

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 93-2671
OSHA INSPECTION NO. 18552687
CSHO ID NO. P6059

v.

MASTER WOODCRAFT, INC.
and its successors,

ORDER

RESPONDENT.

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 27th day of September, 1995 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Hugh M. Wilson, sitting as Chairman, Kenneth K. Kiser, Member and L. McKay Whatley, sitting as designated Member of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Louis B. Moss, President of Master Woodcraft, Inc. for Respondent.

ISSUE PRESENTED

1. Did the Respondent meet its burden of showing by strong and persuasive evidence why he should be treated exceptionally in order to be entitled to a further reduction of the penalty?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C.G.S. § 95-138(a) in effect at the time the citations were issued required that "The Commissioner upon recommendation of the Director, or the Board in case of an appeal, shall have authority to assess all civil penalties provided by this Article, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the record of previous violations."

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).

4. The employer (Respondent) Master Woodcraft, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. The Respondent was inspected by compliance safety officers from the Department of Labor from April 13, 1992 through May 12, 1992. As a result of that inspection two alleged failure to abate citations, one alleged repeat/nonserious citation and one citation with five alleged nonserious violations with no assessed penalties were issued on October 13, 1992.
6. The first alleged failure to abate citation, Citation One, Item 1b, was for the failure to develop a written hazard communication program with an assessed penalty of \$4,800.00.
7. The second alleged failure to abate citation, Citation Two, Item 1 was for the failure to institute a hearing conservation program with an assessed penalty of \$9,000.00.
8. The alleged repeat/nonserious citation, Citation One, Item 1, was for failure to have approved self-closing valves for flammable liquids with an assessed penalty of \$100.00.
9. By letter dated October 28, 1992, the Respondent contested the \$4,800.00 and the \$9,000.00 penalties assessed for the two failure to abate citations.
10. A hearing was scheduled and held on January 12, 1994 before the Honorable Robin E. Hudson. At the hearing the Complainant made a motion to amend the citations for failure to abate by reducing the penalties for Citation No. 1, Item 1b from \$4,800.00 to \$1,600.00 and for Citation No. 2, Item 1 from \$9,000.00 to \$3,000.00 and this motion was allowed.
11. On March 23, 1994, Officer Hudson issued an Order in this matter affirming the repeat non-serious Citation Number One, Items 1 and its \$100.00 penalty, affirming the failure to abate Citation 1, Item 1b but reducing the penalty from \$1,600.00 to \$1,000.00 and affirming the failure to abate Citation 2, Item 1 and the penalty of \$3,000.00.
12. The Respondent timely filed an appeal with the Review Board on April 22, 1994.
13. An Order Granting Petition for Review was filed by the Board on May 13, 1994.
14. The Respondent filed a brief with the Review Board on December 5, 1994 and the Complainant filed its brief with the Review Board on June 27, 1995.
15. The appeal of this matter was limited to whether the penalties should be further reduced.
16. A hearing was held before the full Board on September 27, 1995.
17. The Board adopts the Hearing Examiner's findings of fact # 1 through # 8.
18. At the Hearing the Respondent presented additional evidence in support of his position that the penalties should be further reduced.
19. The total salaries drawn by two officers of Respondent in 1989 was \$40,000.00, in 1990 was \$13,600.00 and in 1991 was \$22,400.00.
20. The building in which the Respondent's business is located is owned by a separate corporation owned by Louis B. Moss, the President of Respondent and his daughter and they receive no rent for the use of the building.
21. At the time of the Review Board Hearing Respondent employed 12 people down from 17 at the time of the hearing before the Hearing Examiner.
22. Respondent has had only two accidents in the 15 years that the business has been located in North Carolina.

23. The hazardous chemicals that Respondent was cited for were lacquer thinner and 40 weight motor oil. The lacquer thinner had been used for spray painting but at the time of the inspection that use had been discontinued and the 40 weight motor oil was used to add oil to a garbage truck, both of which hazardous chemicals have been removed from the work site.

24. Respondent at the time of the hearing uses no hazardous chemicals at his worksite but implemented a written hazardous chemical communication program to show his good faith compliance with OSH regulations.

25. Respondent received a safety award from the North Carolina Department of Labor for each of approximately 10 years previous to the hearing before the Hearing Examiner.

26. Only one employee operated the aluminum cutting saw and was exposed to the excess noise levels of 88.9 dBA for approximately two hours of the day and he was provided with a noise reduction personal protective device (ear muffs) which further reduced his exposure by 20 decibels.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board 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 Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Respondent has met its burden of showing by strong and persuasive evidence that the low gravity of the violations and the financial condition, small size and good faith of the company entitles the Respondent to a further reduction of the penalty from \$1,600.00 to \$100.00 for the failure to abate Citation 1, Item 1b, the violation of 29 CFR 1910.1200(e)(1) for the failure to develop and implement a written hazardous communication program.

4. The Respondent has met its burden of showing by strong and persuasive evidence that the low gravity of the violations and the financial condition, small size and good faith of the company entitles the Respondent to a further reduction of the penalty from \$3,000.00 to \$100.00 for the failure to abate Citation 2, Item 1, the violation of 29 CFR 1910.95(c)(1) for the failure to institute a continuing, effective hearing conservation program.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985).

It is well settled law that the Hearing Examiner has discretion to review the proposed penalty of the Commissioner and that he or she is to do 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). "Before such 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. (citations omitted) . . . 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).

The Hearing Examiner further reduced the penalty for the failure to abate citation on the lack of a hazardous communication program from \$1,600.00 to \$1,000.00 partially based on the good faith of the Respondent with respect to that violation. (The Complainant by motion at trial had already reduced the penalty significantly from \$4,800.00 to \$1,600.00). "An abuse of discretion standard requires that the discretion be plausibly based on the evidence presented before the Hearing Examiner." Brooks v. Household Building Systems, Inc., 3 NCOSH 836, at 840 (RB 1991). The Hearing Examiner found that the Corporate Tax returns show that although the business showed a loss for tax purposes, its financial condition showed steady improvement and the business showed a gross profit of \$222,095.00 for 1991. This finding is supported by copies of tax returns in the record which shows an increase in gross profits from - \$126,770.00 (approximate) to + \$222,095.00.

At the Hearing before the full Board the Respondent presented additional evidence showing that the salary of the two officers of the corporation was reduced substantially from the years 1989 through 1991 and that the business paid no rent to a corporation owned by the President and his daughter for the use of the building in which it is located. Respondent also offered evidence that the size of the business had been reduced from 17 employees at the time of the hearing before the Hearing Examiner to 12 employees at the time of the hearing before the full Board as further evidence of its financial inability to pay. Evidence was also presented that only one employee was exposed to the excessive noise level of 88.9. for a maximum of two hours per day and that he had a noise reduction personal protective equipment (ear muffs) which further reduced the noise by 20 decibels and the gravity of the violation was low. Respondent also showed that the business had an exemplary safety record with only two accidents for the 15 years that the business had been in North Carolina and that the business had received many safety awards from the North Carolina Department of Labor for its safety record. Respondent has shown that the hazardous chemicals on site consisted of a partially filled barrel of lacquer thinner which was not being used and has since been removed and a barrel of 40 weight motor oil which has also been removed. The fact that the lacquer thinner was not being used and that the other hazardous chemical was motor oil which was used only intermittently to service the garbage truck shows that the gravity of the violation for the failure to have a written hazardous communication program was low. The Respondent abated the violations by removing the hazardous chemicals from the workplace and instituted a hazardous communications program even though he no longer used any hazardous chemicals which demonstrates his good faith effort to comply with OSH regulations.

The standard of review for a penalty assessment by the Hearing Examiner is an abuse of discretion standard which is based on the evidence that is presented to the Hearing Examiner. There was no abuse of discretion on the part of the Hearing Examiner below but the Board has in its discretion allowed the introduction of additional evidence of mitigating factors warranting a further reduction of the penalty as is authorized by N.C. Gen. Stat § 95-135(i). Based on this additional evidence of the mitigating factors of financial inability to pay, small size of the business, low gravity of the violation, good faith and good safety record which was discussed above, the Board finds that the Respondent has met its burden of showing by strong and persuasive evidence that it is entitled to a further reduction of the penalties. The penalty for the failure to abate Citation 1, Item 1b for the failure to have a written hazardous communication program is further reduced from \$1,000.00 to \$100.00. The penalty for the failure to abate Citation 2, Item 1 for the failure to have a hearing conservation program is further reduced from \$3,000.00 to \$100.00. The penalty of \$100.00 for the Repeat Nonserious Citation 1, Item 1 for failure to have approved self-closing valves for flammable liquids is affirmed.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the penalty for the failure to abate Citation 1, Item 1b for the failure to have a written hazardous communication program is further reduced from \$1,000.00 to \$100.00 and that the failure to abate Citation 2, Item 1 for the failure to have a hearing conservation program is further reduced from \$3,000.00 to \$100.00.

The Board **FURTHER ORDERS** that penalty of \$100.00 for the Repeat Nonserious Citation 1, Item 1 for failure to have approved self-closing valves for flammable liquids is **AFFIRMED** and the Respondent is ordered to pay the total of \$300.00 in penalties within 30 days of the date of this order.

This the 11th day of January, 1996.

HUGH M. WILSON, SITTING AS CHAIR

KENNETH K. KISER, MEMBER

L. MCKAY WHATLEY, SITTING AS DESIGNATED MEMBER