of water flushing, followed by immediate medical attention. (C#5-6, 9)

27. There is a possibility of an accident when Mr. Polk disassembles and cleans the valves, because his skin and eyes could come into contact with the residual corrosive chemicals spraying out of and contained within the valves.

28. Respondent does not provide personal protective equipment (PPE) to Mr. Polk.

29. Respondent does not provide suitable facility for quick and lengthy drenching of the eyes and body within the work area should any person be exposed the hazardous materials.

30. Although the work site is a car wash, the only immediately available running water source is the cleaning wands in the bays, which can not be used for flushing eyes and skin due to their extremely high water pressure.

31. The work area is approximately 150 to 200 feet from the store bathroom (over half a football field): (1) not immediately convenient to someone whose skin or eyes might be burning; (2) hard to find, in that the burns would likely cause pain, confusion, disorientation, panic, and in the case of the eyes, temporary blindness; and, (3) hard to navigate through gas pumps, customers, moving and stopped cars, the front door, the aisles of merchandise, etc.

32. The bathroom faucet in respondent's convenience store is insufficient to provide the plentiful flushing as contemplated by the Act.

33. Respondent knew or should have known, through reasonable diligence, that the cleaning chemicals it was dispensing were highly corrosive.

34. Respondent knew or should have known, through reasonable diligence, that the Act requires it to provide personal protective equipment to employees exposed to it's undiluted cleaning chemicals.

35. Mr. Polk's unprotected exposure to the cleaning chemicals in the dispensing room create the possibility of an accident, to wit: having his skin and eyes splashed, dripped, sprayed or otherwise in direct contact with the highly corrosive chemicals.

36. Respondent could have avoided this violation by providing impermeable gloves, chemical splash goggles and a synthetic apron to it's employee and by having immediately available a flushing station sufficient to continuously flood the skin and eyes with water for 15 minutes.

Penalty

37. The CO properly calculated the amount of respondent's penalty of $1,650 (One Thousand, Six Hundred and Fifty Dollars) according to the FOM (C#10) as follows:

a. The CO determined the probability of an accident occurring to be lesser because there is only one employee exposed to the hazard and he is exposed infrequently;

b. The CO determined the severity was medium because burning of the eyes and skin is the substantial probable result, resulting in temporary disability;

c. The CO determined that the gravity based penalty (GBP) for an accident of lesser probability and medium severity is $3,000 (Three Thousand Dollars);

d. The CO calculated no GBP reduction for size, due to respondent's large workforce;

e. The CO calculated a 25% GBP reduction for respondent's health and safety program;

f. The CO calculated a 10% GBP reduction for respondent's cooperation with NCDOL;

g. The CO calculated a 10% GBP reduction for respondent's OSHA compliance history;

h. The adjustment factors totaled 45%; and,

i. The adjusted Gravity Based Penalty was $1,650.

CITATION1, ITEM 2a
29 CFR 1910.1200(g)(1): SERIOUS
(Hazard Communication - Maintenance of MSDSs in the Workplace)

38. Paragraphs 1-37 are incorporated by reference as if fully set forth herein.

39. The CO requested from respondent, the Material Safety Data Sheets (MSDSs) for each hazardous chemical which they used. Neither Mr. McCormick nor any other agent of respondent provided any such work site sheets to the CO.

40. The lack of available safety materials constituted a hazard in the workplace.

41. Mr. Polk was infrequently exposed to the hazard.

42. The hazard created the possibility of an accident, to wit: exacerbated chemical burns to the skin and/or eyes as a result in delay of proper first aid.

43. The substantial probable result of an accident would be more severe burns.

44. Respondent knew or should have known, through reasonable diligence, that the Act required the MSDS paperwork to be maintained in the workplace.

45. Respondent could have avoided this hazard by having MSD sheets in the workplace.

Penalty

46. The CO properly calculated the amount of respondent's penalty of $825.00 (Eight Hundred and Twenty-Five Dollars) according to the FOM (C#10, pp. 2-11) as follows:

a. The CO determined the probability of an accident occurring to be lesser because there is only one employee exposed to the hazard and he is exposed infrequently;

b. The CO determined the severity was low because the substantial probable result would be more severe burns caused by the delay of medical aid;

c. The CO determined that the gravity based penalty (GBP) for an accident of lesser probability and low severity is $1,500 (One Thousand and Five Hundred Dollars);

d. The CO calculated no GBP reduction for size, due to respondent's large workforce;

e. The CO calculated a 25% GBP reduction for respondent's health and safety program;

f. The CO calculated a 10% GBP reduction for respondent's cooperation with NCDOL;

g. The CO calculated a 10% GBP reduction for respondent's OSHA compliance history;

h. The adjustment factors totaled 45%; and,

i. The adjusted Gravity Based Penalty was $825.00.

CITATION1, ITEM 2b
29 CFR 1910.1200(g)(8): serious
(Hazard Communication - Immediate Availability to Employees)

47. Paragraphs 1-46 are incorporated by reference as if fully set forth herein.

48. Respondent maintained no MSDSs in the workplace, nor any computer from which an employee could obtain immediate information about the treatment of skin and eyes after contact with highly corrosive chemicals on site.

49. The lack of available safety materials immediately available to Mr. Polk constituted a hazard in the workplace.

50. The hazard created the possibility of an accident, to wit: exacerbated chemical burns to the skin and/or eyes as a result in delay of proper first aid.

51. The substantial probable result of an accident would be more severe burns.

52. Respondent knew or should have known, through reasonable diligence, that the Act required the MSDSs to be immediately available to employees exposed to the chemicals.

53. Respondent could have avoided this hazard by having MSD sheets immediately available to employees exposed to the highly corrosive chemicals it dispensed from bulk barrels.

Penalty

54. The CO properly grouped this violation with Citation 2, Item 1a, with no penalty, because they are closely related and - if the former is abated, so too is the latter.

CITATION 1, Item 3
29 CFR 1910.1200(h)(1): Nonserious
(Hazard Communication - Employee Information and Training)

55. Paragraphs 1- 54 are incorporated by reference as if fully set forth herein.

56. Respondent failed to show the CO that it provided Mr. Polk information and training regarding skin and eyes treatment after contact with highly corrosive chemicals.

57. The lack of information to and training of Mr. Polk constituted a hazard in the workplace.

58. The hazard created the possibility of an accident, to wit: exacerbated chemical burns to the skin and/or eyes as a result in delay of proper first aid.

59. The substantial probable result of an accident would be more severe burns.

60. Respondent knew or should have known, through reasonable diligence, that the Act required it to provide information and training to employees exposed to the chemicals.

61. Respondent could have avoided this hazard by ensuring that employees who are exposed to the store room chemicals are provided with information and training.

Penalty

62. The CO properly calculated the amount of respondent's penalty of $825.00 (Eight Hundred and Twenty-Five Dollars) according to the FOM (C#10, pp. 2-11) as follows:

a. The CO determined the probability of an accident occurring to be lesser because there is only one employee exposed to the hazard and he is exposed infrequently;

b. The CO determined the severity was low because the substantial probable result would be an exacerbation of burns to the skin or eyes by the delay which may result from the employees lack of information and training.

c. The CO determined that the gravity based penalty (GBP) for an accident of lesser probability and low severity is $1,500 (One Thousand and Five Hundred Dollars);

d. The CO calculated no GBP reduction for size, due to respondent's large workforce;

e. The CO calculated a 25% GBP reduction for respondent's health and safety program;

f. The CO calculated a 10% GBP reduction for respondent's cooperation with NCDOL;

g. The CO calculated a 10% GBP reduction for respondent's OSHA compliance history;

h. The adjustment factors totaled 45%; and,

i. The adjusted Gravity Based Penalty was $825.00.

CITATION 2, Item 1
29 CFR 1910.132.(d)(2): Serious
(Workplace Hazard Assessments)

63. Paragraphs 1-54 are incorporated by reference as if fully set forth herein.

64. The CO requested and respondent failed to provide written certification that the workplace hazard assessment had been performed in accordance with the Act .

65. The lack of verification that a workplace hazard assessment has been performed constitutes a hazard in the workplace to Mr. Polk (or any other employee whose job it was to stock and maintain the dispensers).

66. The hazard creates the possibility of an accident. The lack of a workplace assessment led to: (1) the dearth of personal protective equipment for Mr. Polk; (2) the lack of an on-site eye-wash installation in case of emergency; and, the absence of immediate information and training which could cure or lessen the degree of chemical burns.

67. The substantial probable result of an accident would be burns to the eyes and/or skin and/or more severe burns to the skin and/or eyes.

68. Respondent knew or should have known, through reasonable diligence, that the Act requires employers to provide written certification of workplace hazard assessments.

69. Respondent could have avoided this hazard by following the Act.

DISCUSSION

THE ACT, REGULATIONS, AND OTHER LEGAL AUTHORITIES

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina.

To prove a respondent committed a serious violation of a specific standard, the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

(1) A hazard existed;
(2) Employees were exposed;
(3) The hazard created the possibility of an accident;
(4) The substantial probable result of an accident would be death or serious physical injury; and,
(5) The employer knew or should have known of the condition or conduct that created the hazard. (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984))

As outlined in paragraphs 1-69 above, complainant successfully presented *a prima facie* case on each element necessary to affirm each of the above citations and penalties. Respondent proffered no evidence or witnesses.

RESPONDENT'S POSITION AND ARGUMENTS

Respondent stood on the written argument contained in it's Statement of Employer's /Respondent's Position, that their employee was never exposed to the corrosive chemicals and that any technical violations of the regulations should be found to be nonserious. In support of it's defense, respondent painted the following picture:

1. The facility is a free-standing car wash, the only one at WilcoHess, nationally.

2. A part-time employee, Mr. Polk, who has been assigned to this facility on a part-time basis for 28 years, was not exposed to the corrosive chemicals.

3. Mr. Polk's "primary" duties are maintenance of the area, such as keeping the facility neat and clean and free of debris.

4. Mr. Polk's duties do not involve handling the referenced materials.

5. He ensures that car-wash chemicals are in stock. After the chemical distributor refreshes the barrels of stock, Mr. Polk removes, "the cap from the top of the container and places a hose in [the liquid(s)].

6. Because Mr. Polk is not exposed to the chemicals, respondent was not required to comply with the provisions of the Act at issue in this case.

7. Mr. Polk's 28 years of continuous employment without incident/injury, evidences that he is "readily familiar with the product supplied by our third-party vendor."

8. Respondent "believes" that a workplace hazard assessment was performed when the car wash first opened and Mr. Polk was assigned.

9. Respondent is "confident" that Mr. Polk, an employee of long-standing without injury, "was provided adequate training at the time of his initial assignment."

10. Respondents argue that neither the facilities nor his duties have changed.

11. Mr. Polk "freely communicates with his supervisor" on workplace concerns.

12. Respondent argued that the penalties were "inappropriate and unfair," because, the CO, advised that the penalty amounts were so high because WilcoHess "is a large corporation and would be expected to be able to afford such a penalty without undue hardship."

DISCUSSION OF RESPONDENT'S POSITION AND ARGUMENTS

A. Credibility:

Respondent's arguments are unpersuasive.

The complainant's expert witness, the CO, testified that it was Mr. Polk who described how he manually changes out of the barrels; removes the caps and switches over the hoses; cleans out clogs in the valves and hoses; and changes out the valve floats. His self-report included washing down the bay areas twice a year with "Clorox." He uses no PPE.

The CO testified in detail about his conversation with Mr. Polk, corroborating his recollections with his written report. His testimony is credible and consistent with the other credible evidence. The photographs also tend to support complainant's case, in that they were taken at the time of the inspection that warn in plain view of "CORROSIVE" materials.

Respondent proffered no evidence or witnesses and failed to impeach the CO.

B. NCOSH Act:

The Act provides, among other things, that "[e]ach employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees." N.C. Gen. Stat. §95-129(1).

Chapter 95, §127(18) of the Act deems a serious violation to exist, if there is:

> ...a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

It is not complainant's duty to prove that an employee is actually and immediately exposed to the hazard during the inspection. Brennan v. Occupational Safety & Health Rev.Com'n. (Underhill Construction Co.), 513 F.2d 1032 (2d Cir. 1975) The issue is whether employees in the course of their work, while on the job, or going from work are reasonably likely to be in the immediate zone of danger. Maxton Hardwood Corporation, OSHANC No. 79-563, 2-7-81, 2 NCOSHD 277, 282 (1981).

In Underhill Construction, the Second Circuit said it need only be proved "that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking." Underhill Construction, 513 F.2d at 1038, (Emphasis added). See also, Commissioner of Labor v. Weekley Homes, 169 N.C. App. 17, 25, 609 S.E.2d 407, 414 (2005) (N.C. Court of Appeals, quoting that same holding from Underhill). It is the possibility of exposure that is at issue. B&E Auto Paint Co., Inc./Maaco Auto Painting, OSHANC No. 79-449, 1 NCOSHD 449, (April 6 1979); See also, Budd-Piper Roofing Co., Inc., OSHANC No. 80-639, 2 NCOSHD 323, 327 (1983).

Even if Mr. Polk only checks stock and switches hoses, employee contact is possible. This includes the "possibility of occasional, casual, or even inadvertent contact."

As emphasized above, the federal courts have upheld violations even where a third party's employees were the only individuals exposed. Romeo Guest Associates, Inc., OSHANC 96-3513 (1998); Grossman Steel & Aluminum Corp., ¶ 20,791 (RC 1976). Thus, respondent was required, within its regular supervisory capacity, to make reasonable efforts to anticipate hazards to independent contractors working on the job site and to make reasonable efforts to inspect the job site. Romeo Guest, OSHANC 96-3513 (1988); Weekely Homes, OSHRC Docket No. 96-0898, ___BNAOSHC___(Rev. Comm. 2000)

To emphasize the seriousness of the Act and to prevent foreseeable accidents, the North Carolina Review Commission's access test is predicated on the recognition that, "employees may not be restricted to specific paths or movements about their workplace. [and] . . . [s]ome carelessness and negligence is anticipated and expected." See, Budd-Piper, 216 NCOSHD at 327

C. No Prior Incidents:

Respondent seeks legal shelter from the fact that this is the only free-standing, self-serve car wash at WilcoHess nationally and that the same part time employee has been working there for 28 years without injury or incident relating to the car-wash chemicals.

It is well-settled in North Carolina that this argument, "... simply amounts to a claim that there is no good reason to anticipate an accident until at least one has already occurred, which is nonsense." Brooks v. Daniel Construction Company, 73 N.C. App. 426, 432 (1985). The Court of Appeals in Daniel Construction concluded that, "[h]uman error is not a rare phenomenon. A mark of ordinary prudence, we believe, is to anticipate human errors that are likely to injure people... and take precautions against them before, rather than after, injuries occur." Id.

Respondent argues that it must have provided education, training and materials to Mr. Polk when he was initially hired and, since nothing has really changed in 28 years, it was the initial training that has successfully prevented any serious injuries during his long employment.

Respondent proffered no evidence nor witnesses to this effect, rendering it's argument no more than hopeful speculation of past events. Respondent's position also shows a long-standing disregard for new and updated cleaning products over the years, as updated OSHA regulations.

D. Penalties:

Respondent argues that it is unfair and inappropriate to set a higher penalty amount for large businesses because they can "afford to pay more," than smaller businesses.

The Hearing Examiner has discretion to review the proposed penalty of the Commissioner of Labor in a *de novo* review, which is subject to an abuse of discretion standard on review. Brooks v. Household Building Systems, Inc., 3 NCOSH 836 (RB 1991).The standard requires that the discretion be plausibly based on the evidence presented before the Hearing Examiner.

Before a reduction is permitted, evidence must be documented to support it, as there must be evidence elicited during the hearing on which a Hearing Examiner may justify changing the penalty proposed by the Department of Labor. Id. at 840. This "evidence must be strong and persuasive in order to result in a further reduction of the penalty." Id. at 841 (quoting, Brooks v. Southmet Recycling Corporation,1 NCOSHD 942, at 944 (1985).

> The burden of proof is on the Commissioner [of Labor] to show that the proposed penalty is fair, reasonable in amount, and assessed equitably and uniformly. The burden then shifts to the respondent to show why he should be treated exceptionally. Failure of respondent to carry its burden usually results in affirmation of the penalty . . . . The respondent can present as mitigating factors evidence concerning business size, history, financial incapacity, good faith efforts, and gravity of the violations.

Brooks v. Southmet Recycling Corporation,1 NCOSHD 942, at 943 (1985).

North Carolina General Statutes (hereafter, "NCGS.") §95-138 *et seq.*, provides the Commissioner of Labor with the authority to propose civil penalties for violations of the Act and sets minimum and maximum penalties. The legislation also establishes the factors to be used for calculating penalties in a uniform and equitable way. The Act provides that one factor to be considered in determining penalties is, "the size of the business." Other such factors are cooperation, good faith effort to have an overall safety and health program, and history of violations. NCGS §95-138(a)

The Department of Labor Field Operations Manual (FOM) provides detailed rules on calculating penalties. For instance, NCGS §95-138b.1.a provides, in pertinent part, that

violations determined to be serious or nonserious in nature will be assessed a penalty of up to $7,000 ... ." It also defines and provides formulas for "adjustments" to the penalty

The North Carolina Department of Labor, Occupational Safety and Health Division, Bureau of Compliance, Field Operations Manual (FOM), Chapter VI, Penalties, outlines the steps and formulas the COs must use to determine penalties. (C#10) The FOM's general policy is that the penalty provisions were, "not designed as a punishment for violations nor as a source of income for the division or the department. Penalties paid for cited violations are not expended by the division or department, but, instead, are paid to the school district of the county in which the employer is located. Penalties are designed primarily to provide an incentive toward correcting violations voluntarily prior to an enforcement inspection. The incentive is directed not only to the offending employer, but, more especially, to other employers.

The FOM also provides a downward adjustment in the amount of the penalty for businesses who have fewer than 251 employees. FOM, Chapter 6, B (3-9), (C#10, pp. 3-9) The reductions available for size are for the purpose of motivating - not punishing nor bankrupting - progressively smaller businesses.

Respondent presented no evidence or witnesses to rebut Complainant's *prima facie* case of violations and penalties. Respondent's written arguments in it's Statement of Employer's/Respondent's Position, are not under oath, and do not constitute evidence. Respondent has failed to meet its burden of proof justifying a further reduction in penalties that the CO calculated in accordance with the general statutes of North Carolina and the North Carolina Department of Labor's Field Operations Manual.

In addition, the undersigned takes judicial notice of WilcoHess' web site, which indicates that it has 385 stores located North Carolina, South Carolina, and Virginia. Of those, 285 stores are located in North Carolina. Twenty-eight of North Carolina locations have some type of car wash, where barrels of chemicals are refreshed; caps removed; hoses switched; hoses unclogged; and valves disassembled, unclogged, the float replaced and the valve reassembled. http://wilcohess.com/StoresList/13; http://wilcohess.com/StoresList/State/North Carolina/10; and, http://wilcohess.com/StoreLocator, respectively. This suggests that either: (1) the safety regulations were wholly neglected at W-S Car, Inc. for 28 years for some reason related to it's free-standing and/or self-serve nature; or, (2) workplace assessments have not been performed and regulations not followed company-wide.

Word about the citations issued by the CO - and upheld by the undersigned - will circulate throughout the company and industry as OSHA seeks to inspire statewide compliance.

CONCLUSIONS OF LAW

1. To effectuate this Order, paragraphs 1-69 and the discussion sections above, are incorporated by reference as Findings of Fact and Conclusions of Law.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant proved by the greater weight of the evidence that respondent committed a **serious violation of 29 CFR 1910.151(c)**, and that **Citation 1, Item 1 should be affirmed** and respondent should pay an adjusted **penalty of $1,650**. Respondents represent that they have abated this violation by installing an eye-wash "at the facility."

4. Complainant proved by the greater weight of the evidence that respondent committed a **serious violation of 29 CFR 1910.1200(g)(1)** and that **Citation 1, Item 2a should be affirmed** and respondent should pay a **penalty of $825**. Respondents represent that they have abated this violation by placing copies of the respective MSDSs at the site.

5. Complainant proved by the greater weight of the evidence that respondent committed a **serious violation of 29 CFR 1910.1200(g)(8)** and that **Citation 1, Item 2b** should be grouped with Citation 1, Item 2a with **no additional penalty**. This violation should be abated by making the MSDSs immediately available inside the work site.

6. Complainant proved by the greater weight of the evidence that respondent committed a **serious violation of 29 CFR 1910.1200(h)(1)** and that **Citation 1, Item 3 should be affirmed** and respondent should pay a penalty of **$825**. Respondents should abate by properly informing and training any employee with access to the store room.

7. Complainant proved by the greater weight of the evidence that respondent committed a **serious violation of 29 CFR 1910.132(d)(2)** and that **Citation 2, Item 1 should be affirmed with no penalty**. Respondents should abate this violation by performing a workplace hazard assessment and maintain a record at the work site.

8. The undersigned finds as a fact and concludes as a matter of law that complainant's evidence and arguments were more probative and credible than respondent's arguments.

9. All other issues raised in respondent's response were considered and either turned against respondent based upon a credibility determination, or, merited no further discussion.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED as follows:

1. All of the citations and penalties are hereby affirmed and respondent shall pay the penalties as set forth in the Findings of Fact and Conclusions of Law above; and,

2. The penalties shall be paid within ten (10) days of the filing date of this Order.

This the 24th day of September, 2012.

Ellen R. Gelbin
Administrative Law Judge

CERTIFICATE OF SERVICE

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

DANIEL R. MCCORMICK
RISK MANAGER
5446 UNIVERSITY PARKWAY
WINSTON-SALEM NC 27105

JILL CRAMER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

by depositing same in the United States Mail, certified mail, postage prepaid, at Raleigh, North Carolina, and upon;

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 10th DAY OF October 2012.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
FAX: (919) 733-3020