BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DILLARD-EASTLAND MALL,
STORE 451

RESPONDENT.

DOCKET NO. OSHANC 96-3518
OSHA INSPECTION NO. 301519070
CSHO ID NO. F3540

CORRECTED ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 12:00 P.M. on the 24th day of June, 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

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Richard L. Farley of Underwood, Kinsey, Warren & Tucker, PA, Charlotte, 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 nonserious 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.

2. Was the Hearing Examiner's findings of fact and conclusions of law supported by substantial and competent evidence to justify the dismissal of the alleged non-serious violation of 29 CFR 1910.136(a) for the failure of its dock employees to wear safety toe shoes?

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 reverses 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(10).

4. The employer (Respondent) Dillard-Eastland Mall, Store 451 is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On November 6, 1996 through November 7, 1996, an inspection was made of Respondent's work site located in Charlotte, North Carolina by the Occupational Safety and Health Division of the North Carolina Department of Labor.

6. Several serious and nonserious citations were issued as a result of that inspection and all of the alleged violations which were issued were settled prior to the hearing with the exception of Citation 1, Item 2, an alleged serious violation of 29 CFR 1910.136(a) for the failure of the employees to wear safety toe shoes when there was a danger of injuries due to falling or rolling objects.

7. On July 16, 1997 a hearing was held before the honorable Ellen R. Gelbin. At the beginning of the hearing this alleged serious violation of 29 CFR 1910.136(a) was reduced to non-serious by the Commissioner.

8. On August 25, 1997, Judge Gelbin issued an Order dismissing Citation 1, Items 2, the alleged violation of the safety-toe shoe standard, 29 CFR 1910.136(a).

9. On September 25, 1997, Complainant filed a Petition for Review and the Board took jurisdiction of this case.

10. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 6, 8 through 14, 16 through 20, and 27.

11. Three employees of Dillards per truck have the responsibility to lift and carry containers while unloading the truck. (T p 126).

12. The hazard created by employees lifting boxes that weighed between 20 and 60 pounds without the use of protective footwear is that an employee could drop a box on his or her foot. (T p 32).

13. During a normal work week, Dillards received an average of two truckloads of merchandise a week. (T p 71-72)

14. During a peak week such as during the holiday season, Dillards received an average of three truckloads of merchandise a week. (T p 71-72).

15. Each employee spends approximately one and one quarter hours unloading a truck and therefore approximately four-person hours per truck are spent unloading the truck which amounts to approximately eight person-hours of exposure to the hazard per week during a normal week and approximately 12 hours of exposure to the hazard during a peak week.

16. The hazard created the possibility of an accident. (T p 35, 109, 138, 160).

17. The substantially probable result of such an accident would be contusions or bruises. (T p 36, 153, 156, 159)

18. Respondent's supervisors supervised and participated in the unloading of trucks and knew that the employees unloaded boxes that weighted between 20 and 60 pounds.

19. Respondent knew or should have known, with the exercise of reasonable diligence, that employees could drop boxes and that the dropping of boxes that weighed between 20 and 60 pounds onto feet and toes could result in bruises and contusions to the toes and feet.

20. The wearing of safety-toed shoes would have reduced the hazard of bruises and contusions to the toes and feet by the dropping of boxes on the toes and feet.

21. The issues on appeal were heard by the full Board on June 24, 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 nonserious 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 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).

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 Associated Mechanical Contractors, Inc., 118 N.C. App. 54 (1995) the court of appeals defined a nonserious violation as follows:

Although OSHANC only defines the term "serious", 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).

Associated Mechanical Contractors, Inc., 118 N.C. App. 54 (1995), overruled on other grounds, 342 N.C. 825, 467 S.E.2d398 (1996).

In Food Lion, OSHANC No. 96-3431, 7 NCOSHD __, a case involving the use of protective footwear by warehouse selectors, the Board reviewed 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 substantially probable result of an accident could 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 Board has held that in order to prove a nonserious violation of a standard elements 1, 2, 3 and 6 must be proven. The Board and North Carolina Supreme Court have reduced violations from serious to nonserious when there was lack of proof of the possibility of an accident and the Board has also reduced a serious violation to nonserious when there was lack of proof that the substantially probable result of an accident could be serious injury or death.

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).

The Board also holds that it if the Commissioner meets its burden of proof on all of the elements cited above for proving a serious violation of a personal protective standard except for element numbered 5, he has met the standard for proving a nonserious violation as was anounced in Associated Mechanical, supra, and which we adopt. Proof that the substantially probable result of an accident is a bruise or contusion meets the second prong of the test--that the resultant injury or illness would not cause death or serious physical harm. If the Commissioner proves these elements, he has proven that the Respondent committed a nonserious violation of a personal protective standard, however, there may be other methods of proving a nonserious violation of a standard as the Board and the Appellate Courts have held in other cases.

After a review of the record below, the Board finds that the Commissioner has met its burden of proof on each of the above elements by a preponderance of the evidence. The safety officer testified that the hazard of dropping boxes weighing between 20 and 60 pounds existed and that the Respondent's supervisors knew or should have known of the condition that created the hazard. The safety officer and Respondent's witnesses also testified that employees were exposed to the hazard, that there was a possibility of an accident, and that the substantially probable result of the accident was bruises or contusions. The safety officer also testified that the wearing of the safety toed shoes would have reduced the hazard.

The hearing examiner's opinion below either found the above cited elements as facts or found facts from which they can be inferred. We hold, however, that her findings do not support her conclusion of law that "there is insufficient evidence to support a finding of a non-serious violation of 29 CFR 1910.136(a) and the citation should be dismissed". Her conclusion of law in this respect is not supported by her findings of fact and the preponderance of the evidence is that the Respondent committed a nonserious violation of 29 CFR 1910.136(a).

The hearing examiner also relied to some extent for her conclusions of law on the alleged industry practice that safety footwear is not required by dock workers and the fact that there had been no reported injuries to any of Respondent's employees nationwide. One of the arguments put forth by the Respondent is that the industry practice is that dock workers in the department store industry do not wear safety-toe shoes when unloading trucks. 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 <u>one</u> 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.
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> 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. Daniel argues, though, that since no employee at the locations involved has been injured by dropping such an object on his foot, future injuries of that kind are not reasonably foreseeable and preventive measures are therefore unnecessary. This simply amount to the claim that there is no good reason to anticipate an accident until at least one has already occurred, which is nonsense, Human error is not a rare phenomenon. 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.

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

Similarly, in the retail department store, even though several of Respondent's witnesses testified that there was no reason to wear safety-toed shoes, common sense dictates and a reasonably prudent employer should know that the dropping of a box of goods weighing between 20 pounds and 60 pounds could cause at least a nonserious injury to the foot and toes and that the wearing of safety toe shoes would lessen the hazard. It is certainly conceivable that such an accident could cause an employee to stumble or fall, and result in more severe injury. The fact that Respondent presented evidence that there were no foot injuries to its dock workers, does not mean

that the Respondent is relieved of the requirement that it exercise ordinary prudence and anticipate that a dock worker might commit a human error and drop a box on his or her foot and require that they wear safety-toed shoes.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's August 25, 1997 Order in this cause be, and hereby is, **REVERSED** and Respondent is found to have committed a nonserious violation of 29 CFR 1910.136(a) and is **ORDERED** to abate the violation within 30 days of the date of this order.

This the 30th day of November, 1999.

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ROBIN E. HUDSON, CHAIR

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HENRY M. WHITESIDES, MEMBER

J. B. Kelly, member, did not participate.