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## PENALTIES UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF NORTH CAROLINA

BY MICHAEL R. SMITH\*

### INTRODUCTION

Employees in each state are afforded protections of the federal Occupational Safety and Health Act of 1970 (OSHA) or of their respective state occupational safety and health plan. Employees and employers in North Carolina are covered by the Occupational Safety and Health Act of North Carolina (OSHANC or Act).<sup>1</sup> The Act emphasizes voluntary compliance with job safety and health standards. It also emphasizes enforcement and consequent penalties.<sup>2</sup> Employers of general industry and the construction industry may challenge citations and penalties through the two-tiered Safety and Health Review Board of North Carolina (Review Board or Board) and then through the state courts.<sup>3</sup>

This paper:

(1) Correlates the types and amounts of penalties with specific violations of the Act;

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1. For additional information about the OSHANC adjudicatory scheme; elements of each violation denominated by the Act; burden of proof respecting alleged violations and affirmative defenses; and reporters for OSHANC decisions see Smith, *Proving Violations or Proving Affirmative Defenses Under the Occupational Safety and Health Act of North Carolina*, 18 N.C. CENT. L.J. 2 (1989).

2. See Smith, *A Guide to OSHA in North Carolina* (1989) for more information about the separate elements of North Carolina's occupational safety and health plan. For a free copy of the work write to the Bureau of Education, Training, and Technical Assistance, Division of Occupational Safety and Health, North Carolina Department of Labor, 413 North Salisbury Street, Raleigh, North Carolina 27603.

3. See Smith, *A Guide to Procedures of the Safety and Health Review Board in North Carolina* (1988) for more information about the mechanics of contesting a citation for an alleged violation, an abatement period, or penalties. For a free copy of the work, write to the North Carolina Department of Labor (see *supra* note 2). With respect to contests from employers of the agriculture industry, see *infra* text accompanying note 37.

- (2) Compares North Carolina OSHANC penalties with federal OSHA penalties;
- (3) Provides an example calculation of a penalty;
- (4) Sets forth issues regarding the constitutionality of OSHANC penalties, previously addressed by the Review Board;
- (5) Specifies the burden of proof scheme in cases initiated by employer contests of OSHANC penalties;
- (6) Explores the types of evidence with respect to penalty contests considered at the trial level of the Review Board; and
- (7) Reviews appellate-level Review Board decisions regarding OSHANC penalties.

### CRIMINAL PENALTIES

Criminal penalties and imprisonment may be imposed upon conviction for particular types of violations under the Act.<sup>4</sup> The Commissioner of Labor (Commissioner) is empowered to initiate criminal proceedings for such violations.<sup>5</sup>

#### *Criminal Penalty Amounts and Terms of Imprisonment*

The Act provides for the following criminal penalty amounts and terms of imprisonment:<sup>6</sup>

- (1) Willful violations resulting in an employee's death — up to \$10,000 and/or six months.<sup>7</sup>
- (2) Providing unauthorized advance notice of any type of inspection — up to \$1,000 and/or six months.
- (3) Knowingly making false statements or reports pursuant to the Act's requirements — up to \$10,000 and/or six months.

### CIVIL PENALTIES

Civil penalties may be proposed for alleged violations of the Act by private employers.<sup>8</sup> But penalties may not be assessed against any state agency or political subdivision for violations of the Act.<sup>9</sup>

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4. N.C. GEN. STAT. § 95-139 (1989).

5. N.C. GEN. STAT. § 95-133(b)(9) (1989).

6. All criminal penalties are set forth in N.C. GEN. STAT. § 95-139 (1989). The state may additionally prosecute under the general criminal laws for willful violations causing an employee's death and for assault upon employees charged with inspection and enforcement duties.

7. The penalty is double for the second such violation.

8. N.C. GEN. STAT. § 95-138(a) (1989).

9. N.C. GEN. STAT. § 95-148(6) (1989). In the only case involving a governmental entity heard by the Review Board, the Board noted its authority to impose a penalty. *Brooks v. Onslow County Economic Dev. Comm'n*, 2 NCOSHD 522 (RB 1984). However, the Act restricts the Board's authority to the assessment of civil penalties "provided by this Article. . . ." N.C. GEN. STAT. § 95-138(a) (1989).

### Civil Penalty Proposals

The director of the Division of Occupational Safety and Health (Director) recommends to the Commissioner both the imposition and amounts of penalties.<sup>10</sup> In practice, the compliance officer who conducted the inspection is first to calculate and recommend each penalty. The compliance officer's penalty recommendations are reviewed by the area supervisor and by the Chief of the Bureau of Compliance.<sup>11</sup> The penalty proposal is sent by certified mail<sup>12</sup> and, in practice, accompanies the citation.

### Civil Penalty Amounts

The Act provides for the following civil penalty amounts:<sup>13</sup>

- (1) *De minimus* violation — no penalty.<sup>14</sup>
- (2) Nonserious violation — up to \$1,000 may be imposed.<sup>15</sup>
- (3) Serious violation — up to \$1,000 shall be imposed.<sup>16</sup>
- (4) Repeated violation — up to \$10,000 may be imposed.<sup>17</sup>
- (5) Willful violation — up to \$10,000 may be imposed.<sup>18</sup>
- (6) Failure to correct — up to \$1,000 per violation per day may be imposed.<sup>19</sup>
- (7) Posting violation — up to \$1,000 shall be imposed.<sup>20</sup>

### Civil Penalty Assessments

The data in this section report actual penalty assessments for OSHANC violations.<sup>21</sup> The figures compare penalties assessed under

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10. N.C. GEN. STAT. § 95-133(b)(9) (1989).

11. The compliance officer's recommendations may be overruled by his or her superiors. *Brooks v. Miller Brewing Co.*, 2 NCOSHD 365 (RB 1982).

12. N.C. GEN. STAT. § 95-137(b)(2) (1989).

13. Civil penalties are set forth in N.C. GEN. STAT. § 95-138(a) (1989).

14. The Act does not authorize penalties for *de minimus* violations.

15. From 1979-1989, federal appropriations for OSHA enforcement activities prohibited the assessment of penalties for first-instance nonserious violations when fewer than ten violations were discovered. Pub. L. 95-205, 91 Stat. 1460 (1979). The limitation was followed in North Carolina. See N.C. GEN. STAT. § 95-128(6) (1989).

16. Though the Act requires the Commissioner to impose some penalty for a serious violation, the Review Board has considered itself similarly bound. *Brooks v. Sunward Yacht Corp.*, 2 NCOSHD 266 (RB 1980).

17. The amount of the penalty will vary according to the instance of repetition. See O.M. Ch. X. See *infra* note 28 and accompanying text.

18. The actual penalty will vary according to the degree of willfulness manifested (actual intent, indifference, or neglect) by the employer. See O.M. Ch. X.

19. Normally, the total proposed penalty will not exceed 10 times the amount of the daily proposed penalty. See O.M. Ch. X.

20. Posting violations are the failure to post items required to be posted, such as citations or the OSHA poster which informs employees of their rights under the Act. Such penalties normally range from \$100-\$400.

21. The data are averages of figures reported for federal fiscal years 1986-1987 and 1987-1988. Figures for the averages were drawn from North Carolina Occupational Safety and Health Program

North Carolina's state OSH plan with penalties assessed under federal-OSHA.<sup>22</sup> The information reflects averages of data reported during two consecutive years.

The first comparison is of the percent of total assessed penalties represented by various types of violations.<sup>23</sup>

<u>Type of Violation</u>	<u>North Carolina</u>	<u>Federal</u>
Nonserious	2%	0%*
Serious	62%	34%
Repeated	18%	7%
Willful	12%	54%
Failure to correct	7%	6%

\*Less than 0.5 percent but greater than zero.

The second comparison shows the average dollar amount of the penalty assessment per violation of a particular type.

<u>Type of Violation</u>	<u>North Carolina</u>	<u>Federal</u>
Serious	\$246	\$243
Repeated	\$380	\$555
Willful	\$4,887	\$21,267
Failure to correct	\$330	\$914

### COLLECTION OF CIVIL PENALTIES

Civil penalties are collected by the Commissioner and are paid into the general fund of the state treasury.<sup>24</sup> The Act empowers the Commissioner to institute proceedings to enforce the payment of civil penalties.<sup>25</sup>

#### *Example Calculation of a Civil Penalty for a "Serious" Violation of a Safety Standard*

The compliance officer who conducted the inspection originally determines whether a violation is to be classified as "serious."<sup>26</sup> The Act requires the Commissioner to assess a civil penalty for a serious violation.<sup>27</sup> A penalty is initially calculated by the compliance officer. The criteria for calculating penalties are set forth in the compliance officer's *Opera-*

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Statistics State, Regional, and Federal Comparisons, October 1986 — September 1987 (and from the same title for 1987-1988).

22. Federal-OSHA includes the 30 states and Washington, D.C. which have federally-administered programs.

23. The rounding upward of averages caused the totals to exceed 100 percent.

24. N.C. GEN. STAT. § 95-138(b) (1989).

25. N.C. GEN. STAT. § 95-133(b)(9) (1989).

26. O.M. Ch. VII-B-1-b.

27. N.C. GEN. STAT. § 95-138(a) (1989).

*tions Manual*.<sup>28</sup> Criteria for the penalty calculation derive from the Act, which requires that penalties be assessed on the basis of the:

- (1) Gravity of the violation;
- (2) Size of the business;
- (3) Good faith of the employer; and
- (4) Record of previous violations.<sup>29</sup>

The gravity of the violation is the primary basis for determining the unadjusted proposed "gravity-based penalty" (GBP). The other considerations noted above bear on whether the GBP will be reduced to yield a final "adjusted" proposed penalty.

Two factors considered in determining the gravity of the violation are:

- (1) The severity of the injury or illness which could result from the alleged violation; and
- (2) The probability that an injury or illness could occur as a result of the alleged violation.

*The first step in determining the GBP* is the selection of a severity quotient (SQ) and calculation of a probability quotient (PQ).

The SQ is a numerical value taken from an injury/illness category. There are three categories for serious injuries or illnesses:<sup>30</sup> (1) injuries not requiring hospitalization; (2) injuries requiring hospitalization; and (3) injuries involving permanent disability or death. In the *Operations Manual*, each category is assigned a range of numerical values. The value which the compliance officer selects for a category reflects the relative severity of injury expected from an alleged violative condition.

The PQ is an average of numerical values. The values which are averaged are taken from four factors. In the *Operations Manual*, each of the four factors is assigned a range of numerical values. A fifth factor may also be employed. The factors are:

- (1) The number of workers exposed to the hazard;
- (2) The frequency of exposure;
- (3) The proximity of exposed employees to the hazard;
- (4) Working conditions (for example, speed of operations, lighting, noise, temperature and similar conditions) which impose added stress; and
- (5) Other. This factor may or might not be employed by the compliance officer. The factor may influence the PQ either way. If, for example, the employer had an outstanding safety program, use of this factor may lower the PQ. A poor or nonexistent safety program may result in a higher PQ.

The compliance officer selects for each factor a value which most closely

28. O.M. Ch. X and XI-D. The example calculation described in this section is based upon information in those chapters. The *Operations Manual* is a public document.

29. N.C. GEN. STAT. § 95-138(a) (1989).

30. This discussion is confined to injuries.

relates to its description in the *Operations Manual*. For example, a value of 1 for the third factor (above) would indicate that employees were at the fringe of the danger zone, whereas a value of 7 would indicate that employees were at the point of danger. The PQ is derived by adding the numerical points from each factor and dividing by the number of factors used.<sup>31</sup>

The second step in determining the GBP is the calculation of the probability severity quotient (P/S). The SQ and PQ are added and divided by two. The P/S is a number which corresponds to a GBP on a penalty table.

The penalty table also reflects possible reductions in the GBP of from 0 to 80 percent. The percentage reductions derive from the Act's requirement to consider the size of the business, good faith of the employer, and record of previous violations.

In determining the final penalty from the penalty table, the GBP may be reduced for:

(1) Size of business — possible reduction, 40%. The percent of reduction corresponds to ranges of numbers of employees, for example, fewer than 11 equals 40%; more than a total of 100 equals 0%.

(2) Good faith — possible reduction, 30%. The percent of reduction depends upon (a) evidence of pre-inspection concern for safety and health, such as training programs, effective maintenance programs, and complete injury and illness records; and (b) the desire to comply with the Act during and after the inspection, as evidenced by the speed of abatement, for example.<sup>32</sup>

(3) History — possible reduction, 10%. The full credit is normally granted if the employer's record is positive with respect to serious violations and to repeated and willful violations.

In summary, the penalty from the penalty table corresponds to a numerical value representing the average of the SQ and PQ (based on the gravity of the violation) less penalty reductions (based on the size of business and the employer's good faith and history).

### CONSTITUTIONAL ISSUES

The Review Board has addressed challenges to the constitutionality of civil penalties assessed under the Act.

#### *Penalties for Violations of Standards Under the Act are Civil*

Penalties assessed for the purpose of enforcing occupational safety and health standards are civil in nature. Civil penalties do not carry the risk

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31. Fractions are disregarded.

32. Normally, credit for good faith is not granted in the case of repeated or willful violations, since such denominations assume a lack of good faith.

of imprisonment and do not invoke the right to a trial by jury as guaranteed by the federal and state constitutions for criminal penalties.<sup>33</sup>

### *Civil Penalties — Assessment by an Administrative Agency*

The Act's procedure for assessing civil penalties does not abridge existing constitutional rights to a trial by a jury. Additionally, the adjudication of newly created public rights by an administrative tribunal (such as the Review Board) is not foreclosed by the seventh amendment to the United States Constitution nor by the North Carolina Constitution.<sup>34</sup>

### OTHER DUE PROCESS CLAIMS

The Review Board has rejected the notion that penalties proposed *prior* to a hearing, and the duty to appeal *prior* to the penalty becoming final, deny due process rights.<sup>35</sup> The nature of the Act demands a swift enforcement scheme. Further, the Act provides for adequate judicial review.

### REVIEW OF CIVIL PENALTY PROPOSALS

Appeals of general industry and construction employers from civil penalty proposals are heard and decided by the Review Board.<sup>36</sup> Appeals of agricultural employers from civil penalty proposals are initially heard by the Office of Administrative Hearings.<sup>37</sup>

Employers have 15 working days from receipt of a penalty proposal notice in which to file a letter of contest with the Director of the Division of Occupational Safety and Health. Failure to contest within the allotted time period results in the penalty becoming final and not subject to review by any court.<sup>38</sup> Following a timely appeal of a penalty proposal, the authority over the penalty is firmly within the jurisdiction of the Review

33. *Nye v. In-Line, Inc.*, 2 NCOSHD 59 (RB 1977). Neither Article I, Section 24, of the North Carolina Constitution nor the United States Constitution (through the sixth and fourteenth amendments) requires a jury trial for civil penalties. *See also*, *Brooks v. Mechanical Specialty Co.*, 2 NCOSHD 317 (RB 1981).

34. *Nye v. In-Line, Inc.*, 2 NCOSHD 59 (RB 1977), citing *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). Additionally, the North Carolina Supreme Court has ruled that Article IV, Section 3, of the North Carolina Constitution does not prohibit: (1) the legislature from empowering administrative agencies to assess civil penalties; or (2) the administrative agencies from exercising discretion in determining civil penalties, within an authorized range, provided that adequate guiding standards accompany that discretion. In the *Matter of the Appeal from the Civil Penalty Assessed for Violations of the Sedimentation Pollution Control Act*, 324 N.C. 373, 379 S.E.2d 30 (1989).

35. *Nye v. In-Line, Inc.*, 2 NCOSHD 59 (RB 1977). The requirements do not diminish guarantees under the fourteenth amendment to the United States Constitution.

36. N.C. GEN. STAT. § 95-135(b) (1989).

37. N.C. GEN. STAT. § 95-135(j) (1989). That office issues a "recommended decision" which is automatically reviewed by the appellate level of the Review Board.

38. N.C. GEN. STAT. § 95-137(b)(1) (1989).

Board.<sup>39</sup>

### *Review of Civil Penalties by the Hearing Examiner*

Once the penalty proposal is placed before the Review Board, the penalty will be assessed anew by one of the Board's hearing examiners. The hearing examiner may assess a penalty different from that proposed by the Commissioner.<sup>40</sup> The new penalty assessment may even be initiated by the hearing examiner.<sup>41</sup>

### *Burden of Proof — Civil Penalty Proposals*

Initially, the burden of proof is upon the Commissioner to show that the penalty was properly calculated in accordance with the standard guidelines of the *Operations Manual*.<sup>42</sup> The proper use of the uniform guidelines is routinely recognized by hearing examiners as an attempt to forestall arbitrariness and achieve fairness.<sup>43</sup> However, thereafter, the burden shifts to the employer to show why it should be treated exceptionally.<sup>44</sup>

### *Evidence — Penalty Mitigation Factors*

The hearing examiner's consideration will include any new relevant evidence presented by the parties. The employer's evidence is not limited to claims acceptable as defenses to alleged violations.

In the new assessment, the hearing examiner shall give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the record of previous violations."<sup>45</sup> Those are the same factors which the Commissioner originally considered to calculate the penalty proposal. However, the hearing examiner is not bound by the guidelines of the *Operations Manual*.<sup>46</sup>

### *Size of the Business*

In the original assessment of the penalty, the gravity based penalty

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39. Brooks v. Davey Dickens 3 NCOSHD —, OSHANC 87-1428 (RB 1989).

40. Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, 385 (RB 1983).

41. See Brooks v. Davey Dickens, 3 NCOSHD —, OSHANC 87-1428 (RB 1989). *Sua sponte* assessment of the penalty may, for example, be consequent to review of a citation for an alleged violation which bore a penalty.

42. Brooks v. Fayetteville Iron & Metal Co., 1 NCOSHD 536 (1979).

43. Brooks v. Century Steps, Inc., 1 NCOSHD 853 (1982).

44. Brooks v. A & B Milling Co., 1 NCOSHD 318, 322-23 (1978).

45. N.C. GEN. STAT. § 95-138(a) (1989).

46. Brooks v. Griffin Masonry and Tile Co., 3 NCOSHD —, OSHANC 88-1475 (RB 1989). Moreover, the *Operations Manual* has neither the force nor effect of law. Brooks v. Maxton Hardwood Corp., 2 NCOSHD 277 (RB 1981).

may have been reduced because of the size of the employer's business. That reduction, if any, would have been determined by the number of employees in the business. The employer's ability to pay would not normally have been considered. However, since size of business and ability to pay may interrelate,<sup>47</sup> evidence of financial capacity is frequently considered by hearing examiners.

Unlike cases in the early years of OSHANC, recent decisions demonstrate that financial incapacity claims must be supported by substantive evidence.<sup>48</sup> Additionally, the evidence must be persuasive, else the claim will probably fail.<sup>49</sup>

An excellent example of persuasive evidence is found in *Brooks v. Triple I Industries*.<sup>50</sup> The evidence included: (1) *bona fide* financial sheets revealing the extent of the previous year's loss; (2) an account of the numerical reduction in employees due to the company's near-bankrupt condition; (3) testimony concerning the distribution of income generated by the business, including evidence that no dividends had been distributed and that one of the principals had forfeited his salary for six months; and (4) testimony concerning the contemplated effect of paying the penalty upon the continued viability of the business.

### *Gravity of the Violation*

There are numerous ways to show that the penalty should be reduced because the violation was less grave than considered by the complainant. One may attack the citation and prove that it and the attending penalty should be vacated. The violation may be acknowledged while its denomination is challenged.<sup>51</sup> The evidence may show that the citation should be reduced to and affirmed as nonserious.<sup>52</sup>

The employer may also admit the violation, as alleged, but introduce evidence to show, for example, that:

- (1) The compliance officer over-estimated the amount of employee exposure,<sup>53</sup> or that employee exposure was limited for other reasons.<sup>54</sup>
- (2) Only experienced employees<sup>55</sup> or specialists<sup>56</sup> were exposed.

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47. See, *Brooks v. Henry McKee & Sons Co.*, 3 NCOSHD —, OSHANC 89-1564 & 89-1634 (1989).

48. See, e.g., *Brooks v. C & D Printing Co.*, 2 NCOSHD 689, 697 (1984).

49. See, e.g., *Brooks v. Carostate Ice, Inc.*, 1 NCOSHD 979, 984-985 (1983).

50. 2 NCOSHD 793 (1986).

51. *Brooks v. Maxton Hardwood Corp.*, 2 NCOSHD 277 (RB 1981). The denomination of the violation relates to the penalty.

52. See, e.g., *Brooks v. Uzzle Cadillac-Oldsmobile-GMC Trucks, Inc.*, 3 NCOSHD —, OSHANC 89-1606 (1989). The likelihood of employee exposure to the power transmission apparatus was lessened by the remoteness of the equipment.

53. *Brooks v. Crestline Homes, Inc.*, 3 NCOSHD —, OSHANC 87-1426 (1989).

54. See, e.g., *Brooks v. J. D. Dawson Co.*, 3 NCOSHD —, OSHANC 89-1629 (1989). The area without guardrails was primarily for the employer's personal use for storage of personal effects.

55. *Brooks v. Automotive Elec. Assoc., Inc.*, 1 NCOSHD 518 (1979).

(3) The safe design of the equipment lessened the potential for serious injury.<sup>57</sup>

Also the hearing examiner may simply judge that the expected injury would be less severe than the potential for injury posed by other hazards in the workplace.<sup>58</sup>

### *Good Faith of the Employer*

The Commissioner may have reduced the gravity based penalty by up to 30 percent for "good faith" of the employer. Generally, the reduction would have derived from evidence of pre-inspection good faith (such as a strong overall safety program); and of post-inspection good faith (such as vigorous abatement efforts).<sup>59</sup> Specific evidence includes: complete injury and illness records; the absence of serious injuries and illnesses; recorded effort to prevent the recurrence of injuries or illnesses; a written safety program with assigned responsibilities and employee participation; evidence of enforcement of safety rules; training; use of personal protective equipment; housekeeping; and availability of first-aid facilities.<sup>60</sup>

The employer may show that the full 30 percent credit for good faith should have been granted,<sup>61</sup> or that credit in excess of 30 percent should be granted. Its proof may be the very factors the compliance officer normally would have sought but may have overlooked, or the employer may offer different types of proof.

Different evidence may, for example, show:

- (1) A safety program which, though unwritten, was effective;<sup>62</sup>
- (2) That the employer's expressions of dislike of OSHA should not have affected the penalty calculation;<sup>63</sup>
- (3) Abatement efforts including substantial expenditures of funds which the business could ill afford;<sup>64</sup>
- (4) That abatement was attempted through tradesmen<sup>65</sup> or employees<sup>66</sup> who failed to perform; and
- (5) Post inspection cooperation with the complaint, including abatement

56. *Brooks v. Bryant Elec. Co., Inc.* 1 NCOSHD 471 (1979). Only electricians were exposed to the electrical hazard.

57. *Brooks v. Shields, Inc.*, 3 NCOSHD 287 Adv. Sh. No.1 (1988).

58. *See, e.g., Brooks v. Concrete Panel Sys., Inc.*, 1 NCOSHD 688 (1982).

59. See the example calculation of a civil penalty, *supra* notes 26-32 and accompanying text.

60. O.M. Ch. XI.

61. *See, e.g., Brooks v. Hamlin Roofing Co.*, 3 NCOSHD 223 Adv. Sh. No.1 (1988) where the compliance officer's superiors eliminated 10 percent of the good faith credit, though no reason was given for the reduction.

62. *Brooks v. Mechanical Specialty Co.*, 2 NCOSHD 317, 322 (RB 1981).

63. *Id.* at 321.

64. *Brooks v. Form-Pak, Inc.*, 2 NCOSHD 958, 960 (1986); *Brooks v. Barker Furniture Leg Co., Inc.*, 3 NCOSHD —, OSHANC 89-1583 (1989).

65. *Brooks v. Ray*, 2 NCOSHD 734, 735 (1985).

66. *Brooks v. Family Dollar Stores, Inc. Store No. 5*, 3 NCOSHD —, OSHANC 89-1617 (1989).

assistance from the Department of Labor.<sup>67</sup>

### *Record of Previous Violations*

Previous similar violations are frequently considered in conjunction with the employer's record of injuries from such violations.<sup>68</sup> However, a history totally free of injuries may effect a penalty reduction regardless of prior similar violations.<sup>69</sup>

The hearing examiner may also take into account prior similar violations and consequent injuries as related to the volume of the employer's work.<sup>70</sup> Similarly, the record of the numerous branches or subsidiaries of the company may influence a penalty reduction.<sup>71</sup>

### *Other Penalty Mitigation Factors*

Hearing examiners also credit evidence which may only partly fit into the category of business size, gravity of the violation, good faith of the employer, or the record of prior violations. Several examples follow.

An employer's noncompliance may result from good faith confusion about its obligations under the Act. Thus, the Review Board has acknowledged that a penalty might be reduced because of the absence of a citation for a condition which existed on a previous inspection.<sup>72</sup> Another area which frequently spawns confusion sufficient to mitigate penalties is that of multi-employer worksites.<sup>73</sup>

Evidence of good faith and/or financial incapacity may persuade the hearing examiner to eliminate the penalty on the condition that the employer spend an equal amount of money to improve job safety.<sup>74</sup> The Review Board has approved of this compromise.<sup>75</sup>

The financial impact upon a business is a key concern of hearing examiners. To mitigate that impact, they may search for technical bases to justify penalty reductions, such as the grouping of similar violations or violations of the same standard.<sup>76</sup> Or the hearing examiner may simply attempt to scale the penalty to the financial capacity of the business.<sup>77</sup>

The employer may be able to show that, in addition to other factors,

67. *Brooks v. George Sale Lumber Co.*, 3 NCOSHD —, OSHANC 88-1507 (1989).

68. *Nye v. Wadsworth Wrecking Co.*, 1 NCOSHD 87 (1976), *aff'd*, 2 NCOSHD 50 (RB 1977).

69. *Brooks v. Steve Weiss Constr. Co.*, 1 NCOSHD 933 (1982).

70. *Brooks v. Snow Junior & King, Inc.*, 2 NCOSHD 701 (1986).

71. *Brooks v. Family Dollar Stores, Inc., Store No. 5*, 3 NCOSHD —, OSHANC 89-1617 (1989).

72. *See Brooks v. Raleigh Tractor & Truck Co.*, 2 NCOSHD 445, 449-50 (RB 1983).

73. *See Smith, supra* note 1.

74. *Brooks v. J. F. Wilkerson Contracting Co., Inc.*, 2 NCOSHD 1119, 1129 (1987).

75. *Brooks v. Alex Shugart*, 3 NCOSHD —, 89 DOL 0009 (RB 1989).

76. *See, e.g., Brooks v. Sunward Yacht Corp.*, 1 NCOSHD 494 (1979); *Brooks v. Callender Flooring Co.*, 3 NCOSHD 105 Adv. Sh. No.1 (1988).

77. *Brooks v. Henry McKee & Sons*, 3 NCOSHD —, OSHANC 89-1564 & 89-1634 (1989).

the complainant exaggerated the gravity of the violation. It may, for example, prove that the expected injury was overstated.<sup>78</sup>

### *Penalties — Appeals to the Review Board*

Appeals of lower decisions regarding penalties is to the appellate level of the Review Board. Following review, the Board may choose to reduce the penalty.<sup>79</sup> It may reinstate the same penalty amount which the hearing examiner vacated.<sup>80</sup> Or, the Board may increase the penalty amount.<sup>81</sup> The Review Board has rejected the assertion that its right to increase penalties “chills” an employer’s right to appeal the citation. The employer’s right to further review by the court of appeals is unaffected by the Review Board’s actions.<sup>82</sup>

### *Penalties — Appeals — Standard for Review*

The Review Board has long accepted the legitimate role which penalties play in the enforcement of OSHA standards.<sup>83</sup> The standard for reviewing an assessed penalty is whether the hearing examiner’s decision was “an abuse of discretion.”<sup>84</sup> Evidence of an abuse of discretion must be strong because penalty assessment is recognized as a subjective process.<sup>85</sup>

### *Penalties — Appeals — Scope of Review — Amendments*

The Review Board has restored to the lower amount a penalty amended without notice on the day of the hearing from \$120 to \$720. First, the employer which appeared without legal counsel may not have known of its right to seek a continuance. Second, had the employer been apprised beforehand of the intended amendment, it might have employed legal counsel.<sup>86</sup>

### *Penalties — Appeals — Scope of Review — Pleadings*

Where an employer’s notice of contest was restricted to the penalty yet at the hearing it sought to challenge the denomination of the violation, the Board affirmed expansion of the contest. The employer represented itself. Also, the denomination of the violation clearly affects the

78. *Brooks v. Sullivan Cabinet Shop, Inc.*, 1 NCOSHD 666 (1982).

79. *Brooks v. Int’l Minerals & Chemical Corp.*, 3 NCOSHD —, OSHANC 88-1471 (RB 1989); *Brooks v. Martin Milling Co.*, 2 NCOSHD 176 (RB 1979).

80. *Brooks v. Baker Cammack Hosiery Mills*, 2 NCOSHD 94 (RB 1977).

81. *Brooks v. McWhiter Grading Co., Inc.*, 2 NCOSHD 98, 105 (RB 1978).

82. *Nye v. In-Line, Inc.*, 2 NCOSHD 59, 64 (RB 1977).

83. *Brooks v. Salem Coatings, Inc.*, 2 NCOSHD 84 (RB 1977).

84. *Brooks v. Becker Builders Supply Co.*, 2 NCOSHD 544, 550 (RB 1984).

85. *Brooks v. Dickens*, 3 NCOSHD 150 Adv. Sh. No.1 (RB 1989) and cases cited therein.

86. *Brooks v. Andrew Hanes and Co.*, 2 NCOSHD 288, 292 (RB 1980).

penalty.<sup>87</sup>

Regarding the challenge to particular penalties, ambiguities from discrepancies between the notice of contest and answer should be resolved in favor of employers who are not represented by an attorney at law. Similarly, if the complainant fails to object to evidence entered at the hearing regarding penalties, the pleadings may properly be deemed amended.<sup>88</sup>

*Penalties — Appeals — Scope of Review — Errors of Law*

Hearing examiners abuse their discretion by reducing penalties for the Commissioner's failure to notify employers of enforcement policies. The legislative intent was to require employers to keep themselves informed of their duties under the Act.<sup>89</sup>

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87. *Brooks v. Maxton Hardwood Corp.*, 2 NCOSHD 277 (RB 1981).

88. *Brooks v. Becker Builders Supply Co.*, 2 NCOSHD 544 (RB 1984).

89. *Brooks v. Dickens*, 3 NCOSHD 150 Adv. Sh. No.1 (RB 1989) and case law cited therein.