BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 96-3431
OSHA INSPECTION NO. 125308965

v.

ORDER

FOOD LION, INC.

RESPONDENT.

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 27th day of March, 1998 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, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

C. Daniel Barrett of Edwards, Ballard Clark & Barrett PA, Winston Salem, 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 1910.136(a) for the failure of its employees to wear safety toe shoes when there was a danger of injuries due to falling or rolling objects.

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 1910.136(a) which provides:

> Each affected employee shall wear protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards.

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) Food Lion, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On October 8, 1997, Judge Richard M. Koch issued an order affirming the citation for a serious violation of 29 CFR 1910.136(a) together with the agreed upon penalty reached during the settlement of other items grouped with this violation.

6. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 32 and 35 through 36.

7. The Respondent did a statistical analysis of the heel, ankle and toe injuries (T p 181) shown in its records using an arbitrary time period of 15 months before and 15 months after the recision of the safety toe footwear policy which showed that during that time period there were 45 "foot" injuries before and 42 "foot" injuries after the rescission, however, when the reports are examined for the year 1996 after the rescission of the policy and ankle and heel injuries, against which safety toe shoes do not protect, are excluded from the calculations, the records indicate that Respondent's employees experienced 7 foot or toe fractures in 1996 while in previous years when the policy was in effect, there were 1 or fewer foot or toe fractures per year.

8. Respondent's employees at the warehouse experienced a significant increase in foot and toe fractures after the Respondent changed its safety toe footwear policy and stopped requiring its employees to wear safety toe shoes and the wearing of the safety toe footwear would have reduced the hazard of injuries to the feet and toes.

9. At the time that Food Lion rescinded its safety toe shoe policy, it had no data to show that foot injuries would be reduced by not requiring safety toe shoes.

10. Respondent's supervisors filled out the OSHA 200 log of injuries and the Industrial Commission Form 19 forms and they knew that the selectors' feet and toes were being fractured by dropping boxes and by being run over by the pallet jacks and this knowledge by the supervisors of the hazardous conditions is imputed to the Respondent.

11. Respondent knew or should have known, with the exercise of reasonable diligence, that the dropping of boxes that weighed up to 65 pounds onto feet and toes and the running over of feet by a pallet jack that weighed between 2 and 3 tons could result in fractured toes and feet.

12. By a memo dated January 31, 1996, Scott Casey and Larry Wilson, the two directors of distribution sent out a memo to the distribution centers stating:

> There is no longer a requirement for employees to wear steel-toed safety shoes and back support belts. They have the option to wear this safety apparatus, but it is not required.. Under the dress code, they are obligated to wear a leather shoe that covers the entire foot.

(T p 157, Respondent's exhibit #2).

13. On November 10, 1997, Respondent filed a Petition for Review with the Review Board requesting review for Citation 1, Item 1c, Findings of Fact numbered 13, 15, 23-25, 27, 29, 31, 32, 34, 35 and 36, and Conclusions of law number 1, 3, 4, 5 and 6. Respondent contended that the Findings of Fact were not supported by a

preponderance of the evidence and to the extent relied upon in the Conclusions of Law, constituted legal error and that the enumerated Conclusions of Law were not supported by a preponderance of the evidence and constituted an error of law.

14. The Respondent also assigned error with the alleged failure of the Complainant to meet its burden of proof on several of the elements that the Complainant is required to prove and the alleged allocation by the Hearing Examiner of the burden of proof on Respondent to prove that the alleged reduction in the accidents was due to the rescission of the safety toe shoe policy. The Respondent also alleged that the Hearing Examiner committed legal error by ignoring evidence that any benefits from wearing safety toe shoes were outweighed by harm which the wearing of the safety shoes caused, by failing to consider industry practice of not requiring steel toed shoes, by relying on the evidence of injuries, by his relying on Brooks v. Bigger Brothers, Inc,, 2 NCOSHD 183 (RB 1980), and by allowing into evidence hearsay testimony.

15. An Order granting review was filed with the Board on November 14, 1997.

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

17. On March 2, 1998, the Board issued a Notice of Review and the issues on appeal were heard by the full Board on March 27, 1998.

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 serious violation of 29 CFR 1910.136(a) for the failure of its employees to wear safety toe shoes when there was a danger of injuries due to falling or rolling objects.

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 Board has dealt with a violation of a personal protective standard in a 1995 case, Prestige Farms, Inc., OSHANC No. 93-2619. In that case the Board set out the elements that the Complainant is required to prove in order to prove a serious violation of a personal protective standard as follows:

1. A hazard existed;

2. employees were exposed;

3. the use of the personal protective equipment would have eliminated (or reduced) the hazard;

4. the hazard created the possibility of an accident;

5. the substantial probability of an accident would be death or serious physical injury and

6. the employer knew or should have known (applying the reasonable person 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 person 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 argues in essence that the Complainant failed to prove by a preponderance of the evidence elements numbered 1, 3, 4, 5 and 6 and that the Hearing Examiner committed legal error by allowing hearsay evidence of employees testimony to the compliance officer and by failing to take into account the alleged industry practice of selectors not wearing safety-toe shoes. The Respondent sought review of the Hearing Examiner's Findings of Fact numbered 13, 15, 23-25, 27, 29, 31, 32, 34, 35 and 36 and Conclusions of law number 1, 3, 4, 5 and 6 in which the Hearing Examiner found that each of the six elements necessary to prove a serious violation of 29 CFR 1910.136(a) 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 and meets the requirement that the findings of fact be supported by substantial evidence. In conclusion of law numbered 5 (H E order, p 6) he found the following :

5. The respondent knew or should have known, with the exercise of reasonable diligence, that such injuries would result with substantial probability from a failure to require safety toe footwear.

There is substantial evidence in the record to show that the Respondent had actual knowledge through its supervisors that the employees were exposed to the hazards of heavy boxes dropping on feet and of pallet jacks rolling over feet by. The supervisors filled out the accident reports (Industrial Commission form 19's and OSHA 200 logs) which clearly showed that the selectors were suffering injuries to their feet from dropped boxes and rolling pallet jacks. The Board has made additional findings to that effect. The record supports the finding that the Commissioner has proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1910.136(a).

Respondent argues that the compliance officer did not do a statistical analysis to prove that the hazard existed and that the industry practice is that selectors do not wear safety-toe shoes. A North Carolina Court of Appeals case speaks to the hazards which require the wearing of safety-toe shoes on construction sites and to the applicability of industry practice.

> In order to establish that Daniel violated 29 CFR 1926.28 as charged in the citation, OSHA had to prove that under the circumstances which existed a reasonably prudent employer would have recognized that carrying heavy objects above their unprotected feet was hazardous to the employees doing the carrying and would require them to wear safety toe shoes. (citations omitted). . . But as applied by the First and Third Circuits, the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry...
>
> It is a matter of common knowledge, we believe, that people carrying objects can, and sometimes do, drop them and that an object weighing 350 pounds if dropped on an unprotected foot can seriously injure it. . . .A mark of ordinary prudence, we believe, is to anticipate human errors that are likely to injure people, such as dropping heavy objects on themselves, and take reasonable precautions against them before, rather than after, injuries occur.

Daniel Construction Company, 2 NCOSHD 311, 315-317 (RB 1985), 73 N.C. App. 426, 326 S.E. 2d 339 (1985).

Similarly, in the grocery warehouse industry also, common sense dictates and a reasonably prudent employer should know that the dropping of a box of goods weighing up to 80 pounds or the running over of a foot by a two to three ton motorized pallet jack would cause serious injury to the foot and toes and that the wearing of safety toe shoes would lessen the hazard.

The fact that Respondent required the wearing of safety toe shoes prior to 1996, as is evidenced by its memo of January 31, 1996 to its warehouse supervisors, shows that Respondent knew of the hazard and knew that wearing safety toe shoes would lessen the hazard. When an employer knows what the regulation requires and decides for itself to pursue a policy that it deems is as safe is evidence that the violation is willful. Although willfulness is not at issue in this case because the Complainant has chosen not to charge the Respondent with a willful violation, the Respondent should be on notice that if it disagrees with a regulation and decides to deliberately disregard the regulation it does so at the peril of being charged with a willful.

The Respondent objects to the introduction of hearsay testimony by the compliance officer as to what several employees said to the compliance officer. Board practice and Board rule .0513 provides that "the Board or hearing examiner may exercise the right at all times to receive and give due regard to hearsay evidence if the interests or justice so require". The Hearing Examiner was within his rights to allow the hearsay testimony into evidence and to give due consideration to the fact that the testimony was hearsay.

The Respondent makes several other assignments of error which have no merit. The Complainant does not have the burden of proving that there was a hazard due to Food Lions rescission of the policy. The Commissioner only has to prove that the hazard of falling or rolling objects existed, and the Commissioner satisfied his burden on this point. The Respondent also asserts that the Hearing Examiner ignored evidence of the greater hazard caused by the wearing of safety toe shoes. Once the Commissioner proves the feasibility of abatement which the Commissioner has done, the burden is on the Respondent to prove that there was a greater hazard created by the wearing of safety shoes. The Hearing Examiner did not assign much credibility to the testimony that the safety toe shoes created greater fatigue, discomfort and loss of agility and caused more accidents and neither do we. The Hearing Examiner attributed the fatigue, discomfort and loss of agility to the quotas and other work practices of the Respondent and the Hearing Examiner's findings of fact with respect to those issues is supported by the preponderance of the evidence and by substantial evidence.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's October 8, 1997 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 1910.136(a) and is **ORDERED** to pay the penalty which was agreed upon between the parties.

This the 8th day of December, 1998.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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HENRY M. WHITESIDES, MEMBER