

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CALDWELL WOOD CARVING

RESPONDENT.

DOCKET NO. OSHANC 96-3469 & 96-3478
OSHA INSPECTION NO. 125306365 & 125307306
CSHO ID NO. M8730 & A3336

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 12th day of March, 1999 in room 2115 of the Dobbs Building located at 430 North Salisbury Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and Richard M. Koch, Designated Member of the North Carolina Safety and Health Review Board.

APPEARANCES

John Sullivan, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Joseph C. Delk, III of Lenoir, North Carolina, Attorney for Respondent.

ISSUES PRESENTED

1. Did the Hearing Examiner abuse his discretion when he reduced the penalties assessed by the Commissioner of Labor by one-half rather than totally eliminating the penalties?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat § 95-138(a) which provides:

. . . The Commissioner upon recommendation of the Director, or 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 violation, only the record within the previous three years is applicable.

The Commissioner shall adopt uniform standards which the Commissioner, the Board, and the hearing examiner shall apply when considering the four factors for determining appropriateness of the penalty. The report of the hearing examiner and 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.

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 order of the Hearing Examiner in all respects 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) Caldwell Wood Carving is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. The Respondent employs about 46 employees at its Lenoir site and is in the business of cutting, carving and sanding wood blocks into furniture parts for the furniture industry.
6. Beginning on March 21, 1996 and ending on April 19, 1996 a joint safety and health follow-up inspection of Respondent's facility in Lenoir, NC was conducted by Safety Compliance Officer Ellis Man and Health Compliance Officer Sam Atassi.
7. The follow-up inspection was initiated due to inadequate replies by Respondent to an initial general schedule inspection which found numerous serious hazards at Respondent's facility.
8. As a result of that inspection, Complainant on June 21, 1996 issued citations for safety violations as follows: One Repeat Serious citation, one Repeat Nonserious citation, one Serious Failure to Abate citation with five items, and on Nonserious Failure to Abate citation with three items. The total penalty for the Safety violations was \$171,020.00. On that same date Complainant issued citations for health violations as follows: One Serious Failure to Abate citation with three items and one Nonserious Failure to Abate citation with four items. The total penalty for the Health violations was \$20,000.00.
9. Complainant reduced the penalties for the Safety violations from \$171,020.00 to \$139,170.00. The Health violation remained the same at \$20,000.00 for a combined safety and health total penalty of \$159,170.00.
10. On May 16, 1997, a hearing was held before Carroll D. Tuttle, Administrative Law Judge.
11. At the hearing the Respondent withdrew its Notice of Contest as to all citations, admitted the violations and admitted that the proposed penalties were properly calculated according to the Field Operations Manual.
12. Respondent requested and was allowed to present evidence regarding financial hardship after the date of the hearing.
13. After the date of the hearing, Respondent presented documentary evidence from Ray Shew, the owner of Caldwell Wood Carving, and from Kenneth R. Cline, a Certified Public Accountant with Whisnant & Company, CPA's from Hickory, North Carolina. This documentary evidence included the affidavits, tax returns for Respondent, and other financial statements for Respondent and showed that there had been a decline in Respondent and owner, Ray Shew's income of approximately one-half.

14. On November 13, 1997, the honorable Carroll D. Tuttle issued an order in which he reduced the total penalties for Respondent's safety and health citations in half to \$79,585.00 and allowing the Respondent to pay in 36 equal monthly installments.

15. The Respondent filed a timely appeal of the Hearing Examiner's order and the Board assumed jurisdiction of the case.

16. On March 12, 1999, the issues on appeal were heard by the full Review Board.

17. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 10 and its conclusions of law numbered 1 through 4.

18. The Respondent stipulated and the Board finds that the penalty as assessed against the Respondent was calculated after giving due consideration to the size of respondent's business, the gravity of the violations, respondent good faith or lack thereof, and the history of respondent's violations.

19. The Hearing Examiner did not abuse his discretion when he reduced the penalty by one-half based on documentary evidence of the financial condition of Respondent and evidence that it would place a financial hardship on Respondent to pay the full penalty.

20. The Board after giving due consideration to the financial condition of Respondent, the financial hardship that paying the full penalty will work on the Respondent and the necessity that the Respondent comply with the Act and provide a safe workplace for his employees, finds that a reduction in the penalty by one-half to \$79,585.00 is appropriate.

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 Respondent has not carried its burden of proof to present strong and persuasive evidence to justify a further reduction of the penalty of \$79,585.00 as determined by the Hearing Examiner.

DISCUSSION

N.C.G.S. § 95-138(a) requires that "The report of the hearing examiner and 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." (emphasis added) Hearing Examiner Tuttle in his order stated that the Respondent stipulated that the penalties were calculated according to the Field Operations Manual. The Field Operations Manual takes into account the 4 required statutory factors specified by N.C.G.S. § 95-138(a) in setting a penalty. 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).

It is well settled law that the Hearing Examiner has discretion to review the proposed penalty of the Commissioner and that he or she is to do a de novo review which is subject to an abuse of discretion standard on review. Brooks v. Household Building Systems, Inc., 3 NCOSHD 836 (RB 1991). "Before such a reduction is permitted, evidence must be documented to support it as there must be evidence elicited during the hearing on which a Hearing Examiner may justify changing the penalty proposed by the Department of Labor." Id. at 840. This "evidence must be 'strong and persuasive in order to result in a further reduction of the penalty'". Id. at 841 quoting Brooks v. Southmet Recycling Corporation, 1 NCOSHD 942, at 944 (1985). Hearing Examiner Tuttle

set out the documentary evidence that he relied on to further reduce the penalty based on the financial hardship that it would cause to Respondent.

The record also shows that many of the citations were for repeat serious and failure to abate serious violations and shows that Respondent was a recalcitrant employer who failed and refused to timely correct violations that could cause serious injury. The \$70,000.00 maximum penalty allowed for repeat violations and the \$7,000.00 per day penalty allowed for failure to abate in N.C.G.S. § 95-138(a) are intended to persuade employers to comply with the Act. In repeat serious and failure to abate serious violations the penalty assessed must send a message to the employer of the necessity of complying with the purpose of the Act, "to assure so far as possible every working man and woman in the state of North Carolina safe and healthful working conditions". N.C.G.S. § 95-126(b)(2). The reduction of the penalty in half to \$79,585.00 by Judge Tuttle balances the reality of the financial hardships that this large penalty works against Respondent with the necessity that the Respondent stop repeatedly exposing his employees to unsafe conditions and that the Respondent correct those violations that it has been cited for. Judge Tuttle thought that a penalty of \$79,585.00 broken down into 36 monthly installments ameliorated the financial hardship to Respondent and at the same time served to persuade Respondent to provide a safe workplace, and so do we.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's July 15, 1994 Order in this cause be, and hereby is, **AFFIRMED** in all parts and the Respondent is ordered to pay the \$79,585.00 in penalties for both inspections in thirty-six (36) consecutive monthly installments of Two Thousand two Hundred Ten and 69/100 (\$2,210.69) Dollars each beginning 30 days from the filing of this Order with the Review Board. In the event that the Respondent falls behind on any of his payments the entire amount left owing is deemed due and the Complainant may file a judgement with the appropriate Clerk of Superior Court pursuant to N.C.G.S. § 95-141 and institute collection proceedings.

This the 12th day of July, 1999.

ROBIN E. HUDSON, CHAIR

RICHARD M. KOCH, DESIGNATED MEMBER

[Mr. Henry Whitesides, member, did not participate.]