

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 93-2729
OSHA INSPECTION NO. 111090213

v.

AMENDED ORDER

DOLES RED & WHITE, INC.,

RESPONDENT.

Pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, the Review Board on its own motion hereby withdraws the ORDER dated March 22, 1996 which was issued in this matter and hereby issues this following AMENDED ORDER.

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 17th day of June, 1994 in the Commissioners' Meeting Room #700 in the Wake County Courthouse, Raleigh, North Carolina, by Robin E. Hudson, Acting Chairperson, Kenneth K. Kiser, and Hugh M. Wilson, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Ralf Haskell, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Thomas H. Davis, Jr. of Poyner & Spruill, Raleigh, North Carolina for Respondent.

ISSUES PRESENTED

On Appeal by Respondent Doles:

1. Did the Hearing Examiner correctly find and conclude that Citation 1, Items 2, 3, and 4, constituted serious violations?

2. Were the penalties properly calculated for all Citations?

On Cross-Appeal by the Commissioner:

1. Did the Hearing Examiner err by dismissing Citation 1, Item 1; if so, was the violation serious or non-serious?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

The standards which were alleged to have been violated are as follows:

Citation 1

Item 1: 29 CFR 1910.212(a)(5): Fan blade guards were not provided where the periphery of the blades was less than seven feet from the floor or working level:

[compressor fan]

Item 2: 29 CFR 1910.304(f)(4): The path to ground from circuits, equipment, and enclosures was not permanent and continuous:

[Duke Aeroheat food warmer]

Item 3: 29 CFR 1910.304(f)(5)(v): Exposed non-current-carrying metal parts of cord and plug-connected equipment which may become energized were not grounded:

[freezer]

Item 4: 29 CFR 1910.305(b)(2): Pull boxes, junction boxes, and fittings were not provided with covers approved for the purpose:

[mechanical room, storage area, junction boxes, manager's office outlet]

Item 5: 29 CFR 1910.305(g)(2)(iii): Flexible cords were not connected to devices and fittings so that tension would not be transmitted to joints or terminal screws:

[ice machine cord - no strain relief]

Citation 2

Item 1: 29 CFR 1910.157(c)(4): Portable fire extinguishers were not maintained in a fully charged and operable condition:

[main floor fire extinguisher]

Item 2: 29 CFR 1910.305(b)(1): Unused openings in cabinets, boxes, and fittings were not effectively closed:

[storage area junction box knock outs]

Item 3: 29 CFR 1910.1200(e)(1): Employer had not developed or implemented a written hazard communication program which at least describes how the criteria in 29 CFR 1200(f),(g) and (h) will be met.

[INSCO Formula 6]

Item 4: 29 CFR 1910.305(g)(1)(iii): Flexible cords and cables were used for purposes prohibited by subparagraphs (a) through (e) of this paragraph.

[storage area cord stapled to wall]

Item 5: 13 NCAC 7B.0102(a)(1): The OSHA notice was not posted to inform employees of the protections and obligations provided for in the Act.

Item 6: 13 NCAC 7B.0306: Records (OSHA Form No. 200 and its predecessor forms 100 and 102) were not retained in the establishment for 5 years following the end of the year to which they relate.

On review of this case, it appears to the Board that the findings and conclusions of the Administrative Law Judge do not fully address all of the issues necessary to a determination of this case. Accordingly, the decision of the Administrative Law Judge is affirmed in part, and reversed in part, and additional findings and conclusions herein are deemed necessary and required by Brooks v. McWhirter Grading Co., Inc., 2 NCOSHD 115, 303 N.C. 573 (Supreme Ct. 1981).

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). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981). The Board is not bound by the findings of fact of the Hearing Examiner and is required by N.C.G.S. § 95-135(i) to make its own findings of fact.

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), Doles Red & White , Inc., (hereinafter "Doles") is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. On or about March 22, 1993, Officer Willard Whitley, a Safety Compliance Officer for the North Carolina Department of Labor's OSHA Compliance Bureau, made a random program inspections of the Respondent's premises and issued citations on April 27, 1993
6. As a result of the inspection, Officer Whitley recommended two citations, with Citation 1 containing five items alleged to be serious violations of the standards enumerated above, and Citation 2 containing six items alleged to be non-serious violations of the standards enumerated above.
7. Respondent timely filed a Notice of Contest and Statement of Position in which it admitted all alleged violations, (except Citation 2, Item 5, which was subsequently deleted), but objected to the designations and the proposed penalties. All of the violations were abated.
8. The Respondent exercised its right to contest the Complainant's enforcement actions (N.C. Gen. Stat. 95-129, 95-137), and the matter was heard by The Honorable Roger Askew, Administrative Law Judge for the Safety and Health Review Board, on November 3, 1993 , in Rocky Mount, NC; Judge Askew issued his decision in an Order filed December 16, 1993.
9. The Complainant moved in open court to amend the Citation 2 as follows:
 - a) to delete Item 5, the posting violation; and
 - b) to reduce the penalty for Item 6, the failure to keep OSHA logs, to \$400.00 per year for the first four years of the violation.
10. The Amendments were allowed, and before the hearing proceeded, the Respondent acknowledged that it was contesting only the assessed penalties on the remaining citations.
11. In his Order filed December 16, 1993, with respect to Citation 1, the Administrative Law Judge dismissed Item 1, affirmed as serious violations Items 2, 3, and 4, and affirmed as non-serious violations Item 5, for a total grouped penalty of \$4200.00, for Citation 1.

12. With respect to Citation 2, the Administrative Law Judge affirmed as non-serious Items 1, 2, 3, 4 (none with penalties), dismissed Item 5 as agreed by the parties, and amended the penalty for Item 6 as agreed, to \$400.00 per year for four years, for a total penalty of \$1600.00 for Citation 2.
13. The Respondent-Petitioner Doles Red & White (hereinafter "Doles"), appealed those portions of the decision of Judge Askew which upheld Citation 1, Items 2 [the Aerohot food warmer], Item 3, [freezer] Item 4 [various pull boxes, junction boxes and fittings], and Item 5 [ice machine cord- no strain relief] as serious violations.
14. The Aerohot food warmer, subject of Citation 1, Item 2, although equipped with a grounding pin (three-pronged cord), was running from the warmer into a two-pronged cord, thereby eliminating the path to ground.
15. The Aerohot food warmer was plugged into an electrical outlet on a daily basis, by Respondent's employees who were thereby exposed to the danger of electrocution.
16. The Respondent's six cubic-foot freezer, subject of Citation 1, Item 3, also had a three-pronged grounding plug, which was plugged into a two-pronged outlet, thereby eliminating the path to ground.
17. The freezer was plugged in at the time of the inspection, and was stocked by the Respondent's employees on a regular basis, thereby exposing them to the hazard created thereby.
18. The ungrounded cord from the food warmer and freezer each created the possibility of an accident, consisting of the escape of electrical current.
19. If an accident occurred involving the escaping of current through the ungrounded cords from the food warmer or the freezer, the substantially probable result would be death or serious injury by electrocution.
20. With reference to Item 4, in the mechanical room that there was a transformer box with live contacts and a junction box with no cover, in the storage room there were two junction boxes and an electrical timer with no covers and in the manager's office, there was a wall outlet with no face plate.
21. With respect to the outlet in the manager's office, there was a possibility of an accident and the probable result would be serious injury or death by electrocution.
22. With respect to the remaining violations under Citation 1, Item 4, there was no evidence that a serious injury or death would be the probable result of an accident.
23. The Complainant/Cross-Petitioner Commissioner sought reversal of the determinations by the Hearing Examiner that Citation No. 1, Item 1 should be dismissed and that the violation in Citation No. 1, Item 5 was non-serious.
24. Citation 1, Item 1 alleges a serious violation of 29 CFR 1910.212(a)(5) in that Respondent failed to have a fan blade guard. At the time of the inspection a fan was energized, but not turning; because the fan's blade guards were missing, an accident was possible, the probable result of which would be amputation or severe injury.
25. Employees had access to the area where the fan was located and were thereby exposed to the hazard.
26. Citation 1, item 5 alleges a serious violation of 29 CFR 1910.305(g)(2)(iii) in that Respondent failed to have strain relief for a flexible cord. The sheathing on an electrical cord had been pulled back approximately three-sixteenths of an inch from the actual plug housing itself.
27. The only evidence addressing the probable severity of a possible accident reveals that such a possible accident would probably result in electrocution. It is found as a fact that there was a possibility of an accident and that the probable result of a possible accident due to the violation in Citation 1, Item 5 was serious injury or death by electrocution.

28. The Respondent knew or should have known of the conditions that gave rise to the violations alleged in Citation 1, Items 1, 2, 3, 4(c) and 5.

CONCLUSIONS OF LAW

1. To the extent that the foregoing FINDINGS OF FACT constitute CONCLUSIONS of LAW, they are incorporated herein.
2. The Review Board has jurisdiction of the parties and the subject matter involved in this case.
3. With respect to Doles' appeal of the disposition of Citation 1, Item 2 (the food warmer) the violation is designated serious. The penalty for this Item is grouped with the violation pertaining to the freezer
4. With respect to Doles' appeal of Citation 1, Item 3 (the freezer), the violation is designated serious, and the grouped penalty of \$1400.00 for Items 2 and 3 is properly calculated .
5. With respect to Doles' appeal of Citation 1, Item 4 (the various electrical receptacles) the Board concludes that the existence of a violation was admitted and the issue of employee exposure therefore was not properly before the Board. Further, the violation cited in subpart (c) (the managers office) is properly designated as serious, and the remaining subparts of Citation 1, Item 4, are properly designated as non-serious violations. The grouped penalty of \$1400.00 is properly calculated.
6. With respect to the Commissioner's cross-appeal of the disposition of Citation 1, Item 5, the violation is designated serious. The proposed penalty of \$1400.00 is appropriate.
7. With respect to the Commissioner's cross-appeal of the disposition of Citation 1, Item 1, the dismissal is reversed and the violation is designated serious. The proposed penalty of \$1,000.00 is appropriate.

THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the Order of the Administrative Law Judge is **AFFIRMED** in Part and **REVERSED** in Part, as follows:

1. With respect to Doles' appeal of the disposition of Citation 1, Item 2 (the food warmer) the designation of the violation as serious is **AFFIRMED** , and the penalty is grouped with the violation in Item 3.
2. With respect to Doles' appeal of Citation 1, Item 3 (the freezer), the designation of the violation as serious is **AFFIRMED**, and a grouped penalty of \$1400.00, is assessed for Citation 1, Items 2 and 3.
3. With respect to Doles' appeal of Citation 1, Item 4 (the various electrical receptacles) the Board concludes that the existence of a violation was admitted and the designation of the violation in subpart (c) as serious is **AFFIRMED**, the violations in the remaining subparts of Item 4 are **AFFIRMED** as non-serious violations. The grouped penalty of \$1400.00 is **AFFIRMED**.
4. With respect to the Commissioner's cross-appeal of the disposition of Citation 1, Item 5, the determination that the violation was non-serious is **REVERSED**, and the violation is designated serious. The proposed penalty of \$1400.00 is assessed.
5. With respect to the Commissioner's cross-appeal of the disposition of Citation 1, Item 1, the dismissal is **REVERSED** and the violation is designated serious. The proposed penalty of \$1,000.00 is assessed.
6. The Respondent shall pay all citations and remaining penalties including those which were not appealed in the sum of \$6800.00, to the Department of Labor.

This the 3rd day of June, 1996.

ROBIN E. HUDSON, CHAIR

KENNETH K. KISER, MEMBER

HENRY M. WHITESIDES, MEMBER
DID NOT PARTICIPATE IN THE DECISION OF THIS CASE