



**A Guide to
Procedures of the
N.C. Occupational Safety and Health
Review Commission**



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This guide is intended to be consistent with all existing OSHA standards; therefore, if an area is considered by the reader to be inconsistent with a standard, then the OSHA standard should be followed.

To obtain additional copies of this guide, or if you have questions about North Carolina occupational safety and health standards or rules, please contact:

**N.C. Department of Labor
Education, Training and Technical Assistance Bureau
1101 Mail Service Center
Raleigh, NC 27699-1101**

Phone: 919-807-2875 or 1-800-NC-LABOR (1-800-625-2267)

Additional sources of information are listed on the inside back cover of this guide.

The projected cost of the NCDOL OSH program for federal fiscal year 2012–2013 is \$18,073,694. Federal funding provides approximately 30.5 percent (\$5,501,500) of this total.



Contents

Part	Page
Foreword	iv
Introduction	v
The Review Commission	1
How a Case Begins	2
Employer Contest of a Citation	2
Commissioner Objects to Employer’s Petition for Modification of Abatement Date	3
Employee Objects to Employer’s Petition for Modification of Abatement Date	3
Employee Objects to Abatement Period Set in Citation	4
Employee Objects to Settlement Agreement	4
Hearings	5
Procedure After the Hearing	7
Other Important Matters	8
Appendixes	9
Appendix A—Notice of Contest to Citation and Proposed Penalties	9
Appendix B—Notice of Docketing; Certification of Posting	10
Appendix C—Statement of Employer’s/Respondent’s Position; Notice of Employee Rights	12
Appendix D—Complaint; Answer	14
Appendix E—Notice of Hearing	18
Appendix F—Notice of Contest by Employee Representative; Notice of Contest by Affected Employee	19
Appendix G—Hearing Examiner Decision	20
Appendix H—Review Commission Decision	23

Foreword

In North Carolina, state compliance safety and health officers (CSHOs) enforce federal OSHA laws through a state plan approved by the U.S. Department of Labor. The N.C. Department of Labor's Occupational Safety and Health Division is charged with this mission. The division enforces all current OSHA standards through inspections of worksites that have experienced accidents, fatalities, complaints, or which have been identified by a computer-generated "random selection" process.

As a result of an inspection, a citation for alleged violations of the OSHA standards may be issued. If the employer contests the citation, it goes for hearing to the N.C. Occupational Safety and Health Review Commission. The commission hears and issues decisions on appeals entered from citations and abatement periods and from all types of penalties.

NCDOL offers many educational programs to the public and produces publications to help inform people about their rights and responsibilities regarding occupational safety and health.

When reading this guide, please remember the mission of the N.C. Department of Labor is greater than just regulatory enforcement. An equally important goal is to help citizens find ways to create safe workplaces. Everyone profits when managers and employees work together for safety. This booklet, like the other educational materials produced by the N.C. Department of Labor, can help.

Cherie Berry
Commissioner of Labor

Introduction

This publication is intended as an informal explanation of the procedures of the N.C. Occupational Safety and Health Review Commission. Information in this guide will benefit employees and employers of the construction industry, agriculture industry and general industry. The publication offers the reader a guide to, through and beyond the Review Commission's proceedings. However, the guide was designed to be used with the commission's governing rules close by the reader's side.

Specific "Rules of Procedure" are promulgated by the Review Commission to regulate all of its transactions. An updated copy of the Rules of Procedure may be obtained by contacting the

N.C. Occupational Safety and Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
Telephone: 919-733-3589

The Rules of Procedure contain numerous requirements. To illustrate, various deadlines must be met by anyone pursuing a right guaranteed by the Review Commission's rules. Otherwise, if an obligation is not met within an allotted time, valuable rights may be forfeited, a contested case may be lost by default, or one may even be precluded from contesting a disputed matter. To offer the reader a quicker and smoother idea of how the commission's proceedings operate, specific requirements such as time constraints were omitted from this publication. However, frequent reference is made to particular rules. You may follow these references to specific rules of procedure for detailed information on your topic of interest. *Should there be any discrepancy between the information in this guide and the Rules of Procedure, the Rules of Procedure must be followed.* Currently, notices of contest from employers and employees of the agriculture, construction and general industries are directed to be heard by the Review Commission.

Readers who require more details about the administration of OSHA in North Carolina should consult *A Guide to Occupational Safety and Health in North Carolina* (OSH NCDOL Industry Guide #4). Readers who are interested in a summary of North Carolina legal decisions regarding OSHA issues should consult *OSHA Law in North Carolina* (2nd edition).

The website for the Review Commission is www.oshrc.state.nc.us.

The Review Commission

The N.C. General Assembly created the N.C. Occupational Safety and Health Review Commission as part of the Occupational Safety and Health Act of North Carolina (OSHANC or act). The sole function of the Review Commission is to resolve disputes that arise under the act.

The Occupational Safety and Health Division within the N.C. Department of Labor administers and enforces the act. In its enforcement activities, NCDOL is required by the act to issue citations for violations of safety and health standards. Employers who dispute citations alleging violations of the act, or challenge proposed penalties, and employers or employees who contest the length of time allowed for correction of violations do so before the Review Commission. In addition, employees who elect party status or intervene in a contested case do so before the Review Commission.

The Review Commission is an independent adjudicatory body. Neither the N.C. Department of Labor nor the OSH Division is connected with the Review Commission; neither influences the commission's decisions. The Review Commission is, in effect, a neutral court. Its governing rules ensure that all affected persons, including employees, are impartially heard.

At the appellate level of the Review Commission are three members who are appointed by the governor of North Carolina. The chairman of the commission appoints hearing examiners who hear and initially determine contested issues. The hearing examiners reside in various areas of the state so that hearings can be conducted near the employer's worksite where the contested violation allegedly occurred.

Any party may ask the appellate level of the Review Commission to review a hearing examiner's decision. On appeal, the commission has the discretionary power to accept new evidence. However, the commission will normally restrict its review to errors attributed to a lower decision.

Both levels of the Review Commission possess all of the powers traditionally afforded to courts. Additionally, the proceedings of the commission follow the format of the judiciary. But since many employers appear before the commission without the benefit of an attorney (appear *pro se*), the commission's proceedings are less formal than that of the courts. All hearings before the commission are open to the public.

How a Case Begins

Matters that come before the Review Commission may be traced to an inspection conducted by the OSH Division of an employer's worksite. If, while inspecting, the OSH compliance officer discovers what he or she believes to be a violation of the act or of standards under the act, the law requires that a citation be issued to the employer.

An OSH inspection and resulting citation(s) may give rise to any of the following occasions for the Review Commission to resolve disputes: [1] the employer may contest any alleged violation, any penalty set for a violation, and/or any period set in the citation for the abatement of a violation (.0303(e)); [2] the North Carolina commissioner of labor (commissioner) may object to an employer's petition for the modification of the date designated for the abatement of a violation (.0305(d)); [3] an employee may object to the employer's petition for the modification of an abatement date (.0305(c)(2) and (d)); [4] an employee may object to the length of an abatement time as originally set for the correction of a violation, notwithstanding whether the employer contested any aspect of the citation (.0306(a)); and [5] an employee may object the reasonableness of any abatement date included in a proposed settlement agreement between the employer and the commissioner of labor (.0701(c)).¹ Each of these occasions for a hearing before the Review Commission is discussed below.

Employer Contest of a Citation. The sequence of events prior to a hearing begins when the employer decides to contest a citation issued by the commissioner of labor (complainant). The citation sets forth requirements that were allegedly violated; describes the alleged violation with specificity; includes a notification regarding any penalty for the alleged violation; and specifies a date for the correction (abatement) of the alleged violation (.0303(a)). The employer may contest all of or any part of the citation (and/or penalty, if a penalty is imposed). Failure to contest within the time allowed by law results in the citation and penalty becoming final as a matter of law. The employer must then correct the violation within the abatement period and must pay any penalty.

The citation must be posted where affected employees can read it. Any affected employee has the right to file a notice of contest, objecting to the length of time set for the abatement of a violation, regardless of whether the employer files a notice of contest. Additionally, any affected employee has the right to participate as a party or an intervenor in a contested case.

To contest, the employer (respondent) mails the complainant a timely (.0303(b)) notice of contest (letter), which identifies the employer (.0106) and informs the commissioner of labor of the intent to contest (.0303(e)). (Appendix A is an example of an acceptable notice of contest.) The complainant then transmits in timely fashion (.0303(c)) to the Review Commission the respondent's notice of contest, a copy of the citation and any notice of penalty. From that moment, all matters in the proceedings, including any settlement (.0701(b)), must be resolved by or approved by the Review Commission. An effect of contesting a citation is to suspend enforcement proceedings, including the time set for the abatement of the alleged violation being contested, until the commission can decide the issue.

The respondent is informed by a "Notice of Docketing" (.0303(g)) that the Review Commission has taken jurisdiction of the case. The notice of docketing will have upon it an "OSHANC" docket number. The OSHANC number should be used on all correspondence to refer to the particular contested case. (Included in Appendix B are examples of a notice of docketing and certification of posting.) Like the citation, the notice of docketing must be posted where affected employees can read it. In fact, employees must have access to all documents concerning the case.

Together with the notice of docketing will be a copy of the *Rules of Procedure*, a statement on certain employee rights, and a form entitled "Statement of Employer's/Respondent's Position" (statement). (Appendix C contains a copy of the Statement of Employer's/Respondent's Position and an example of the Notice of Employee Rights.)

The statement is designed to narrow the issues being contested. The employer should correctly complete the statement (.0303(e)), because at the hearing the statement will determine the scope of the respondent's case. The statement must be returned *on time* (.0303(d)) to the Review Commission, and a copy must be sent to the Attorney General's Office (.0303(d)). Copies of all documents, filed by any party with the Review Commission, must also be served to all other parties or intervenors. Generally, all documents must be posted, and posted in a place convenient to affected employees (.0107(f)).

On the statement there is a box that must be checked if the respondent wishes to receive from the complainant a formal "Complaint" (.0303(f)). If the box is checked, formal "pleadings" are elected. Such election requires the complainant to

1. The Review Commission's rules of procedure referenced in this guide can be found in Title 13, Chapter 10, of the N.C. Administrative Code.

send to the Review Commission, in timely order (.0304(1)(a)), a copy of the complaint, which the complainant also must send to the employer. The complaint must include the details of all alleged violations of which the respondent is charged (.0304(1)(b) and (c)). The respondent must then send to the Review Commission, *within the time allowed* (.0304(2)(a)), a copy of the “answer,” which the respondent also must send to the complainant, in response to the complaint. In the answer, each item in the complaint should be identified, and each item identified should be admitted or denied. If an item is not denied, it will be assumed to have been admitted. Additionally, the answer should contain any defense which may apply to an admitted violation. For example, a defense may be that the violation occurred because of an isolated instance of employee misconduct. If the answer fails to contain certain types of defenses, the employer may be prevented from raising such defenses later at the hearing (.0304(2)(b)). (Appendix D contains examples of a complaint and answer.)

Assuming that the respondent does not elect formal pleadings (and assuming that the complainant does not elect them either), the respondent will receive a “Notice of Hearing” (.0501) relating the time, place, and nature of a hearing for resolving the dispute. If the respondent elects formal pleadings, the notice of hearing will follow the filing (and exchange) of the complaint and answer. If the respondent does not elect formal pleadings, the complainant will nonetheless have the option of doing so (.0303(f)). (In Appendix E there is an example of a notice of hearing.)

Commissioner Objects to Employer’s Petition for Modification of Abatement Date. The citation specifies a date by which the employer must correct (abate) an alleged violation (.0303(a)). If a notice of contest is not filed to contest the violation or the time set for its correction, the citation becomes final. In that instance, the violation must be corrected within the abatement period specified in the citation. If the citation is contested but is found valid and is affirmed, the citation becomes final. In that instance, the violation must be corrected within the abatement period specified in the decision (if different from the date in the citation). However, if the employer can demonstrate good faith efforts to correct the violation and can show why punctual compliance is not possible, *a timely petition* (.0305(c)) may be filed with the commissioner of labor for modification of the abatement date (petition). The petition must include the steps being taken to protect employees against the hazard (.0305(a), (b) and (d)(2)). A copy of the petition must be posted near affected employees (.0305(c)(1); .0107(h)(2); .0107(j)) so that they may object to it if they so desire (.0305(c)(2)).

The commissioner of labor may object to the employer’s petition (.0305(d)). If the commissioner of labor does object, the objection, the petition, and the citation must be sent by the commissioner of labor, within a certain time (.0305(d)), to the Review Commission. Thereafter, the Review Commission has jurisdiction over the matter. The commissioner of labor’s objection initiates automatic review of the issue, as if the petition had been denied and the employer objected to the denial.

The employer will receive a notice of docketing from the Review Commission (.0305(d)(3)). A statement of reasons supporting modification of the abatement date must then be submitted *within the time allowed* to the Review Commission by the employer (.0305(d)(3)). A statement of reasons for not granting the petition for modification of the abatement date must likewise be submitted to the Review Commission by the commissioner of labor (.0305(d)(3)). The matter will then be resolved in an expedited hearing (.0305(d)(1); .0702) where the burden of proving why the petition should be granted will be on the employer (.0305(d)(2); .0514(b)).

Employee Objects to Employer’s Petition for Modification of Abatement Date. The citation specifies a date by which the employer must correct (abate) an alleged violation (.0303(a)). If a notice of contest is not filed to contest the violation or the time set for its correction, the citation becomes final. In that instance, the violation must be corrected within the abatement period specified in the citation. If the citation is contested but is found valid and is affirmed, the citation becomes final. In that instance, the violation must be corrected within the abatement period specified in the decision (if different from the date in the citation). However, if the employer can demonstrate good faith efforts to correct the violation and can show why punctual compliance is not possible, *a timely petition* (.0305(c)) may be filed with the commissioner of labor for modification of the abatement date (petition). The petition must include the steps being taken to protect employees against the hazard (.0305(a), (b), and (d)(2)). After a specified interval of time, the commissioner of labor may exercise his or her right to approve the petition.

A copy of the petition must be posted near affected employees (.0305(c)(1); .0107(h)(2); .0107(j)) so that they may object to it if they so desire (.0305(c)(2)). An affected employee may object to the petition by filing a notice of contest (letter) (.0106; .0301) with the commissioner of labor (.0305(c)(2) and (d)). (Appendix F contains examples of an employee notice of contest.) The objection must be filed *within the time allowed* after the employer posts the petition or further right to object is waived (.0305(c)(2)). The objection, the petition, and the citation must be sent by the commissioner of labor, within a certain time, to the Review Commission (.0305(d)).

The employee who filed the notice of contest will receive a notice of docketing from the Review Commission (.0305(d)(3)), indicating that the objection to the petition has been filed by the commissioner of labor with the Review Commission, and that the Review Commission has assumed jurisdiction. A statement of reasons for objecting to modification of the abatement date must then be submitted *within the time allowed* to the Review Commission by the employee who objected (.0305(d)(3)). A statement of reasons supporting modification of the abatement date must likewise be submitted to the Review Commission by the employer. The matter will then be disposed of in an expedited hearing (.0305(d)(1); .0702), where the burden of proving why the petition should be granted will be on the employer (.0305(d)(2); .0514(b)). An employee must file a *timely* application with the Review Commission to secure the right to participate as a party at the hearing (.0201).

Employee Objects to Abatement Period Set in the Citation. Citations for alleged violations must include a date by which the employer must abate each violation (.0303(a)). The employer must post the citation and a statement regarding employee rights (.0306(a); .0107(f)). Any affected employee may contest (.0306(a)) the length of time allowed for abatement of violations, irrespective of whether the employer files a notice of contest. The employee's objection must be filed with the commissioner of labor *within the time allowed* (.0306(a)).

If an employee objects to the length of an abatement period, the commissioner of labor will submit the employee objection to the Review Commission and file a statement with the Review Commission, indicating why the abatement period is reasonable (.0306(a)). Following receipt of a copy of the labor commissioner's statement, the employee must submit a statement to the Review Commission *within the time allowed* explaining why the abatement period is unreasonable (.0306(b)). A date for an expedited hearing will then be set to resolve the matter (.0306(b); .0702).

Employee Objects to Settlement Agreement. The Review Commission encourages the settlement of cases. A settlement proposal must contain the terms of the settlement and state whether there has been any employee objection (.0701(a) and (b)). A notice must be posted by the employer (.0107(f); .0701(c)) to alert employees to the settlement proposal and to inform them of their right to object to the reasonableness of any abatement date (.0107(h)(1)). The proposed settlement agreement must also be posted (.0107(h)(1); .0701(c)).

Unless an employee objects in writing to the Review Commission *within the time allowed*, the proposed settlement may be approved by a hearing examiner without a hearing being held (.0107(h)(1)).

If an employee does object within the time allowed, a hearing will be scheduled before a hearing examiner (.0701(c)).

Hearings

Hearings are usually held near the place where the alleged violation occurred. A notice of the date, time and location of the hearing is sent to all who will participate in the hearing (.0501). Once set, the hearing will not normally be postponed (.0502). The failure to appear at the hearing may result in the party forfeiting all rights, except to receive a copy of the decision, which may be against the defaulting party (.0503(a)).

Typically, parties at the hearing will include the employer and a member of the state attorney general's staff who will represent the complainant. The employer may represent himself, appear through an attorney or send an authorized representative (.0203(a) and (b); .0101(5)). Since the proceedings may involve complex legal issues and rules of evidence, the employer may want to retain an attorney. The case for the commissioner of labor will be handled by an attorney who specializes in OSHA law. If a lawyer is to be employed, the respondent should choose the attorney when the notice of contest is filed, rather than briefly before the date of the hearing. In any event, the employer may not be represented by a person who is not an attorney, unless the person is a full-time officer or employee of the business. There are special requirements that out-of-state attorneys must satisfy (.0203(a)).

Any affected employee (.0101(2)) may also participate as a party and appear either in person, through an attorney or through an authorized representative (.0203(a) and (b); .0101(4)). An employee must elect to be a party *within the time allowed* (which may vary with the occasion for the hearing) (.0201). The failure to file to be recognized as a party may not totally preclude an employee from participating, because a petition to appear as an "intervenor" may be filed at any time prior to the hearing (.0202(a)).

Pre-hearing conferences may be held by the parties until the case is called on the record by the hearing examiner. Such conferences help to narrow the issues and facilitate the hearing process (.0402(a)). From the beginning of the hearing, a set procedure is followed to resolve the issues. The commissioner of labor (complainant) (.0101(12)), who must prove the alleged violations by a preponderance of the evidence (.0514(a)), presents the state's case first. The complainant's attorney, normally an assistant attorney general, will call witnesses who will be placed under oath or affirmation, then questioned ("direct-examination") (.0509). The questioner is limited by the witness's answers and explanation (if any) of the answers. Argument with the witness is not allowed. Similarly, statements qualifying as testimony, but made by the questioner, are not allowed. When the complainant has finished questioning the witness, the employer (respondent) (.0101(11)) then questions ("cross-examines") each witness (.0509). The scope of the employer's questions is not limited to those points raised by the complainant's initial questions. However, the employer should take careful notes during the complainant's direct examination of the witness so that the cross-examination will be thorough. In that manner, all pertinent points can be developed for the hearing examiner's decision and for possible appeal purposes.

Following the direct and cross-examination of each witness, there will be a time for the complainant to ask questions (redirect examination) on points raised during cross-examination. The respondent is then provided time for recross-examination on points raised during redirect. Typically, questioning will be limited to one redirect and one recross opportunity. However, the Review Commission's hearings are less formal than many other types of judicial hearings, especially when respondents appear without legal counsel. Therefore, the hearing examiner may allow more time for questioning.

The hearing examiner may also question the witness. If so, he or she will normally afford both parties the chance to question the witness on points raised by the hearing examiner's questions. Each of the complainant's witnesses will be examined using this same procedure.

During examination of witnesses, the opposing party has the right to raise objections (.0515). Objections might be to the admissibility of certain evidence; "hearsay" testimony is an example (statements other than those made by the person giving testimony). [However, under the Review Commission's rules, the hearing examiner may, in his discretion, admit hearsay evidence (.0513)]. An objection may be to the conduct of the hearing. To illustrate, the questioner might be arguing with the witness, or testifying, rather than questioning. Objection may be to the form of a question (leading the witness to a desired answer), or to a specific question (the question may call for the witness to give an expert opinion in an area outside of his area of expertise). The hearing examiner will either sustain or overrule the objection, and the proceeding will continue.

Exhibits may be offered into evidence either to illustrate or corroborate witnesses' testimony or to prove facts (as substantive evidence). If opposing parties do not object, exhibits are generally admitted as part of the record (.0512(b)). If there is objection, the hearing examiner will rule either to admit or to exclude exhibits. Exhibits must be properly identified (.0512(a)).

Once the complainant's witnesses are examined and all of the state's exhibits and all other evidence are presented, the complainant will "rest the state's case." Then, following the same procedure as that followed by the complainant, the respondent will present the employer's case, examining witnesses and offering exhibits and any other evidence. Like the state, the respondent must bear the expense of its own witnesses (.0504).

The employer assumes the burden of proving such defenses that assert the violation occurred because of "isolated employee misconduct" or that compliance was "impossible" or posed a "greater hazard" than noncompliance. These and other "affirmative defenses" must have been raised in the answer to notify the complainant that the defenses would be pursued at the hearing. Similarly, the employer bears the burden of proving why the penalty should be reduced (assuming the penalty was correctly calculated and equitably assessed). Acceptable proof is the greater weight of the evidence (.0514(a)).

An employer who appears without legal counsel may be tempted to testify rather than to ask questions of witnesses. However, after all of the witnesses have testified, there will be an opportunity for the respondent to testify. At that time, any respondent—with or without counsel—may elect to be sworn and testify, following the same procedure as for other witnesses. If the respondent does testify, he or she will thereafter be subject to the complainant's questions on cross-examination. Similarly, a respondent who appears without counsel may find it difficult to question a witness while refraining from arguing with the witness. However, at the conclusion of the respondent's case, there will be an opportunity for each party to argue its case orally (.0516). This is a time for presenting to the hearing examiner all of the reasons why the party believes the evidence supports its contentions.

During the hearing, the hearing examiner sits as a judge with full powers to dispose of motions (.0308) and to take any action necessary to resolve almost any type of issue (.0507(1) through (12)). A court reporter will record all of the proceedings, including all testimony (and argument, if requested). Automatically, on appeal, or at the specific request of a hearing examiner, a typed transcript will be prepared (.0506). The cost to a particular party for a typed transcript of record differs, depending on whether it was ordered by the hearing examiner or by the appellant (.0505). Any person may record the proceedings with an audiotape recorder (.0506). Following the hearing, each party may, at the discretion of the hearing examiner, be allowed to submit material containing legal authority (a "brief") to support its case; a *time period* will be set for submission of the brief (.0516).

Procedure After the Hearing

The hearing examiner will file with the Review Commission office a signed, written decision that includes findings of fact, conclusions of law and an order. (Appendix G contains an example of a hearing examiner's decision.) A copy of the hearing examiner's decision will be served to each party involved in the case. The employer must post a copy of the decision where affected employees can read it (.0107(f)). The decision will go into effect on the date it is filed with the Review Commission Office (.0601(a) and (b)). *If there is no direction or request for review within a specified time, the hearing examiner's decision will become a final order of the commission (.0602(a)).*

Any party may petition the Review Commission to review the hearing examiner's decision. An appeal from a decision of a hearing examiner to the three members of the Review Commission will be granted as a matter of right (.0602(c)), provided that the notice of appeal is filed within the time allowed (.0602(a)).

The petition for review (petition) should state precisely what in the hearing examiner's order is being appealed (.0602(b)). For example, if the party petitioning for review ("appellant") asserts that a finding of fact in the hearing examiner's decision was not supported by the evidence, the specific finding of fact should be identified. Portions of the hearing examiner's order claimed to be contrary to law, an abuse of discretion or containing prejudicial error should be specified. If the appellant alleges that the hearing examiner's decision involves a substantial question of law or policy, the question should be clearly defined.

Each party to a case on appeal is required to file a legal brief. The failure to file a brief is grounds for dismissal of the party's case. The brief must contain the page numbers of the transcript that are relevant to the portion of the hearing examiner's decision being appealed (.0602(c)).

All parties will be informed of the date, time and place of the review hearing (.0602(c)). Following the review, a decision, adopting, modifying or vacating the hearing examiner's decision, will be issued by the Review Commission. Each party will receive a copy of the decision (.0602(d)). (Appendix H contains an example of a Review Commission decision.)

The order of the Review Commission becomes final and not subject to further review unless there is a *timely* appeal to a state superior court. A copy of the petition for judicial review must be filed with the Review Commission, and a copy must be served to the opposing party (.0605).

Other Important Matters

Under the Review Commission's Rules of Procedure:

1. *Affected employee* "means an employee of a cited employer who is exposed to or has access to the alleged hazard described in the citation, as a result of his assigned duties" (.0101(2)). Management and company officers might also be affected employees.
2. *Affected employees or their elected labor organization* may appear at Review Commission proceedings with or without an attorney (.0101(4)).
3. "An out-of-state attorney-at-law must be associated with a North Carolina attorney-at-law in order to appear before either the Review Commission or its hearing examiners" (.0203(a)). Out-of-state attorneys must comply with *pro hac vice* admission requirements pursuant to N.C. Gen. Stat. § 84-41.
4. To compute a *time period*, do not count the day that caused the period to start. (Example: a hearing examiner's decision is filed on July 31; the first day of the period is August 1.) Only count intervening Saturdays and/or Sundays and/or holidays observed by the state of North Carolina if the time period is seven days or more. In any event, if the time period ends on a Saturday or Sunday or legal holiday, count as the last day the next day that is not a Saturday, Sunday or legal holiday (.0104(a)).
5. *Documents* may be served by first-class mail or by personal delivery (.0107(c)). If service is by mail, add three days to the time period within which a party must serve a response (.0104(b)). A statement specifying the date and manner of service must be attached to any document served (.0107(d)).
6. Documents may normally be filed with the Review Commission in the same manner as with service upon parties (.0108(c)). However, the form of *mailing copies of petitions for judicial review* is governed by N.C. Gen. Stat. § 95-141 and 150B (.0605).
7. *Failing to file or serve pleadings* and/or *failing to appear* at a hearing may result in the forfeiture of all rights except to receive a copy of the decision, and the decision may dismiss the defaulting party's case (.0309; .0503(a)).
8. *Documents may be served* to a party's or intervenor's representative or attorney, who is deemed to control all of the intervenor's or party's interests in the dispute (.0107(b); .0203(b)).
9. A party may initiate *withdrawal of the notice of contest* at any time. An employer-party must comply with the citation and pay any penalty before withdrawing the notice of contest (.0401).
10. Objections to an abatement period or to a petition for modification of an abatement period are resolved in *expedited* proceedings. Expedited proceedings may also be ordered by a hearing examiner or by the Review Commission. The hearing format will remain the same except for time limits, which will be set by the hearing examiner or the Review Commission (.0702).
11. No one connected with the Review Commission who might be involved in the decisional process may conduct any discussion (oral or written) related to the contest with any participant in a case ("*ex parte communication*") unless the other participants are equally included and involved (.0704).
12. Any *penalties* that the Review Commission eliminates or assesses are civil penalties (.0710(a)) which, if assessed, go into the Civil Penalty and Forfeiture Fund of the state treasury.
13. A willful violation of an OSHA standard that causes an employee's death is a *criminal act*. There are other actions also classified by the act as "criminal." Such criminal acts will be prosecuted by the N.C. Department of Justice; they are not within the jurisdiction of the Review Commission (.0710(a)).
14. If the Review Commission's Rules of Procedure fail to address a procedure, the North Carolina Rules of Civil Procedure govern the procedure (.0102).
15. Generally, the Review Commission follows the same rules that pertain to evidence as do the state courts, except with regard to "hearsay" evidence (.0513).

Appendixes

Particular forms and pleadings that follow are intended as examples of documents acceptable to the Review Commission. The example-decisions (Appendixes G and H) were altered before they were included. Their inclusion does not suggest any position of the Review Commission with regard to claims or defenses in the decisions. The complaint and answer in Appendix D are for illustrative purposes only and are not intended to reflect agreement as to content by the N.C. Department of Labor, the N.C. Department of Justice or the Review Commission.

Appendix A

Notice of Contest to Citation and Proposed Penalties

Omega-Alpha, Inc.
Lazy River Road
Omega
North Carolina
July 31, 2008

Mr. XYZ, Director
Occupational Safety and Health Division
N.C. Department of Labor
1101 Mail Service Center
Raleigh, North Carolina 27699-1101
Attention: Compliance Bureau

Dear Mr. XYZ:

This is to notify you that Omega-Alpha, Incorporated, intends to contest all of the items and penalties alleged in the Citation and Proposed Penalty which we received July 20, 2008, which was dated July 18, 2008 (a copy is enclosed).

Sincerely,

Judith F. Smith, President Omega-Alpha, Incorporated

Enclosure (copy of the Citation)

Appendix B

Notice of Docketing; Certification of Posting

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,)	
)	DOCKET NO. OSHANC 81-1001
Complainant,)	
)	
)	NOTICE OF DOCKETING
v.)	
)	
OMEGA-ALPHA, INCORPORATED,)	
)	
Respondent.)	

Dear Judith F. Smith:

This is to acknowledge receipt of your Notice of Contest, dated July 31, 2008, and received in our office on August 2, 2008; and to inform you that jurisdiction over this case is now with the Review Commission.

Attached is a form entitled "Statement of Employer's/Respondent's Position." On this form, by checking appropriate boxes, you can state your position regarding each item of the citations; or you can explain your position; or you can request a formal complaint. If you do not use the enclosed form, you must submit your own statement of position. **IF YOU DO NOT RESPOND IN WRITING WITH EITHER THIS FORM OR YOUR OWN STATEMENT OF POSITION BY MAILING OR DELIVERING IT TO THE REVIEW COMMISSION, POST-MARKED, WITHIN 20 DAYS FROM THE DAY YOU RECEIVED THIS FORM, YOUR RIGHT TO CONTEST THE GOVERNMENT'S ALLEGATIONS IS WAIVED!**

Send the original to the Review Commission and a copy of the completed form and any attachments or your statement of position to both the following offices:

N.C. Occupational Safety and Health
Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101

N.C. Department of Justice
Labor Section
P.O. Box 629
Raleigh, NC 27602-0629

This case will more than likely be scheduled for hearing within the next 90 days. *Please notify this office within five days from receipt of this notice the dates that you will not be available for hearing within this time frame.* This will be used to guide our office in setting your case for hearing. If you do not respond, we will assume that you will be available anytime within the next 90 days.

Legal counsel is not required but may be helpful. During any hearing or any other Review Commission proceeding, employers may not be represented by non-attorneys who are neither owners, nor bonafide full-time officers not employees of the company (Rule of Procedure .0101(7)). If you wish to retain an attorney, you should do so now. The Review Commission will not be inclined to continue cases for respondents who have failed to retain an attorney until a brief time before the hearing.

You are required to post your Notice of Contest and the attached Notice of Employee Rights. You must keep copies of all documents related to this proceeding in a place where employees may examine them.

To certify your compliance, we ask that you sign and return a copy of the enclosed Certification of Posting within three working days. Failure to comply will be grounds for immediate dismissal of your Notice of Contest.

If we can be of any service to you, please feel free to call. We are enclosing a copy of the Review Commission's Rules of Procedure. The Rules of Procedure may be accessed at our website address: www.oshrc.state.nc.us.

Sincerely,

Docket and Office Administrator/NCOSH Review Commission

NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

CERTIFICATION OF POSTING

MEMORANDUM

FROM:

(Company Name)

OSHANC NO.:

TO:

NCOSH Review Commission
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

SUBJECT:

Certification of Posting

I HEREBY CERTIFY that the attached was posted on the company bulletin board where employees could see it at reasonable times. I understand that I am required to keep copies of all notices and pleadings received in some place where employees may inspect them.

As required by the provisions of Rule .0107(e) of the Rules of Procedure adopted by the NCOSH Review Commission, I am herewith returning this executed Certification of Posting.

This the _____ day of _____, 20____

(Signature)

(Title)

Appendix C

STATEMENT OF EMPLOYER'S/RESPONDENT'S POSITION

Notice to _____, OSHANC NO. _____: This form *or* your own statement of position *must be used* for responding to any alleged violations, proposed penalties and abatement dates on the attached citation.

IF YOU DO NOT RESPOND IN WRITING WITH EITHER THIS FORM OR YOUR OWN STATEMENT OF POSITION BY MAILING OR DELIVERING IT TO THE REVIEW BOARD, POSTMARKED, WITHIN 20 DAYS FROM THE DAY YOU RECEIVED THIS FORM, YOUR RIGHT TO CONTEST THE DEPARTMENT OF LABOR'S ALLEGATIONS IS LOST!

If you use this form, use a separate 5-column section (below) for your response to each item. In columns 1 and 2, identify your response by the Citation number and Item number, then check appropriate boxes within Columns 3 and 4 and 5. If your position cannot be stated by checking the blocks, please use the "Remarks" section below. If you do not understand the Citation or if you desire a formal complaint, you may check only the "Formal Pleadings" block below and return this form. If you request formal pleadings, you must file a formal answer. Send the original to (Review Commission) and a copy of this completed form and any attachments, or your own statement of position to both of these offices:

NCOSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101

N.C. Department of Justice—Labor Section
P.O. Box 629
Raleigh, NC 27602-0629

Column #1	Column #2	Column #3	Column #4	Column #5
Citation	Item	Alleged Violation	Proposed Penalty	Abatement Date
No. _____	No. _____	Admit violation, as charged: YES <input type="checkbox"/> —or— Admit violation, but deny designation as "serious," or "willful," or "repeated"; and request a hearing: YES <input type="checkbox"/> —or— Deny violation, and request a hearing: YES <input type="checkbox"/>	Accept penalty: YES <input type="checkbox"/> —or— Object to the penalty and request a hearing: YES <input type="checkbox"/>	Accept the date by which the violation must be corrected: YES <input type="checkbox"/> —or— NO <input type="checkbox"/>

Column #1	Column #2	Column #3	Column #4	Column #5
Citation	Item	Alleged Violation	Proposed Penalty	Abatement Date
No. _____	No. _____	Admit violation, as charged: YES <input type="checkbox"/> —or— Admit violation, but deny designation as "serious," or "willful," or "repeated"; and request a hearing: YES <input type="checkbox"/> —or— Deny violation, and request a hearing: YES <input type="checkbox"/>	Accept penalty: YES <input type="checkbox"/> —or— Object to the penalty and request a hearing: YES <input type="checkbox"/>	Accept the date by which the violation must be corrected: YES <input type="checkbox"/> —or— NO <input type="checkbox"/>

YOUR DEFENSE: If you want a hearing, please state on the back of this form your reasons for disagreeing with the Citation. Identify comments by Citation and Item number.

FORMAL PLEADINGS: For a formal statement of pleadings by the N.C. Department of Labor, check this box: . If you request or receive a formal statement of pleadings, **you must file a formal answer within 20 days of receipt of the formal complaint.**

- PLEASE NOTE:**
- (1) At a hearing, you will be limited to the specifics of this form or the specifics of your own statement of position.
 - (2) **IF YOU DO NOT RESPOND IN WRITING WITH EITHER THIS FORM OR YOUR OWN STATEMENT OF POSITION BY MAILING OR DELIVERING IT TO THE REVIEW BOARD, POSTMARKED, WITHIN 20 DAYS FROM THE DAY YOU RECEIVED THIS FORM, YOUR RIGHT TO CONTEST THE DEPARTMENT OF LABOR'S ALLEGATIONS IS LOST!**
 - (3) A corporation must submit with this form a list of all of its parents, subsidiaries, and affiliates, or state that none exist.

Respondent/Employer: _____

Address: _____

Completed by: _____ Position: _____

Signature: _____ Date: _____

NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

DATE

NOTICE OF EMPLOYEE RIGHTS

TO THE EMPLOYEES OF: (COMPANY NAME)

Your employer has been charged with a violation of the Occupational Safety and Health Act of North Carolina. He is contesting this alleged violation before the N.C. Occupational Safety and Health Review Commission, an independent agency. As affected employees, you have the right to participate as parties in this action by addressing a request for party status to:

N.C. Occupational Safety and Health Review Commission
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

You may also inspect all documents related to this contest at:

(or place that is reasonably convenient)

For additional information or instructions, please contact the above office at 919-733-3589.

Appendix D
Complaint; Answer

BEFORE THE NORTH CAROLINA SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR)	
OF THE STATE OF NORTH CAROLINA,)	OSHANC NO. 81-1000
)	
Complainant,)	
)	
v.)	COMPLAINT
)	
ALPHA-OMEGA INCORPORATED,)	
Lazy River Rd.)	
Omega, N.C.)	
)	
Respondent.)	

**WITHIN 20 DAYS AFTER RECEIPT OF THE
COMPLAINT RESPONDENT MUST FILE AN
ANSWER WITH THE REVIEW COMMISSION**

COMPLAINANT, Commissioner of Labor of the State of North Carolina brings this action to enforce the provisions of the Occupational Safety and Health Act of North Carolina (hereinafter, referred to as the Act) (Article 16, Chapter 95 of the General Statutes of North Carolina) seeking to have affirmed by the NCOSH Review Commission (hereinafter, referred to as the Review Commission) a citation and proposed penalty issued to the Respondent for an alleged violation of the Act and the safety and health regulations promulgated under the Act.

I.

Jurisdiction of the Review Commission is invoked pursuant to North Carolina General Statutes § 95-135. Complainant files this Complaint in accordance with Rules .0303 and .0304 of the Rules of Procedure adopted by the NCOSH Review Commission.

II.

Complainant is an agency of the State of North Carolina charged with inspection for compliance with and enforcement of the provisions of the Act and brings this action pursuant to North Carolina General Statutes § 95-133.

III.

Respondent is a corporation doing business in North Carolina under the name of Alpha-Omega, Incorporated, and maintains an office and place of business in Omega, North Carolina, and is subject to suit under the Act. On June 16, 2008, Respondent, a sewage line contractor, was digging a trench for the installation of sewer lines.

IV.

1. On or about June 16, 2008, David Eller, a duly authorized agent of the North Carolina Department of Labor, properly entered onto and conducted an inspection of Respondent’s job site located along Lazy River Road in Omega, North Carolina.

2. During the course of his inspection, Compliance Officer Eller observed that conditions of employment, free from recognized hazards, were not provided to Respondent’s employees at this job site. Specifically, Compliance Officer Eller observed a trench which had been dug for sewer line installation in hard or compact soil.

(a) The trench was located at the intersection of Moonshine Drive and Lazy River Road. This trench was 94 feet long. The west end of the trench was 8 feet deep and measured 10 feet 8 inches wide at the bottom and 12 feet wide at the top. The east end of the trench varied between 8 feet 6 inches and 7 feet deep. The east end of the trench measured 8

feet 6 inches wide at the bottom and 9 feet wide at the top. Respondent's foreman provided the measurements for the trench and confirmed their accuracy. The Respondent's foreman was actually in the trench when Compliance Officer Eller arrived at the job site.

(b) Compliance Officer Eller further observed that the sides or walls of the trench were not shored, sheeted, braced or otherwise adequately supported in accordance with Table P-2 of 29 CFR 1926.652 and that the sides or walls of the trench were not adequately sloped in accordance with Table P-1 of 29 CFR 1926.652. Consequently, Respondent's employee in the trench was exposed to the hazard of the unshored and improperly sloped walls collapsing and striking, trapping, or covering him with falling soil. Further, the possible cave-in or collapse of the trench walls onto Respondent's employee would likely result in either his death or serious bodily injury.

3. As a result of the foregoing findings and observations, Compliance Officer Eller recommended a citation for a serious violation of 29 CFR 1926.652(c).

V.

1. On or about July 29, 2008, Mr. XYZ, Director of the Occupational Safety and Health Division of the North Carolina Department of Labor, after reviewing the report submitted by Compliance Officer Eller, issued the following Citation and Notification of Penalty:

(a) Citation Number One, Item 1, alleges a serious violation of 29 CFR 1926.652 in that the sides of the trench dug in hard or compact soil, located at the intersection of Moonshine Drive and Lazy River Road were not shored or otherwise supported when the trench was 5 feet or more in depth and 8 feet or more in length.

(b) Respondent was aware of the condition by virtue of the foreman's presence in the trench.

(c) Respondent was aware or with the exercise of reasonable diligence should have been aware of the standard and its requirements by virtue of the Respondent's principal vocation as a sewer line contractor.

(d) A penalty of \$3,500 was proposed for Item 1 and was calculated in accordance with the OSH Field Operations Manual and is reasonable in light of the nature of the probable injury from a possible trench cave-in. The gravity-based penalty of \$7,000 was reduced by 20 percent for size, 10 percent for history and 20 percent for good faith, adjustment factors allowed under the facts and circumstances of the instant case. The penalty is the same that would be proposed for any other employer, similarly situated.

(e) This violation was required to be immediately abated.

VI.

1. On or about August 21, 2008, the OSH Division received Respondent's Notice of Contest contesting the above Citation and proposed penalties.

2. On or about October 19, 2008, the Labor Section of the N.C. Attorney General's Office received Respondent's Statement of Employer's/Respondent's Position requesting formal pleadings.

WHEREFORE, Complainant requests that the Review Commission affirm Citation Number One, Item 1 and assess a penalty in the amount proposed by Complainant.

This the 4th day of November, 2008.

Respectfully Submitted,

Attorney General

Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Telephone No. 919-716-6680

BEFORE THE NORTH CAROLINA SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR
OF THE STATE OF NORTH CAROLINA,

Complainant,

v.

ALPHA-OMEGA INCORPORATED,
Lazy River Rd.
Omega, N.C.

Respondent.

OSHANC NO. 81-1000

ANSWER

Alpha-Omega, Incorporated hereby answers the complaint as follows:

- I.
- Admitted.
- II.
- Admitted.
- III.
- Admitted.
- IV.
- 1. Admitted.
- 2. Admitted.
 - (a) Admitted.
 - (b) Admitted.
- 3. Admitted

DEFENSE TO PART IV OF THE COMPLAINT

The violation which occurred was directly due to isolated employee misconduct. The conduct was idiosyncratic, isolated and unforeseeable. Alpha-Omega, Incorporated has a written safety program. The safety program was developed by a leading safety firm which specializes in safety programs for companies involved in digging trenches. Part A of *The Alpha-Omega Safety Program* covers the hazards of trenches. Part B of *The Alpha-Omega Safety Program* is exclusively devoted to OSHA regulations relating to excavations and trenches. Part C of *The Alpha-Omega Safety Program* instructs on how to dig trenches safely, in compliance with OSHA regulations. The safety program is orally communicated to each newly-hired employee. Additionally, each newly hired employee signs a statement reflecting that the safety program was communicated to him or her. A written copy of the safety program is given to each employee. The safety program is effectively enforced. Upon the first violation of any standard within the safety program, a written reprimand is placed in the employee's personnel file. The employee is placed on notice that a second violation will result in the termination of his or her job. Upon the second violation of any standard within the safety program, the employee's job is terminated, without exception. Company records are available to indicate that the safety program has been strictly enforced. The job foreman was a newly hired employee. The safety program had been communicated to him. The Moonshine Drive/Lazy River Road sewer project was the foreman's first job while employed at Alpha-Omega, Incorporated. The foreman, Mr. Jimmy Foster, has received a written reprimand and is now on notice that a second violation will result in job termination.

V.

1. Admitted.

(a) Admitted.

(b) Denied.

(c) Admitted.

(d) It is admitted that the penalty was properly calculated and equitably assessed. Should a violation be found, Alpha-Omega, Incorporated will pay the penalty.

(e) Admitted.

DEFENSE TO PART V OF THE COMPLAINT

[Defense to Part 5(b) of the Complaint] Alpha-Omega, Incorporated denies that it had knowledge of the condition. The written safety program was designed to prevent the very type of violation which occurred. The safety program was and is effectively communicated to employees. The safety program is consistently enforced, as it was in the instant case. The newly hired foreman, Mr. Jimmy Foster, had extensive experience in the trenching business. Alpha-Omega, Incorporated, was entitled to rely upon its state-of-the-art safety program and upon the foreman's experience to forestall the expectation (employer knowledge) of the violation for which it was cited.

VI.

1 Admitted.

2 Admitted.

RELIEF REQUESTED

Alpha-Omega, Incorporated, respectfully requests that the Review Commission dismiss the complaint and vacate the citation along with its proposed penalty.

Attorney for Alpha-Omega, Inc.
227 Main Street
Omega, NC
704-555-1961

**Appendix E
Notice of Hearing**

BEFORE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR
OF THE STATE OF NORTH CAROLINA,

Complainant,

v.

OMEGA-ALPHA,

Respondent.

DOCKET NO. OSHANC NO. 81-1001

NOTICE OF HEARING

1. Be it known by all interested parties to the above action that an Administrative Hearing will be held:

Date: _____

Time: _____

Place: _____

2. The purpose of this hearing is to determine all matters relating to Respondent's Notice of Contest dated _____ Respondent is contesting Citation Number _____ dated _____, specifically:

3. The hearing will be presided over by _____ Administrative Law Judge, in accordance with Review Commission Rules of Procedure.

Date

Docket and Office Administrator,
NC Occupational Safety and Health
Review Commission

NOTE:

The Review Commission will not be inclined to continue cases for Respondents who have failed to retain an attorney until a short time before the hearing. The hearing date will be postponed only upon a showing of good cause by petition to the Commission. No request will be considered if received later than three (3) days before the scheduled date of hearing except in extreme emergency. Interested parties (employer/employees/employee representative) not already joined in this action may petition to intervene, at any time up to commencement of hearing, by addressing a request to:

N.C. Occupational Safety and Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101

A copy of this Notice must be posted in a conspicuous place at or near the site of the alleged violation where all affected employees may read it.

Appendix F

Notice of Contest by Employee Representative; Notice of Contest by Affected Employee

Amalgamated Clothing and Textile Workers Union Local
15 Lazy River Road
Alpha, North Carolina
August 6, 2008

Mr. XYZ, Director
Occupational Safety and Health Division
N.C. Department of Labor
1101 Mail Service Center
Raleigh, NC 27699-1101
Attention: Compliance Bureau

Dear Mr. XYZ:

As the elected representative of all employees at Apparel Unlimited, ACTWU, Local 15 hereby files this notice of contest to the OSHA citations issued on July 27, 2008, against the employer, Apparel Unlimited, Alpha, North Carolina. The abatement dates of December 31, 2008, for Items No. 1 and No. 3 of the non-serious citation and January 5, 2009, for Item No. 1 of the serious citation are unreasonable.

Sincerely yours,

Shirlee Staley, Steward, ACTWU

Route 2, Box 43R
Alpha
North Carolina
March 6, 2009

Mr. XYZ, Director
Occupational Safety and Health Division
N.C. Department of Labor
1101 Mail Service Center
Raleigh, NC 27699-1101
Attention: Compliance Bureau

Dear Mr. XYZ:

I work for Apparel Unlimited. More specifically, I work directly with the machine involved in the OSHA citation of July 27, 2008 (Item 1 of the serious citation). My employer filed a notice of contest (OSHANC 81-1001) but subsequent to a Review Commission hearing, the citation was affirmed. Now, Apparel Unlimited has petitioned for a modification of the abatement date. I object to my employer's petition. Please consider this letter as my notice of contest.

Sincerely,

Barrett Foster

Having reviewed and considered the evidence and the arguments of the parties, the undersigned hereby 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), ABC Distributing Company (hereinafter “ABC”) is subject to the provisions of OSHANC (N.C. Gen. Stat. § 95-128).
5. The Complainant inspected the Respondent’s premises on or about February 10, 2007, and issued citations on March 17, 2007.
6. The Respondent exercised its right to contest the Complainant’s enforcement actions (N.C. Gen. Stat. § 95-129, 95-137), and the matter was heard by the under-signed Administrative Law Judge for the NCOSH Review Commission, on February 23, 2008, in Raleigh.
7. During the hearing, the Respondent stipulated to the existence of the violations, but disputed the classifications of the penalties in Citation 1 as serious.
8. As to the violations in Citation 2, the Respondent admitted the violations as charged.
9. The violation of 29 CFR 1910.304(f)(4) for having a grounding pin missing from a flexible cord and the violation of 29 CFR 1910.305(g)(1)(iii) for using flexible cords for prohibited purposes, both involve similar or related hazards, the danger of electrocution and are grouped for penalty purposes with a combined penalty of \$1,050.00.

Citation No. 1, Item No. 1

10. The missing ground pin created the hazard of electrocution.
11. Several employees including the warehouse manager, Mr. Cook, were exposed to the hazard of electrical shock.
12. The hazardous conditions of the improperly grounded equipment (missing ground pin) created the possibility of an accident, the substantially probable result of which could be an employee completing the circuit to ground and being electrocuted.
13. ABC Distributing Company knew or should have known of the missing ground pin in that its warehouse superintendent, Mr. Cook, felt a “tingle of electricity” occasionally when using the equipment plugged into the electrical cord with the ground pin missing.

Citation No. 1, Item No. 2

14. The flexible cords that were being used for prohibited purposes created the hazard of fire and electrical shock.
15. Four employees including the warehouse manager were exposed to the hazard created by the use of the flexible cords for prohibited purposes.
16. The hazardous conditions of the flexible cords used for prohibited purposes created the possibility of an accident, the substantially probable result of which could be fire and electrocution.
17. ABC Distributing Company knew or should have known that the electrical cords were used for prohibited purposes in that the flexible cords were stapled to a partition and were in plain view.

Citation No. 2, Items No 1, 2, 3a and 3b

18. The Respondent admitted the nonserious violations alleged in Citation No. 2, Items 1, 2, 3a and 3b which carried no penalty.

Penalties for Citation No. 1

19. The penalties as grouped by the undersigned Hearing Examiner for the serious violations alleged in Citation No. 1, Items 1 and 2 were calculated according to the Field Operations Manual with a high severity assessment assigned because of the hazard of electrocution and a probability assessment of greater assigned because of the four hours of exposure a day by the employees resulting in a gravity based penalty of \$7,000.00. A 60% reduction for size, a 15% reduction for good faith and a 10% reduction for history were allowed resulting in a final assessed penalty of \$1,050.00.

CONCLUSIONS OF LAW

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 Review Commission has jurisdiction of this cause and the parties are properly before the Review Commission.
3. The Respondent has admitted the nonserious violations alleged in Citation No. 2, Items 1, 2, 3a and 3b which carried no penalty.
4. The Respondent stipulated to the existence of the violations in Citation One, Items 1 and 2 and the Commissioner has proven by the greater weight of the evidence that the violations of 29 CFR 1910.304(f)(4) for having a grounding pin missing from a flexible cord and the violation of 29 CFR 1910.305(g)(1)(iii) for using flexible cords for prohibited purposes were serious violations.
5. The \$1,050 penalty for serious violations as grouped by the undersigned Hearing Examiner is calculated according to the Field Operations Manual and is fair and reasonable in amount.

THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

1. Citation No. 1, Items 1 and 2 charging serious violations of 29 CFR 1910.304(f)(4) for having a grounding pin missing from a flexible cord and of 29 CFR 1910.305(g)(1)(iii) for using flexible cords for prohibited purposes is hereby affirmed, together with the grouped penalty of \$1,050.00.
2. Citation No. 2, charging four (4) nonserious violations is hereby affirmed, together with no penalty.
3. The Respondent is ordered to pay the penalty of \$1,050.00 to the Department of Labor within 30 days of the date of this order.

This the _____ day of _____, 2008.

ROBIN E. ABBOTT,
ADMINISTRATIVE LAW JUDGE

Appendix H

Review Commission Decision

BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR
OF THE STATE OF NORTH CAROLINA,

Complainant,

v.

ABC GROUP, INC.
and its successors,

Respondent.

DOCKET NO. OSHANC NO. 94-1000
OSHA INSPECTION NO. 000000000
CSHO ID NO. 00000

ORDER

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 9:00 A.M. on the 26th day of April 2008 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Abbott, Chair, Kenneth K. Mason, Member and Henry M. Johnson, Member, of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

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

John Q. Public of Apple, Beta and Jones, 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 North Carolina Occupational Safety and Health Review Commission 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) ABC 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 Review Commission adopts the Hearing Examiner's findings of fact numbered 1 through 7 and 9 through 16.
7. On September 9, 2007 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 ½ 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 ¼ 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 ¼ inches so that a gap could be created between the end grates and the edge of the opening.
8. On January 5, 2008, Respondent filed a Petition for Review with the Review Commission 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 Review Commission on January 22, 2008.
10. The North Carolina Occupational Safety and Health Review Commission assumed jurisdiction over the issues in contest. (N.C. Gen. Stat. § 95-135).
11. On March 20, 2008, the Review Commission issued a Notice of Review granting Respondent's Petition for Review and the issues on appeal were heard by the full Review Commission on April 26, 2008.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Review Commission 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 Review Commission has jurisdiction of this cause and the parties are properly before this Review Commission.
3. The Commissioner of Labor 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 Commission "the Review Commission shall schedule the matter for hearing, *on the record*, (emphasis added) except that the Review Commission may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Review Commission 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 Review Commission 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 NCOSH Review Commission, 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 ¼ inches for a total overlap of 2 and ½ 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 ½ 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 ¼ 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 Review Commission:

...the Review Commission 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 Review Commission 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 Commission 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 ____ day of _____, 2008.

ROBIN E. ABBOTT, CHAIR

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