**BEFORE THE SAFETY AND HEALTH REVIEW BOARD**

**OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

LIGGETT GROUP, INC.

RESPONDENT.

DOCKET NO. OSHANC 94-3175
OSHA INSPECTION NO. 125286823
CSHO ID NO. G1025

**ORDER**

## DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 26th day of April, 1996 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and Henry M. Whitesides, Member of the North Carolina Safety and Health Review Board.

## APPEARANCES

Jane A. Gilchrist, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

John R. Long of Newsom, Graham, Hedrick & Kennon, PA, Durham, 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 serious violation of 29 CFR 1910.23(a)(5) by failing to properly guard a floor opening and do the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the Respondent did commit a serious violation of 29 CFR 1910.23(a)(5)?

## SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1910.23(a)(5) which provides:

> Every pit and trapdoor floor opening, infrequently used, shall be guarded by a floor opening cover of standard strength and construction. While the cover is not in place, the pit or trap opening shall be constantly attended by someone or shall be protected on all exposed sides by removable standard railings".

2. 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).

---

Having reviewed and considered the record, 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) Liggett Group, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On December 4, 1995, Judge Morgan issued an order affirming the citation for a serious violation of 29 CFR 1910.23(a)(5) together with the penalty of $1,625.00.

6. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 7 and 9 through 16.

7. On September 9, 1994 the trapdoor floor opening measured 98 inches long and 34 inches wide and was covered by a grate that was in three pieces which when fitted together measured 100 and 1/2 inches long and 38 inches wide and were not bolted down and were not fastened together. When the three pieces were centered over the opening the three piece grate would overlap the opening by 2 inches on each side and 1 and 1/4 inches on each end. The two end pieces of the grate if not properly fitted together could ride over the center piece of the grate by more than 1 and 1/4 inches so that a gap could be created between the end grates and the edge of the opening.

8. On January 5, 1996, Respondent filed a Petition for Review with the Review Board requesting review for Citation 1, Item 1, Findings of Fact numbered 8 through 14 and Conclusion of law number 3. Respondent contended that the Findings of Fact were not supported by a preponderance of the evidence or by substantial evidence and that the Conclusion of Law constituted an error of law.

9. An Order granting review was filed with the Board on January 22, 1996.

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

11. On March 20, 1996, the Board issued a Notice of Review granting Respondent's Petition for Review and the issues on appeal were heard by the full Board on April 26, 1996.

**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 preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1910.23(a)(5) by failing to adequately guard a floor opening with a cover of standard strength and construction.

**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 8 through 14 in which the Hearing Examiner found that each of the five elements necessary to prove a serious violation of 29 CFR 1910.23(a)(5) existed. A review of the transcript and the exhibits shows that each of those findings of fact is supported by the testimony of the safety compliance officer and by the Complainant's exhibits. The only discrepancy is that the grate when centered on the opening only extended past each end of the opening by 1 and 1/4 inches for a total overlap of 2 and 1/2 inches on the ends. The testimony of the employee who fell through the opening was that the grate was in three pieces and was not secured to the floor. The Respondent did not offer any evidence to controvert the testimony that the grate was in three pieces and that the three pieces when fitted together measured 100 and 1/2 inches long and 38 inches wide and the floor opening was 98 inches long and 34 inches wide and that the grate was not bolted down and the three pieces were not fastened together. If the three

piece grate were centered on the hole this would allow only 2 inches of overlap on the sides and 1 and 1/4 inches of overlap on the ends.

The findings of fact and the testimony of the compliance safety officer were that the two end pieces of the grate could slip toward the ends and could ride over the middle grate toward the center and that if the grate were resting on top of the metal flange on the floor it could shift toward the air handler. The Respondent's witnesses testified that the grate was of standard strength and construction and of such a sufficient weight so that it would be secure and would not shift. The testimony of the compliance safety officer was that the three piece grate did not guard the opening as is required by the standard and that the grate as it covered the opening was not of standard strength and construction although the material of which the grate was made was of standard strength and construction. The preponderance of the evidence supports the findings of fact of the Hearing Examiner regarding the 5 elements necessary to find a serious violation of 29 CFR 1910.23(a)(5).

Respondent's argument that the grate was of standard strength and construction and that therefore meets the requirements of 29 CFR 1910.23(a)(5) was countered by the Complainant's argument that the grate as it covered the opening was not of standard strength and construction. The regulation has two requirements that must be met. First, the cover must be of "standard strength and construction" so that the weight of the traffic on top of the cover does not cause the cover to collapse. Secondly, the cover must "guard" the opening. In order for the cover to adequately guard the opening it must be large enough to cover the opening and must be secure so that it doesn't shift or move. The size and secure requirements are common sense requirements that are part of the regulation. No one would dispute that a grate of standard strength and construction that was smaller than the opening would not comply with the regulation in that it would not adequately guard the opening. Likewise, a three piece grate that was large enough to barely cover the opening but was not fastened together or to the floor so that it was secure and would not slip also would not comply with the regulation. It is noteworthy that the construction counterpart to the general industry regulation requiring that floor opening be guarded has a written requirement that the covers be of sufficient strength that they not collapse and that they "be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees". 29 CFR 1926.502(i)(2) and (3). (emphasis added). The requirement in the construction standard that the cover must be secured so as to prevent accidental displacement by employees adds credibility to the interpretation given above that the requirement that a cover "guard" an opening necessitates the common sense interpretation that the cover be secured so as not to be displaced by equipment or employees that traffic across it.

Respondent makes the argument that it had an aggressive written safety program that was rigorously enforced by management and the union and that if the condition of the grate had been a hazard that a reasonably prudent person would have discovered it as a result of their safety program. Respondent is to be commended for its aggressive safety program and was given credit for it in the reduction of the penalty for good faith. However, it was obvious to anyone including supervisors who frequently walked across the grate that the grate was in three pieces, barely covered the opening, was not fastened together and was not secured to the floor. This meets the reasonable person test that is part of the proof of a serious violation that the employer could "with the exercise of reasonable diligence, know of the presence of the violation".

The remaining item to be considered is whether the penalty that was assessed is appropriate for a serious violation of 29 CFR 1910.23(a)(5). N.C.G.S. 95-138 states the following with respect to penalty assessment by the Board:

> . . . 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 following factors:
>
> (1) Size of the business of the employer being charged,
>
> (2) The gravity of the violation,
>
> (3) The good faith of the employer, and

> (4) the record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.
>
> . . . the report, decision, or determination of the Board on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

After giving due consideration to the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board affirms the finding by the Hearing Examiner that a penalty of $1,625.00 is appropriate for the serious violation of 29 CFR 1910.23(a)(5) by Respondent.

**ORDER**

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's December 4, 1995 Order in this cause be, and hereby is, **AFFIRMED** in all parts and Respondent is found to have committed a serious violation of 29 CFR 1910.23(a)(5) and is **ORDERED** to pay a penalty of $1,625.00 to the Department of Labor.

This the 1st day of November, 1996.

_____
ROBIN E. HUDSON, CHAIR

_____
KENNETH K. KISER, MEMBER

_____
HENRY M. WHITESIDES, MEMBER