

1-21-18

**NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
RALEIGH, NORTH CAROLINA**

JUL 20 2018

**COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,
COMPLAINANT,**

JUL 20 2018

**DOCKET NO.: OSHANC 2017-5890
INSPECTION NO.: 318084845
CSHO ID: U6613**

v.

**CUSTOM NON-WOVEN, INC., and its
successors,
RESPONDENT.**

**DOCKET NO.: OSHANC 2017-5894
INSPECTION NO.: 318093325
CSHO ID: S0077**

HEARING ORDER

THIS MATTER came onto be heard and was heard before the undersigned Administrative Law Judge, Ellen R. Gelbin, June 27, 2018 in Greensboro, North Carolina. Complainant was represented by Ms. Melissa H. Taylor, Assistant Attorney General for the North Carolina Department of Justice. Present for the North Carolina Department of Labor (NCDOL) were Supervisor Ben Harris, Safety Compliance Officer (CO) Kirby Atwood and CO Scott Lyle. Respondent owner Mr. Jong Myung Kim appeared, testified and was represented by Mr. Mitchell H. Blankenship of Bennett & Guthrie, PLLC, located in Winston-Salem, North Carolina.

After considering the NCOSH Review Commission's record files; the NCDOL certified files; the evidence proffered the testimony given and the arguments made on all sides during the hearing; and after researching the relevant legal authorities, the undersigned makes the following:

FINDINGS OF FACT:

1. The Occupational Safety and Health Act of North Carolina (the Act) charges the NCDOL with the duty of enforcing the Act. N.C. Gen. Stat. §95-126 *et seq.*
2. The Act also provides for the creation of a Safety and Health Review Commission to hold independent hearings regarding contested citations and/or penalties.
3. Respondent is a textile manufacturer located at 113 Sunrise Center Dr., Thomasville, NC (job site) is an employer and its machine operators are employees within the meaning of and subject to the provisions of the Act.

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**Line A Carding Machine Amputated Operator's Hand
(August 12, 2016 Inspection by CO Scott Lyle)**

4. On August 12, 2016, CO Scott Lyle conducted a partial inspection of respondent's plant, located at 113 Sunrise Center Drive in Thomasville NC as the result of respondent properly calling OSHNC to report that its machinery amputated an employee's hand. *C2, Narrative Comments, p. 1*
5. The CO opened an inspection, introduced himself, presented credentials and conducted the opening conference with Director of Sales and Operations Mr. Harry Kim. *Id.*
6. The CO conducted a documentation/records review, physical inspection of the workplace, took photographs/videos and held private employee interviews. *Id.*
7. The CO held a closing conference on February 7, 2017 with Mr. Harry Kim. CO Atwood identified deficiencies, 9 of which were serious and 4 of which were non-serious. *C2*
8. CO Lyle issued citation on February 7, 2017. The total penalties for the violations of August 12, 2016 equaled \$19,300. *Id.*
9. The Citations and Notifications of Penalty will not be set forth herein because respondent stipulated to the violations and – in this hearing- contested only the penalties assessed on the on the grounds of his inability to pay. *See Stipulations dated June 12, 2018*
10. On February 7, 2017, the CO issued serious citations related to the following hazards:
 - a. Unguarded nip points and chain sprockets on machines;
 - b. Lockout/Tagout locks were not standard and were not properly identified;
 - c. There was no certified lockout/tagout training;
 - d. Energy control measures not documented;
 - e. Catwalk not guarded and missing stair rails; and,
 - f. Housekeeping and record keeping (non-serious).
11. The injured employee's left index, middle and ring fingers and part of his palm and thumb were amputated or severely damaged. *C2, Narrative p. 3*

12. The penalties assessed for the August 12, 2016 inspection were properly calculated and equaled \$19,300. *C2*

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(December 5, 2016 Inspection by CO Atwood)**

13. On December 2, 2016, Mr. Robert Fant was operating respondent's carding machine on Line A day shift. His hand was amputated at the wrist. The retractable doors had been open all day and Mr. Fant had been removing lint and spraying water on the roller every 10 minutes. *Complainant's Exhibit C1, Certified Copy of the Original Report of Investigation, Narrative Comments, p. 1*
14. On December 5, 2016, CO Atwood inspected the job site as a result of a report from respondent relating to "employee [Robert Fant's] left hand was amputated at the wrist while operating machinery." *Id.*
15. The CO held a closing conference with Mr. Harry Kim on January 31, 2017. He issued 11 serious and 4 non-serious citations. *C2 Citations Issued.*
16. The CO issued the citations on March 2, 2017.
17. The total penalties for the violations pursuant to these citations equaled \$14,300. *Id.*
18. The CO properly calculated the penalties.
19. The Citations and Notifications of Penalty will not be set forth herein because respondent stipulated to the violations and contested only the penalties assessed on the grounds of his inability to pay. *See Stipulations dated June 12, 2018.*
20. On March 2, 2017, the CO issued serious citations related to the following hazards:
 - a. Lack of protocol for the control of potentially hazardous energy when employees were engaged in electric activities;
 - b. Lockout and Tagout devices were not standardized;
 - c. Lack of periodic inspections of the energy control procedures at least annually;
 - d. No proper training/evaluation for the operators of powered industrial trucks;
 - e. Lack of affixation for machines designed for fixed locations; and,

f. Other serious and non-serious offenses.

21. Respondent abated the hazards in April 2017 by selling all of Custom Non-Woven machines and assets to Fibrix.
22. The penalties assessed for the December 2016 inspection were properly calculated and equaled \$14,300.
23. The aggregate penalty for the August and December 2016 inspections equaled \$33,600.
24. The CO interviewed the day and night shift supervisors and some of the machine operators. C2 The employees were consistent in their reports that respondent did not provide written operator or LOTO instructions to his employees and respondent's first priority was keeping the machines running even at the risk of employee safety.

Discussion

Respondent owner Jong Myung Kim testified and argued at the hearing that he was incapable of paying the penalties.

The gist of respondent's testimony is as follows:

In Korea, respondent successfully manufactured and distributed upholstery and bedding materials made with melted plastic fibers. He opened a Custom Nonwoven plant in Pennsylvania in 2010. The business failed secondary to the economy and rezoning. He moved his business to Thomasville, NC and showed a negative profit for 2014, 2015 and 2016. *Respondent's exhibits R1 and R2*

Respondents stated that he unsuccessfully tried various methods to increase cash flow. *R1-5*

Respondent testified that the second amputee could not receive Workers' Compensation benefits because his man in charge let it lapse. From personal and borrowed funds, he negotiated a settlement and paid the employee \$100,000 (One Hundred Thousand Dollar). *R4*

He testified that Custom Non-Woven, Inc. closed its doors permanently in April 2017. It has not operated since its closure.

He testified that he lost millions in the sale and he was still obligated to pay almost 2 million dollars of unsecured corporate debt. *R1-5*

He stated that he was personally in debt \$600,000. He currently receives \$60-70,000 a year from shares held in a Mississippi plant. Respondent intends to open another business in SC that would involve only one simple machine.

Respondent's attorney asked for a 50% reduction of the total penalties and three years in which to pay, with no set schedule.

Legal Authority

North Carolina's declared intent for the OSH Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *North Carolina General Statutes §95-138 et seq.* (hereafter, the Act)(Emphasis added) The Act was passed to "prevent workers from being killed or otherwise harmed at work." The statute requires employers to provide their employees with working conditions that are free of known dangers." (*Emphasis added*)

Injured employees are entitled to benefits under the NC Workers Compensation Act. N.C.G.S. Chapter 97 *et seq.* This employee protection Act was adopted in the 1930s to compensate employees who were injured by accidents on the job The purpose was "for industry to pay for its own wreckage." (*Cite omitted*)(*Emphasis added*)

Without Workers Compensation, injured employees lose the insurance safety net for their time out of work, medical expenses, physical rehabilitation, prosthetic adaptation, job retraining, remuneration for the loss of a body part or for the loss of the capacity to earn comparable income.

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

The Hearing Examiner must document all evidence justifying any changes to the penalties. *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. ... Respondent can present as mitigating factors evidence concerning business size, history, financial incapacity, good faith efforts and gravity of violations.

Id. at 943.

Based upon the foregoing FINDINGS OF FACT, the hearing testimony, exhibits in evidence, discussion and based upon the applicable law, the undersigned CONCLUDES as a MATTER OF LAW as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order;

2. The Review Commission has jurisdiction of this case and the parties;
3. Complainant properly calculated the proposed penalties for each citation;
4. Respondent stipulated to the violations in both cases and objected to the penalty amounts on the grounds that he does not have the ability to pay.
5. For the following reasons and others, respondent failed to carry his burden to show why he should be treated exceptionally:
 - a. The August and December 2016 hazards were known and respondent kept his operators working;
 - b. Both amputations were permanent and life altering for the production workers;
 - c. Respondent let his Workers' Compensation insurance lapse and the second amputee was not covered;
 - d. It is somewhat mitigating that respondent paid \$100,000 to Mr. Fant out of his personal funds or extensions of credit;
 - e. Respondent did not present a complete picture of his net worth;
 - f. Respondent's financial spreadsheets were only minimally probative;
 - g. Respondent did not proffer personal and corporate tax returns from NC, the IRS and Korea and did not provide credible itemizations of respondent's personal assets in the US and Korea;
 - h. Respondent testified that he can earn the money to pay the penalties if he opens a new machine shop in South Carolina for \$20,000 in seed money. However, if he has access to \$20,000, it should be used to pay the OSHA penalties;
 - i. If respondent opens a new machine shop in South Carolina, the undersigned has grave concerns about the health and safety of his workers;
 - j. The affirmation of the penalties will serve to underscore the seriousness of the hazards, the absolute need for safety protocol and training and it may deter respondent and other employers from exposing employees to recognized hazards;
 - k. The debt to OSHNC is based upon admitted safety violations, which created a risk of accident and caused repeated and catastrophic amputation injuries for two operators and lesser crush or amputation injuries to other employees;

1. Elimination or reduction of the penalties in these cases would render meaningless the regulation and enforcement of the provisions of the Act; and,
 - m. Allowing respondent to avoid some of the penalties would allow him to profit from his own malfeasance.
6. Respondent's ability to obtain credit from banks and other friendly sources is impressive and the undersigned finds that he needs some time to pay the penalties.

Based upon the foregoing **FINDINGS OF FACT, DISCUSSION** and **CONCLUSIONS OF LAW**, the undersigned enters the following **ORDER**:

1. The citations and penalties in these cases are **AFFIRMED**;
2. Respondent is hereby **Ordered** to pay the total penalty of \$33,600 (Thirty Three Thousand Six Hundred Dollars) within 120 days of the filing date of this Order; and,
3. Respondent shall remit the sum of \$8,400 per month for four consecutive months. The first payment is due within 30 days after the filing date of this Order and subsequent payments are due on the same date of each month thereafter until paid in full.

It is **ORDERED, ADJUDGED and DECREED** on this, the 17th day of July, 2018.

A handwritten signature in black ink, appearing to read 'E. Gelbin', written over a horizontal line.

Ellen R. Gelbin
Administrative Law Judge

CERTIFICATE OF SERVICE

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

MITCHELL H. BLANKENSHIP
BENNETT GUTHRIE LATHAM
1560 WESTBROOK PLAZA DR.
WINSTON-SALEM, NC 27103

certified mail, return receipt requested, and upon:

MELISSA H. TAYLOR
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

by USPS first class mail, 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 20 DAY OF July 2018.

ARLENE K. EDWARDS
CHAIRMAN



Karissa B. Sluss

Docket and Office Administrator
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