BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

KINSTON NEUSE CORPORATION
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 94-3150
OSHA INSPECTION NO. 125286427
CSHO ID NO. P9873

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 9th day of June, 2000 in Room 124 on the first floor of the Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by J. B. Kelly, Chairman, Robin E. Hudson, Member and Henry M. Whitesides Member of the North Carolina Safety and Health Review Board.

APPEARANCES

Daniel S. Johnson, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Michael C. Lord of Maupin, Taylor & Ellis PA, Raleigh, North Carolina for the Respondent.

ISSUES PRESENTED

1. Has the Commissioner proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a non-serious violation of 29 CFR § 1910.242(b) as alleged in Citation Two, Item 1 in that compressed air used for cleaning purposes was not reduced to 30 p.s.i.?

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.

2. 29 CFR § 1910.242(b) provides the following:

> **Compressed air used for cleaning**. Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

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 with respect to the finding of a *de minimus* violation of 29 CFR § 1910.242(b) 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) Kinston Neuse Corporation is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On October 21, 1994, an inspection was made of Respondent's work site located in Kinston, North Carolina by the Occupational Safety and Health Division of the North Carolina Department of Labor.

6. One serious and one non-serious citations were issued as a result of that inspection.

7. On April 11, 1995 a hearing was held before the Honorable L. McKay Whatley.

8. On November11, 1999, Judge Whatley issued an Order dismissing Citation 1, Item 1, the alleged violation of the lockout-tagout standard, 29 CFR 1910.147(d)(4)(ii) and affirming Citation 2, Item 1, the alleged violation of 29 CFR § 1910.242(b) for the failure to reduce compressed air used for cleaning purposes to 30 p.s.i., as a *de minimus* violation.

9. On December 21, 1999, Complainant filed a Petition for Review objecting to the Hearing Examiner's affirming of Citation 2, Item 1, the alleged failure to reduce compressed air used for cleaning purposes to 30 p.s.i., as a *de minimus* violation and the Board took jurisdiction of this case.

10. The issues on appeal were heard by the full Board on June 9, 2000.

11. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 16.

12. The employees using the compressed air wore personal protective equipment including a face shield.

13. One employee, Anthony Steve James, was injured while cleaning the machine parts with compressed air when he blew shot underneath his face shield and into his eye. (T p 23-24).

14. The Respondent stipulated that the air was coming out of the air hose at 60 pounds p.s.i. and that it was a violation of the cited standard which is 29 CFR § 1910.242(b). (T p 22-23)

15. The air coming out of the air hose at 60 p.s.i. created a hazard of blowing dust and material into an employee's eye.

16. The hazard created the possibility of an accident.

17. The injury that would result from using the compressed air at 60 p.s.i. would not result in a requirement for medical treatment. (T p 23).

18. Employees were exposed.

19. The employer knew or should have known of the condition that the air was coming out of the air hose at 60 p.s.i.

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 a preponderance of the evidence and by substantial evidence that the Respondent committed a non-serious violation of 29 CFR § 1910.242(b) as alleged in Citation Two, Item 1 in that compressed air used for cleaning purposes was not reduced to 30 p.s.i.

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).

The Respondent stipulated that the air was coming out of the hose at 60 p.s.i and that it was in violation of the cited standard, 29 CFR § 1910.242(b), so the Commissioner does not have to prove that the standard was violated. The only issue in this appeal is the correct designation of the citation as to whether it was non-serious or *de minimus*. A lot of arguments have been made about the legal ability of the Review Board and the Department of Labor to classify a violation as *de minimus*. First, we will determine if the Commissioner has met his burden of proof with respect to the classification of the violation as non-serious. In doing so, we first must determine if the Hearing Examiner's finding that the Commissioner has failed to meet his burden of proving a non-serious violation of 29 CFR § 1910.242(b) is supported by substantial evidence in the record.

Non-serious violations do not frequently come before the Review Board or the appellate courts because they usually carry no or very little penalty. In Dillard-Eastland Mall, OSHANC No. 96-3518, 7 NCOSHD ____ (RB 1999) the Board stated:

> The Board adopts the definition of a nonserious violation announced by the Court of Appeals in Associated Mechanical, supra, and holds that a nonserious violation exists where "there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." Mark A. Rothstein, Occupational Safety and Health Law § 312, at 332 (3rd ed. 1990) (hereinafter Rothstein); Stephen A. Bokat & Horace A. Thompson III, Occupational Safety and Health Law 263 (1988).

Dillard-Eastland Mall, OSHANC No. 96-3518, 7 NCOSHD ____ (RB 1999). See, Associated Mechanical Contractors, Inc., 118 N.C. App. 54 (1995). The testimony of the Compliance Officer was that an employee, Anthony Steve James was injured when he blew shot underneath his shield and into his eye and that his accident was corroborated by the OSHA 200 logs. He also testified that the "worst reasonable anticipated injury in this case would not result in a requirement for medical treatment." This testimony is in direct contradiction to the finding of the Hearing Examiner that "There was no evidence that any employee had sustained an injury using the compressed air at 60 p.s.i. and no indication of a direct relationship between use by respondent's employees of compressed air at 60 p.s.i. and the safety of the affected employees.". (Finding of fact 17). However, a review of the record does not reveal any substantial evidence to support that finding and the Board declines to adopt that finding. The Board finds that Commissioner has shown by the preponderance of the evidence and by substantial evidence that there is a direct and immediate relationship between the violative condition of air coming out of the air hose at 60 p.s.i. and occupational safety and health but not of such a relationship that a resultant injury could be death or serious physical harm and that the Respondent has committed a non-serious violation of 29 CFR § 1910.242(b).

Since we have decided that the Commissioner has met his burden of proof for proving a non-serious violation of the cited standard, we do not need to reach the issue of whether the Board has the power to reduce a non-serious violation to a *de minimus* violation.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's April 25, 1997 Order in this cause be, and hereby is, **REVERSED** and Respondent is found to have committed a non-serious violation of 29 CFR § 1910.242(b) with no penalty and is **ORDERED** to abate the violation within 30 days of the date of this order.

The Hearing Examiner's dismissal of Citation 1, Item 1, an alleged violation of 29 CFR § 1910.147(d)(4)(ii) was not subject to this appeal and is not affected by this order.

This the 20th day of September, 2000.

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J. B. KELLY, CHAIRMAN

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ROBIN E. HUDSON, MEMBER

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HENRY M. WHITESIDES, MEMBER