BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BLUEGRASS ART CAST TN, INC.

RESPONDENT.

DOCKET NO. OSHANC 94-3060
OSHA INSPECTION NO. 111149407
CSHO ID NO. F3243

ORDER

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 7th floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser and Hugh M. Wilson, Members 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.

Michael C. Lord, of Maupin, Taylor, Ellis & Adams, P.A., Raleigh, North Carolina for Respondent.

ISSUES PRESENTED

1. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the high temperature shut-off switch is not the functional equivalent of a high temperature alarm?

2. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the Respondent committed a serious violation of 29 CFR 1926.103(f)(2)(ii)?

3. Can a serious violation be proven by opinion evidence from the compliance officer that the violation created the possibility of an accident and that the substantially probable result of the accident could be death or serious physical injury?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C.G.S. § 95-127(18) which provides:

> A "serious violation" shall be deemed to exist in a place of employment 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. (emphasis added).

2. 29 CFR 1926.103(f)(2)(ii) which provides:

> The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type compressor shall be used. Compressors shall be constructed and situated so as to

avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape form a contaminated atmosphere in event of compressor failure, and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high-temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (f)(1) of this section.

3. 29 CFR 1926.103(f)(1) which provides:

> Compressed air, compressed oxygen, liquid air, and liquid oxygen used for respiration shall be of high purity. Oxygen shall meet the requirements of the United States Pharmacopoeia for medical or breathing oxygen. Breathing air shall meet at least the requirements of the specification for Grade D breathing air as described in Compressed Gas Association Commodity Specification G-7.1-1966. Compressed oxygen shall not be used in supplied-air respirators or in open circuit self-contained breathing apparatus that have previously used compressed air. Oxygen must never be used with air line respirators.

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 affirms the decision of the Hearing Examiner 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(9).

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

5. On April 27 and 28, 1994 an inspection was made of Respondent's worksite located at the Glaxo facility in the Research Triangle Park in Durham, North Carolina by Compliance Safety Supervisor, Kevin Beauregard and trainee, Jack Forshey of the Occupational Safety & Health Division of the North Carolina Department of Labor. The inspection was a general schedule inspection.

6. As a result of that inspection four serious violations of the respiratory protection standards were alleged in one serious citation which was issued on June 21, 1994. The Citation carried a proposed abatement date of June 27, 1994 and a proposed penalty of $3,500.00.

7. On July 21, 1994 Respondent's Notice of Contest, contesting all of the alleged violations, was filed with the Review Board.

8. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

9. On August 11, 1994 Respondent filed with the Review Board its statement of position denying all violations and objecting to both the penalty and the abatement dates.

10. On February 15, 1994 a hearing was held before the honorable Carroll D. Tuttle. At the beginning of the hearing the Complainant moved to dismiss Citation one, Item 1d and to amend Citation one by increasing

Respondent's credit for size to 50% which resulted in a reduction of the proposed penalty from $3,500.00 to $2,800.00 and Judge Tuttle granted both motions.

11. Prior to the hearing the Respondent filed a Motion to Dismiss Citation Number one, Items 1b and 1c and a Motion in Limine requesting that the Complainant be prohibited from presenting any testimony that any alleged violations were serious and from presenting any evidence that the Respondent allegedly failed to test the quality of the air supplied by the oil-lubricated compressor.

12. Judge Tuttle granted the motion to dismiss Items 1b and 1c on the basis that no air sampling tests were performed by the Complainant. The Complainant in open court objected to the granting of the dismissal of Items 1b and 1c.

13. Judge Tuttle denied the motion in limine. As a result of all these motions the only remaining citation was Citation one, Item 1a, the alleged violation of 29 CFR 1926.103(f)(2)(ii) for failure to have a high-temperature alarm, a carbon monoxide alarm or both on an oil-lubricated air compressor and the failure to have the air from the compressor frequently tested if only a high-temperature alarm was used.

14. On May 8, 1994, Judge Tuttle filed an Order affirming Citation Number One, Item 1a as a serious violation and reducing the penalty to $1,400.00 by finding that the evidence supported reducing the probability assessment from "greater" to "lesser".

15. On June 1, 1995, Respondent filed its Petition for Review objecting to and excepting to certain Findings of Fact, the upholding of Citation One, Item 1a as a serious violation, and the penalty assessed by the Hearing Examiner for this violation.

16. On June 19, 1995, the Honorable Robin E. Hudson entered an Order granting Respondent's Petition for Review.

17. On September 27, 1995, the issues on appeal were heard by the full Review Board.

18. The Board adopts the Hearing Examiner's findings of facts numbered 14 through `19, 23, 26, 27 and 28.

19. At the time of the inspection the Respondent had two employees on the worksite Mr. Bill Macy, who was the supervisor and his son.

20. Mr. Macy was sandblasting patchwork on the pre-cast concrete panels that Respondent had installed on the building.

21. Mr. Macy performed the sandblasting operations from the bucket of a manlift that at the time of the inspection was 7 or 8 feet off of the ground and was using a Clemco supplied air helmet as a source of breathing air during his sandblasting operations.

22. The source of the compressed air for both the sandblasting equipment and the Clemco supplied air respirator of the helmet type which Mr. Macy used for breathing air was a rented Sullair diesel powered oil-lubricated compressor.

23. The Rental Contract for the Sullair diesel powered oil-lubricated compressor which Mr. Macy rented for this job from Prime Equipment Rental had two warnings in all capitals as follows:

> **AIR PRODUCED BY THIS UNIT IS NOT SUITABLE FOR BREATHING**
>
> **THIS UNIT PRODUCES CARBON-MONOXIDE GAS.**
>
> **OPERATE IN A WELL VENTILATED AREA ONLY**

(Complainant's exhibit # 5).

24. It was the normal practice for the rental contracts from Prime Equipment Rental to go directly from Prime Rental to the Respondent's office in Tennessee.

25. The Rental Contract for the Sullair compressor which Mr. Macy used on the jobsite as a source of breathing air went directly to the Respondent's home office in Ashland City, Tennessee and Respondent knew that the air compressor produced carbon monoxide and that the air produced by the air compressor was not suitable for breathing.

26. The Sullair compressor that was used by Mr. Macy as a source of breathing air had a warning label stating that it was an oil-lubricated compressor and produced carbon monoxide; Mr. Macy knew or should have known that the air compressor produced carbon monoxide.

27. The Clemco supplied air respirator had a label warning that it did not remove or protect against carbon monoxide and that a monitor removal system must be used in conjunction with the respirator and Mr. Macy knew or should have known that a system for the detection and/or removal of carbon monoxide should be used with the respirator and the air compressor.

28. The vehicles in the parking lot adjacent to the Sullair compressor which Mr. Macy used produced carbon monoxide.

29. The manlift in which Mr. Macy performed his sandblasting operations was running at the same time as the Sullair compressor and producing carbon monoxide within a few feet of this same compressor.

30. The Sullair compressor produced carbon monoxide in two ways: First, by the burning of the hydrocarbon fuel (diesel fuel) in the engine of the air compressor and second, through the high temperature breakdown of the oil that is used to lubricate the piston and cylinder that compresses the air that is used to operate the sandblasting equipment and to supply breathing air. (T p 65, 74, 83 and Complainant's Exhibit # 4).

31. On the day of the inspection Mr. Macy had used the sandblasting equipment and the Clemco respirator for approximately three hours. Mr. Macy would sandblast and breathe the air from the Sullair compressor for intervals of 15 minutes because the sand in the sandpot would last that long. When the sand gave out Mr. Macy would have to wait a few minutes until his son re-filled the sandpot with sand, when he would then resume sandblasting for another 15 minutes.

32. The Sullair diesel powered oil-lubricated air compressor had neither a high temperature alarm nor a carbon monoxide alarm.

33. Respondent did not test the air from the Sullair compressor for the presence of carbon monoxide to see that the air met at least the requirements of the specification for Grade D breathing air as described in Compressed Gas Association Commodity Specification G-7.1-1966.

34. The engine component of the Sullair compressor was equipped with two high-temperature shutoff switches which were designed to protect the engine component of the compressor from damage from overheating and was not designed to protect the employees using the air compressor. One of the high-temperature shutoff switches would trip if the temperature in the hydraulic oil exceeded 240 degrees and the other would trip if the temperature of the coolant exceeded a certain temperature. These switches would cut off the engine if the engine overheated but would not cut off the air compressor component if it overheated and became hot enough to break down its lubricating oil to produce carbon monoxide.

35. The high-temperature shut-off switches on the engine of the Sullair compressor had no audible alarms.

36. The Sullair compressor was not equipped with a high-temperature air monitor which would alarm and warn the person breathing the air that the piston and cylinder in which the compressed air was being produced was overheating and producing carbon monoxide from the high temperature breakdown of the oil used to lubricate that piston and cylinder. (T p 80-81, 97-98, Complainant's exhibit # 4).

37. The high-temperature shut off switches that tripped when the temperature of the hydraulic oil and the coolant in the engine component of the Sullair compressor are not the functional equivalent of a high-temperature alarm. (T p 75-81,97-98, Complainant's exhibit # 4).

38. The hazard created by not having the high-temperature alarm or carbon monoxide alarm, or both on the Sullair compressor is overexposure to carbon monoxide so that the person is overcome or asphyxiated by carbon monoxide. (T p 69).

39. The hazard created by having a high-temperature alarm and not testing the air from the Sullair diesel powered oil-lubricated air compressor for carbon monoxide is overexposure to carbon monoxide so that the person is overcome or asphyxiated by carbon monoxide. (T p 69).

40. Carbon monoxide is a odorless and tasteless gas that impairs the mental functions so that a person would not know that he or she has been exposed to it until it is too late. (T p 69).

41. Mr. Macy was working in a manlift approximately 7 to 8 feet off of the ground and if he had been overcome with carbon monoxide he could have fallen to the ground and suffered a serious physical injury.

42. Respondent's employee, Bill Macy was exposed to the hazard.

43. Physical exertion and smoking tobacco increase the effects of exposure to carbon monoxide.

44. Bill Macy was a tobacco smoker and was engaged in physical exertion at the time of the inspection while he was breathing the compressed air from the Sullair diesel powered oil-lubricated air compressor.

45. The hazard created the possibility of an accident.

46. The substantially probable result of the accident created by the hazard is death or serious physical injury such as serious damage to the brain, liver and other organs.

47. The Respondent knew or should of known of the condition that created the hazard of overexposure to carbon monoxide.

48. The Respondent had a written respiratory protective program, a copy of which was sent to its superintendent and employee Mr. Bill Macy.

49. The final penalty calculation was in accordance with the Field Operations Manual and adjustments were given to Respondent based upon size, history and gravity of the violation. No reduction was given for good faith. The Respondent's size entitles it to a penalty reduction of 50%. The Respondent's history of violations within the three years previous to the inspection entitles it to a 10% reduction. The severity factor was rated as "high" based on the assessment that if an accident occurred death or permanent injury could result and the probability was rated as "greater" by the compliance officer because of the approximate three hours of exposure on the day of the inspection, the three sources of carbon monoxide in the area and the physical exertion of the employee who was exposed. The "high/greater" rating results in a gravity based penalty of $7,000.00. Applying the total of 60% reduction to the gravity based penalty of $7,000.00 gives a final assessed penalty of $2,800.00 for the violation of 29 CFR 1926.103(f)(2)(ii). (T pp 81-86).

50. Hearing Examiner Tuttle reduced the final penalty as assessed by the Commissioner for this violation of 29 CFR 1926.103(f)(2)(ii) from $2,800.00 to $1,400.00 based on his finding that the probability assessment should be "lesser" rather than "greater".

51. A "high/lesser" assessment results in a gravity based penalty of $3,500.00. Applying the total of 60% reduction to the gravity based penalty of $3,500.00 results in a final assessed penalty of $1,400.00.

52. Respondent did not have an effectively enforced written safety program.

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 Commissioner has proven by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.103(f)(2)(ii) by failing to have a high-temperature or carbon monoxide alarm, or both on the Sullair diesel powered oil-lubricated air compressor which provided breathing air to Bill Macy, Respondent's employee and superintendent, while he was performing sandblasting operations.

4. The Commissioner has proven by the greater weight of the evidence and by substantial evidence that the Respondent failed to test the air from the Sullair diesel powered oil-lubricated air compressor frequently for carbon monoxide to insure that it met the specification for Grade D breathing air as described in Compressed Gas Association Commodity Specification G-7.1-1966.

5. Respondent is not entitled to any reduction in the penalty for good faith since it did not have an effectively enforced written safety 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). "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.

There is competent and substantial evidence in the record that the hazard of overexposure to carbon monoxide existed and that Respondent's superintendent and employee Bill Macy was exposed to the hazard for up to three hours at 15 minute intervals on the day of the inspection.

There is competent and substantial evidence in the record that the violations were serious. In Brooks v. McWhirter, 2 NCOSHD 115, at 126-127, 303 NC 573 (Supreme Court, 1981) the North Carolina Supreme Court ascertained "the proper meaning of a serious violation and stated the following:

> G.S. 95-127(18) (1981) defines a "serious violation" as follows:
>
> > A "serious violation" shall be deemed to exist in a place of employment 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.

(emphasis added). This Board has consistently held that the Commissioner must establish that there is a substantial probability that death or serious physical harm could result and not that death or serious physical harm would result as the Respondent asserts. Brooks v. O.S. Steel Erectors, 2 NCOSHD 237, 244 (RB 1984), affirmed on appeal, 2 NCOSHD 529, 84 N.C. App. 630 (1987); Payne v. Woodgraphics, Inc., 4 NCOSHD 912, 916 (RB 1993).

The North Carolina Supreme Court in McWhirter, supra, compared the state definition with the federal definition as almost identical and adopted the reasoning of the Ninth Circuit Court of Appeals in California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975) as persuasive and held the following.

> The purpose of our General Assembly in enacting the Occupational Safety and Health Act, G.S. §§ 95-126 to 95-160 (1981), like that of Congress, was "to assure as far as possible every working man and woman . . . safe and healthful working conditions and to preserve our human resources. G.S. § 95-126(2). Thus we hold that in order to establish a serious violation under G. S. 95-138 the Commissioner must show by substantial evidence, see G.S. §150A-51(5), that the violation created a possibility of an accident a substantially probable result of which was death or serious physical injury.

Brooks v. McWhirter, 2 NCOSHD 115, at 128, 303 NC 573 (Supreme Court, 1981)

Under McWhirter, in proving the possibility of an accident, the Commissioner must only show that an accident could happen and not that an accident is probable.

> Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at

> the probability of an accident in deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is "serious".

Brooks v. McWhirter, 2 NCOSHD 115, at 127-128, 303 NC 573 (Supreme Court, 1981), quoting with approval, California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, at 988 (9th Cir. 1975).

> All that is required of the Commissioner is that he produce substantial evidence, whether it be data or opinion, that the violation created a possibility of a serious accident.

Brooks v. McWhirter, 2 NCOSHD 115, at 128-129, 303 NC 573 (Supreme Court, 1981).

McWhirter, supra, allows the Commissioner to prove the possibility of an accident by opinion evidence. The compliance officer supervisor who has over six years of experience testified that there were three possible sources of carbon monoxide entering the breathing air. "The alarm's intended to prevent CO from going in there so the person doesn't become overcome or asphyxiated with carbon monoxide." (T p 69, LL 6-8.) He testified that this hazard created the possibility of an accident and the most likely result would be death or serious physical harm. (T p 71). He testified further on the effects of carbon monoxide. " . . . in my history with the Department and also in my history with access to other agencies and other agencies' records, I've seen injuries up to and including death, brain damage, serious damage to body parts such as liver and other bodily organs." (T p 73, LL 10-15). "Carbon monoxide is odorless and tasteless so you're not going to know whether you're being exposed to it or not until perhaps it's too late." (T p 69). This is competent and substantial evidence from which the hearing examiner could conclude that the failure to have a high-temperature or carbon monoxide alarm, or both on the oil-lubricated air compressor created a possibility of an accident the substantially probable result of which was death or serious physical injury.

Respondent also makes the argument that the Complainant is required to test for the concentration of carbon monoxide in order to determine whether the vehicles in the parking lot, the air compressor or the man lift were a potential hazard. However, the regulation requires the Employer to frequently test the air for carbon monoxide if a carbon monoxide alarm is not used in conjunction with a high temperature alarm. To ensure that the quality of air is of high purity when an oil-lubricated air compressor is used to supply breathing air it must meet the requirements of 29 CFR 1926.103(f)(2)(ii) and have a "high-temperature or carbon monoxide alarm, or both". If it has only a high-temperature alarm frequent testing for carbon monoxide must be done by the Employer.

Respondent makes much of his argument that the high temperature switches on the engine of the air compressor meet the requirements of the alarm required by 29 CFR 1926.103(f)(2)(ii). Even if the alarms are equivalent and we do not find them to be equivalent, it is admitted by Respondent's employee that there was no carbon monoxide alarm on the air compressor and that no testing of the breathing air for carbon monoxide was done as is required by the regulation if only a high-temperature switch is used and Respondent would still be in violation of the regulation. Respondent also makes an argument that the citation contained no charge that frequent testing for carbon monoxide was not done but Respondent is clearly mistaken. Citation 1, Item 1a clearly states: "Compressor . . . was not equipped with a carbon monoxide monitor nor was air from compressor frequently tested."

There is competent and substantial evidence in the record that the high-temperature switches used on the air compressor in this case are not the functional equivalent of a high-temperature alarm. Mr. Beauregard, the compliance safety officer supervisor who has over six years experience in safety and health testified that they were not equivalent. (See findings of fact 34-37). In support of his opinion that the lack of a high-temperature alarm created the hazard that carbon monoxide could enter the breathing air, the compliance officer testified that there were three sources of carbon monoxide on site. One was the cars in the parking area and driving around that area, the second was diesel and gas powered equipment being operated on site and the third was the compressor itself.

The Complainant indicated that a high-temperature air monitor was required for personal protection of the operator (T p 97) and that the high-temperature shut-off switch measured the temperature of the hydraulic oil and the coolant that was part of the engine component of the air compressor unit. Since the high-temperature shut-off

switches are tied into the temperature of the engine component and not the temperature of the air produced by the compressor component, carbon monoxide could be produced by thermal breakdown of the oil used to lubricate the piston in the compressor component and the high-temperature shut-off switches would not cut off the engine or give any warning to the operator of the compressor. This is the main reason that the high-temperature shut-off switches that works off of the temperature of the hydraulic oil and the coolant are not the equivalent of a high-temperature alarm required by 29 CFR 1926.103(f)(2)(ii). See, Distler, "Formation of carbon monoxide in air compressors", 40 American Industrial Hygiene Association, 548, 551 (June, 1979).

In Brown & Root, Inc., 1981 OSHD 31,557 (RC 1981) cited by the Respondent as support for its position, the high-temperature shutdown device cut the entire compressor off if the temperature of the air produced by the compressor became too hot as well as when the engine of the compressor became too hot or the oil pressure became too low whereas in this case the high-temperature shut-off switch cut off only the engine when the temperature of the hydraulic oil or the coolant temperature became too hot. Id., at 31,558. The high-temperature switches on the compressor in this case would give no warning of the production of carbon monoxide by the thermal breakdown of the lubricating oil in the air supplied by the oil-lubricated air compressor.

Respondent also makes the argument that it should have received a 25 percent reduction for good faith so that the penalty should be reduced from $1,400.00 to $525.00. 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 had already reduced the penalty from $2,800.00 to $1,400.00 on the basis that the probability assessment was "lesser" rather than "greater" which reduced the gravity based penalty and resulted in the reduction of the penalty to $1,400.00. Respondent's asks for a further reduction based on good faith through the assertion that it had a written safety and health program. The Field Operations Manual, Chapter VIB9f(2), p VI-10, allows a reduction for good faith only if the program has been effectively implemented in the workplace. There is competent and substantial evidence in the record in the testimony of the compliance officer that the good faith component of the penalty was calculated according to the Field Operations Manual and that there was no effective implementation of the safety program in the workplace on this jobsite. There is no abuse of discretion on the part of the Hearing Examiner in refusing to further reduce the penalty.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's May 3, 1995 Order in this cause be, and hereby is, **AFFIRMED** in all parts and the Respondent is ordered to pay the $1,400.00 in penalties.

This the 15th day of July, 1996.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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