BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

THE DONOHOE COMPANIES, INC.

RESPONDENT.

DOCKET NO. OSHANC 93-2876
OSHA INSPECTION NO. 111092086
CSHO ID NO. R6131

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 12th day of September, 1997 in the conference room on the first floor of the Review Board office located at 217 West Jones Street, Raleigh, North Carolina by Kenneth K. Kiser, Designated Chair, Henry M. Whitesides and Richard M. Koch, Designated Member of the North Carolina Safety and Health Review Board.

APPEARANCES

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

Michael C. Lord of MAUPIN, TAYLOR, ELLIS & ADAMS, P.A., Raleigh, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did the Complainant prove by a preponderance of the evidence that the Respondent committed a serious violation of 29 CFR 1926.500(b)(1) as alleged in Citation No. 1, item 1?

2. Did the Complainant prove by a preponderance of the evidence that the Respondent committed a serious violation of 29 CFR 1926.500(d)(1) as alleged in Citation No. 1, item 2?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".

2. 29 CFR 1926.500(b)(1) which provides:

> Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides except at entrances to stairways.

3. 29 CFR 1926.500(f)(1) which provides:

> A standard railing shall consist of top rail, intermediate rail, toeboard, and posts, and shall have a vertical height of approximately 42 inches from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be halfway between the top rail and the floor, platform, runway, or ramp. The

ends of the rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard. Minimum requirements of standard railing under various types of construction are specified in the following paragraphs:

(vi) Other types, sizes and arrangements of railing construction are acceptable, provided they meet the following conditions:

(a) A smooth-surfaced top rail at a height above floor, platform, runway, or ramp level of approximately 42 inches;

(b) A strength to withstand at least the minimum requirement of 200 pounds top rail pressure with a minimum of deflection;

(c) Protection between top rail and floor, platform, runway, ramp, or stair treads, equivalent at least to that afforded by a standard intermediate rail;

(d) Elimination of overhang of rail ends unless such overhang does not constitute a hazard.

4. 29 CFR 1926.500(d)(1) which provides:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing or the equivalent, as specified in paragraph (f)(1) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Having reviewed and considered the record, the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby reverses the decision of the Hearing Examiner in part and 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(10).

4. The employer (Respondent), The Donohoe Companies, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On February 5, 1997, the honorable Robin E. Hudson issued an order affirming the citation for serious violations of 29 CFR 1926.500(b)(1) and 29 CFR 1926.500(d)(1) together with the grouped penalty of $2,275.00.

6. The Board adopts the Hearing Examiner's findings of fact numbered 8 through 12 and 18 through 22.

Citation No. 1, Item No. 1

7. The only employee of Respondent that was exposed to the slack cables around the fourth floor opening was Haille Marian and he was three feet away from the cables. (T p 54).

8. The possibility of an accident would be that Mr. Marian could trip and fall into the cables. (T pp 55-57).

9. The substantially probable result of such an accident would not be death or serious physical injury.

Citation No. 1, Item No. 2

10. The only employee of Respondent's who was potentially exposed to the slack cables on the third floor was engineer Henry Baker who had been on the floor the morning of the inspection to transfer a control point from the floor below to the third floor with a plumb bob. (T pp 77-78).

11. In order to transfer the control point with a plumb bob, Henry Baker approached the edge of the building, knelt down and reached under the cables to stick a folding rule over the edge and suspended the plumb bob on a string to the floor below. (T pp 78-79, 82-83).

12. At no time during this process of transferring the control point was Henry Baker exposed to a fall over the edge of the building. (T p 85-87).

13. Respondent is a large employer with over 350 employees.

14. Respondent has an exemplary written documented safety program with a full time safety director and regular employee safety meetings.

15. Respondent had received no recent OSH citations at the time of the inspection.

16. After taking into account the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations the Board finds that no penalty is appropriate for the nonserious violation of 29 CFR 1926.500(b)(1).

CONCLUSIONS OF LAW

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 the Board.

3. The Complainant has failed to prove by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.500(b)(1) as alleged in Citation No. 1, item 1 by failing to guard floor openings by standard railings and toeboards or covers, however, Complainant has proven by the preponderance of the evidence and by substantial evidence that Respondent committed a nonserious violation of 29 CFR 1926.500(b)(1).

4. The Complainant has failed to prove by a preponderance of the evidence and by substantial evidence that the Complainant committed a serious violation of 29 CFR 1926.500(d)(1) as alleged in Citation No. 1, item 2 by failing to guard open-sided floors 6 feet or more above ground level with standard railing or equivalent on all open sides.

5. The zero penalty for the nonserious violation of 29 CFR 1926.500(b)(1) was calculated after taking into account the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations and is fair and reasonable in amount.

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). "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 follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

"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, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence. Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In order to prove that the 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 substantially probable result of an accident could be death or serious physical injury and

5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The Respondent sought review of the Hearing Examiner's findings of fact numbered 13, 14, 16 and 17 in which the Hearing Examiner found that each of the five elements necessary to prove a serious violation of 29 CFR 1926.500(b)(1) existed. Respondent is also seeking review of findings of fact numbered 18, 19, 23, 24, 26 and 27 in which the Hearing Examiner found that each of the five elements necessary to prove a serious violation of 29 CFR 1926.500(d)(1) existed. In addition, Respondent is seeking review of conclusions of law numbered 1, 3, 4 and 5 and the Order.

In holding that the Respondent committed a serious violation of 29 CFR 1926.500(b)(1) the hearing examiner found that the possibility of an accident was that an employee could fall through the floor opening. This finding was supported by the opinion testimony of the compliance officer, however, the evidence is that the possibility of an accident under the circumstances of this case is that the employee Haille Marian could fall into the cables and not through the floor opening. Mr. Marian was observed by the compliance officer 3 feet from the opening and a fall from that distance would have Mr. Marian falling into the cables. There is no evidence that the substantially probable result of an accident under these circumstances could result in death or serious physical injury. If the opinion of the Compliance Officer is contradicted by the preponderance of the evidence that the result of an accident would be nonserious, then the finding that the violation is nonserious is within the discretion of the Board. Harrison-Wright Co., Inc., ___ NCOSHD ___, OSHANC No. 94-3087 (1996).

In holding that the Respondent committed a serious violation of 29 CFR 1926.500(d)(1) the hearing examiner found that the Respondent's employee, Henry Baker was exposed to the hazard of the inadequately guarded open sided third floor while he was using a plumb bob to transfer a control point from the second floor to the third floor. This finding is supported by the opinion testimony of the Compliance Officer. However, again, the evidence is that Mr. Baker knelt down and reached through the cables to extend his folding rule over the edge of the third floor to suspend his plumb bob down to the second floor. The evidence is also that the Compliance Officer did not observe Mr. Baker but relied on an interview with Mr. Baker that he had been on the third floor that morning. Mr. Baker's testimony is that at no time did he feel that he was in danger of falling off the third floor and he did not observe that the cables were slackened. The Complainant has failed to prove by a preponderance of the evidence and by substantial evidence that any of Respondent's employees were exposed to the hazard of the slacked cables on the third floor and has therefore failed to prove by a preponderance of the evidence that Respondent committed any violation of 29 CFR 1926.500(d)(1).

As is required by N.C.G.S. 95-138, after giving due consideration to the statutory criteria of size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board finds that no penalty is appropriate for the nonserious violation of 29 CFR 1926.500(b)(1).

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's February 5, 1997 Order in this cause be, and hereby is, **REVERSED** with respect to the holding affirming Citation One, Item 1 as a serious violation and Respondent is found to have committed a nonserious violation of 29 CFR 1926.500(b)(1) with no penalty.

The Review Board further **ORDERS** that the Hearing Examiner's holding affirming Citation One, Item 2 as a serious violation of 29 CFR 1926.500(d)(1) is hereby **REVERSED** and Citation One, Item 2 is **DISMISSED**.

This the 15th day of October, 1997.

_____
KENNETH K. KISER, DESIGNATED CHAIR

_____
HENRY M. WHITESIDES, MEMBER

_____
RICHARD M. KOCH, DESIGNATED MEMBER