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SECRETARY OF LABOR,

Complainant,

v.

HERN IRON WORKS, INC.,

Respondent.

OSHRC Docket No. 88-1962

*DECISION*

BEFORE: FOULKE, Chairman and MONTOYA, Commissioner.

BY THE COMMISSION:

## I. Introduction

In June 1987, pursuant to an administrative search warrant, a representative of the Occupational Safety and Health Administration ("OSHA") of the Department of Labor sought to conduct an inspection of Hern Iron Works ("Hern") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("The Act"). Hern refused to honor the warrant and, on July 25, 1987, filed a motion to quash the warrant. Shortly thereafter, the Secretary of Labor sought an order of contempt against the company. On November 19, 1987, the United States District Court of Idaho entered a contempt order which was affirmed by the United States Court of Appeals for the Ninth Circuit on August 3, 1989. *In re Establishment Inspection of Hern Iron Works*, 881 F.2d 722 (9th Cir. 1989). Hern was fined $2000 and ordered to reimburse the Secretary's litigation costs.

While the district court's contempt order was pending on appeal, the Secretary again attempted to inspect Hern's facility. Initially, Hern refused to allow the inspection. The next morning, however, the compliance officer returned with a copy of the 1987 warrant. The compliance officer asked Mr. Hern, the company president, to produce the facility's

OSHA 200 log of injuries and illnesses and the OSHA 101 forms (supplementary records of injuries and illnesses). After consulting with his attorney, Mr. Hern refused to produce the forms.

As a result of Hern's refusal to produce the forms, the Secretary issued a citation for willful violation of 29 C.F.R. § 1904.7[1] and proposed a penalty of $10,000.[2] Hern contested the citation and a hearing was held before Judge Benjamin Loye. On October 25, 1989, Judge Loye issued his decision and order vacating the citation on the grounds that the inspection was based neither on Hern's consent nor on a valid warrant. The Secretary filed a petition for review with the Commission, but the petition was not granted[3]. The Secretary subsequently appealed Judge Loye's decision to the Ninth Circuit, which reversed the judge and held that the inspection was properly conducted pursuant to the 1987 warrant. *Dole v. Hern Iron Works*, 937 F.2d 612 (9th Cir. 1991). The matter was remanded to the Commission with instructions to reinstate the citations and conduct appropriate proceedings.

The Commission remanded the matter to Judge Loye who issued a decision affirming a willful violation of the cited standard on January 9, 1992. In finding the violation willful, Judge Loye rejected Hern's argument that it had made a good faith decision not to comply with the district court's order allowing the inspection because it believed that the order

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[1]The relevant provision of the cited standard is § 1904.7(a) which states:

> **§ 1904.7 Access to records.**
>
> (a) Each employer shall provide, upon request, records provided for in §§ 1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act, and by representatives of the Secretary of Health, Education, and Welfare during any investigation under section 20(b) of the act, or by any representative of a State accorded jurisdiction for occupational safety and health inspections or for statistical compilation under sections 18 and 24 of the act.

[2]Approximately a week after OSHA attempted to execute the 1987 warrant, Hern filed suit in district court seeking declaratory judgment and injunctive relief on the ground that the 1987 warrant was stale and unenforceable. After Hern's motion for a preliminary injunction was denied, *Hern Iron Works, Inc. v. McLaughlin*, 1987-1990 CCH OSHD ¶ 28,310 (D. Idaho, June 13, 1988), Hern allowed the inspection. That inspection resulted in the issuance of citations for willful failure to record injuries on the same OSHA 200 form that Hern refused to turn over here. These citations were recently affirmed by the Commission. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1993 CCH OSHD ¶ 30,046 (No. 89-433, 1993) (*"Hern I"*).

[3]At the time the Secretary filed his petition, the Commission had no members.

would be overturned on appeal. Judge Loye also rejected Hern's argument that it held a good faith belief that, based on statements made by the compliance officer, it could produce the requested documents as late as the informal conference without a citation being issued.

In determining an appropriate penalty under section 17(j) of the Act, 29 U.S.C. § 666(j),[4] Judge Loye found the gravity of the violation low because no employees were exposed to a hazard as a result of Hern's failure to provide the forms. The judge also noted that the requested records had eventually been turned over. However, he concluded that some penalty was appropriate because Hern's willful delay in producing the records resulted in "the needless expenditure" of OSHA's time and resources. Citing *Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶ 15,277 (No. 881, 1972), Judge Loye held that, where necessary to best effectuate the purposes of the Act, consideration must be given to modifying factors such as the financial stability of the employer. He noted that the Act's purposes are not served by the assessment of "destructive" penalties. Based on his finding that Hern experienced a five-year net loss of $17,000 in the years prior to 1987, he found that Hern could not continue to sustain such large losses, including large OSHA penalties, and remain in business. Accordingly, he concluded that the $10,000 penalty proposed by the Secretary was excessive and assessed a penalty of $200.

## II. Issues on Review

On review, the Secretary takes issue with the judge's decision to reduce the proposed penalty based on Hern's financial condition. He also proposes modifications to the Commission's authority to assess penalties. We first consider the basis of that authority.

## III. Discussion

### A. Statutory Authority to Assess Penalties

The Secretary complains that the Commission lacks his wide-ranging perspective on the role of penalties under the Act as well as a systematic basis for assessing penalties.

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[4]Section 17(j) provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving 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 history of previous violations.

However, his basic argument is that the Supreme Court's reasoning in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991) ("*CF&I*") supports a conclusion that his penalty proposals are entitled to "substantial weight" from the Commission. He contends that because the weight to be given each of the statutory criteria is a policy decision, his proposed penalties should not be recomputed in the absence of an express finding that they are unreasonable or that the statutory factors have not been met.

In *CF&I*, the Court had to determine whether the courts should defer to the interpretation of the Commission or the Secretary in the absence of any clear Congressional statement on the issue. The Court concluded "that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them." *Id.* at 158. It held that a reviewing court should defer to the Secretary's reasonable interpretation of an ambiguous regulation. The Secretary contends that both his standard-interpreting function and his penalty-proposing function are exercises of delegated enforcement authority, suggesting of course that both deserve the same deference from the Commission. We disagree.

Unlike the controversy in *CF&I* over whose interpretation of an ambiguous standard receives deference, the matter of penalty assessment is governed by the express language of the Act. As the Secretary correctly notes, in the Act Congress gives the Secretary the power to issue a document called a "*proposed assessment of penalty*." Section 10(a) of the Act, 29 U.S.C. § 659(a). However, in the event the citation and proposed penalty are contested, the Act expressly grants to the Commission the sole authority to determine penalties:

> The Commission shall have authority to assess all civil penalties provided in this section, giving 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 history of previous violations.

Section 17(j) of the Act, 29 U.S.C. § 666(j). The Commission's express authority to determine the appropriate penalty in contested cases has been recognized from the earliest days of the Act:

> The Congressional intent is thus plainly manifested that the Commission shall be the final arbiter of penalties if the Secretary's proposals are contested and that, in such a case, the Secretary's proposals become merely advisory. We find no authority to the contrary.

*Brennan v. OSHRC (Interstate Glass Co.)*, 487 F.2d 438, 442 (8th Cir. 1973). The Commission's power has never been questioned by the courts that have discussed the issue:

> Congress gave the OSHRC the authority to assess penalties. . . . The Secretary's proposed penalty is effective only if not contested; once contested, the OSHRC can affirm the proposed penalty, modify it, vacate it, or direct other appropriate relief. The OSHRC thus determines the penalty de novo, considering the proposed penalty as, in fact, only a proposal.

*California Stevedore and Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975);[5] *see also Western Waterproofing v. Marshall*, 576 F.2d 139, 145 (8th Cir. 1978) (the matter of penalty is within the discretion of the Commission). Indeed, "[t]here has never been any question that the Commission has the power to assess a penalty lower than or equal to the one proposed by the Secretary." M. Rothstein, *Occupational Safety and Health Law* § 338 (3d ed. 1990).[6] Moreover, the courts do not, as the Secretary would have it, review the Commission's penalty assessments for reasonableness. As the United States Court of Appeals for the Eighth Circuit stated: ". . . [A] determination of how large or how small a penalty should be imposed is an exercise of discretion by the Commission which will not be disturbed by us in the absence of abuse." *Long Mfg. Co., N.C. v. OSHRC*, 554 F.2d 903, 907-08 (8th Cir. 1977).

While the Secretary may seek a nationwide uniformity in penalty assessments as he does in his interpretation of standards, the Commission recognized in its very first decision that its mission is to determine the appropriate penalty based solely on the facts of each case:

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[5]We note that the case now under consideration arose in the Ninth Circuit.

[6]To support his contention that his penalty proposals are, in effect, entitled to controlling weight, the Secretary also relies on statements in the legislative history of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101, 104 Stat. 1388, 1388-29 (1990), relating to the amendment of section 17 of the Act.

Although we have no doubt that, by increasing the penalty structure of the Act sevenfold, Congress sought to enhance the Secretary's ability to use penalties to enforce the Act's provisions, we fail to see how such an intent would reduce the Commission's authority to review the Secretary's penalty proposals in contested cases. To the contrary, these increased penalties heighten, rather than diminish, the importance of having a neutral arbiter review the factual underpinnings of the proposed penalties. In light of overwhelming precedent recognizing the Commission's authority to assess penalties *de novo* in contested cases, we are far more persuaded by the fact that, when amending the penalty structure of the Act, Congress saw fit not to amend those sections of the Act that grant the Commission express authority to assess penalties.

> The Commission is cognizant of the difficulties of the Secretary's task in proposing an appropriate penalty in the many and diverse cases with which he is faced. The formula he has devised is an attempt to achieve uniformity in a decentralized operation. He has set out to achieve the impossible. He deserves credit for the attempt and this decision should not be interpreted as a criticism of his efforts.
>
> Nevertheless, in the opinion of the Commission, no matter how desirable uniform treatment of violations may be, the achievement of a just result in each case is the standard by which our deliberations must be guided.

*Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, pp. 20,043-44 (No. 4, 1972).

The Secretary also relies on *Moog Indus. v. FTC*, 355 U.S. 411, 413 (1958) and *NL Indus., Inc. v. FTC*, 901 F.2d 141, 144 (D.C. Cir. 1990). Neither of these cases provide support for the Secretary. The Court in *Moog* rightly deferred to the FTC's specialized judgment. It characterized certain questions as deserving "discretionary determination by the administrative agency." Here, despite the Secretary's claims, the amount of the penalty to be assessed is a discretionary determination by the Commission. In *NL Industries*, substantial deference was awarded to the agency assessing the civil penalty. Under the statute cited there, the Secretary of Transportation was expressly empowered to assess penalties. Under section 17(j) of the OSH Act, however, "[t]he Commission shall have the authority to assess all civil penalties."

In addition to lacking support in the case law, the Secretary's contention that his penalty proposal should be adopted by the Commission unless the proposal is unreasonable runs directly contrary to the responsibility of the Commission to assess an appropriate penalty based on its findings regarding the factors enumerated in section 17(j) of the Act. The evaluation of those penalty factors are issues of fact, the resolution of which is the exclusive province of the Commission. The Secretary does not consider that his view of the penalty factors when he issued the citation will not always be the one that the Commission judge adopts from the hearing or the view that the Commission gains from a review of the record. Under the Secretary's standard of review, the Commission apparently would be prohibited from reducing or raising the penalty to more accurately reflect the facts of the case.

Finally, we note that in its recent decision in *Reich v. OSHRC (Erie Coke Corp.)*, 998 F.2d 134 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit, in upholding the Commission's authority to classify a violation as *de minimis*, stated:

> The Commission has the statutory authority to affirm, modify, or vacate the Secretary's citation, or to direct other appropriate relief. Its action in reducing the violation to de minimis status clearly falls within that grant of power. *The reduction of the offense level is analogous to the power of a court to reduce a criminal offense to a lesser level than the one charged in an indictment. That traditional procedure has not been considered to be a usurpation of prosecutorial discretion, but rather a necessary prerogative of the court.* Moreover, the Secretary does not challenge the Commission's authority to reduce a serious violation to non-serious status. *Thus, it appears that it is not the Commission that is seeking to enhance its authority, but the Secretary who is attempting to enlarge his power at the expense of the 'neutral arbiter.'*

*Id.* at 139 (emphasis added).

In our view, the logic applied by the Third Circuit to uphold the Commission's authority to find a violation *de minimis* applies equally to the Commission's authority to assess penalties.

### B. Did the Judge Err in His Penalty Assessment in this Case?

#### 1. Arguments of the Parties

The Secretary argues that the judge's penalty assessment was unreasonably low and constituted an abuse of discretion. He argues that, given Hern's lack of good faith, none of the section 17(j) factors[7] justifies a reduction in the penalty.

The Secretary further argues that the judge also erred by holding that the violation was one of low gravity. He contends that the OSHA 200 log is the cornerstone of the information gathering system mandated by Congress and is used to identify high-hazard industries for inspection targeting. He points out that, even during an inspection, the OSHA 200 and OSHA 101 can be scrutinized by the compliance officer to enable him to determine the effectiveness of the employer's safety and health program and to identify areas of particular concern that warrant closer investigation.

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[7]*See* note 4.

The Secretary also argues that the judge erred by considering Hern's financial condition as a basis for imposing a reduced penalty. He points out that Congress said nothing about an employer's ability to pay as being part of a section 17(j) penalty calculation.[8] To the contrary, the Secretary contends that Congress recognized and accepted the proposition that certain unsafe, unhealthful business establishments could only abate by shutting down. *AFL-CIO v. Brennan*, 530 F.2d 109, 123 (3d Cir. 1975).

Finally, the Secretary argues that, given Hern's purposely obstructionist tactics, the judge's penalty assessment makes a mockery of the Act's penalty scheme and does little to deter intentional violations of the Act.

Hern contends that the judge correctly found the violation to be of low gravity. It argues that the Secretary's attempt to impose the maximum penalty stems from his desire to punish Hern for its use of the administrative and judicial process to vindicate its philosophical resistance to OSHA. Pointing to *Hern I*, in which the evidence established that it had gross annual sales of $500,000, and a net worth of $50,000, Hern argues that, on a proportional basis, the $13,000 penalties assessed in that case by the judge greatly exceed penalties assessed against giant corporations such as Chrysler.[9] It argues that the penalty sought by the Secretary guarantees only financial ruin, not compliance with the Act.

**2. Discussion**

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees

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[8]In comparison, the Secretary notes that penalties under the Federal Mine Safety and Health Act require consideration of both "the appropriateness of such penalty to the size of the business of the operator charged" and "the effect on the operator's ability to stay in business." 30 U.S.C. § 820(i)

[9]We note that Hern's argument predated the Commission review of the judge's decision in *Hern I*. In that decision, the Commission assessed penalties of $9000.

exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

We find that the Judge did not err in finding the violation to be of low gravity. The Commission has held that recordkeeping violations are generally of low gravity because such violations touch in only the most tangential way the factors that go to gravity: the number of employees exposed to the hazard, the duration of exposure, whether any precautions have been taken against injury, and the degree of probability that an accident would occur. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1993 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993). After he determined that the records at issue here were improperly kept, the Secretary issued a citation against Hern that the Commission recently affirmed in part. In that decision, the Commission found Hern's failure to adequately maintain the required OSHA forms to be of low gravity. *Hern I*, 16 BNA OSHC at 1216-17, 1993 CCH OSHD at pp. 41,259-60. We find nothing in this record to warrant a finding that the failure to turn over records is of a higher gravity than the failure to adequately maintain them.

We find that no credit shall be given Hern for either good faith or history. Judge Loye did not discuss Hern's history of previous violations. However, in *Hern I, id.* at 1216-17, 1993 CCH OSHD at p. 41,259, the Commission found that in 1982 Hern was cited for an other-than-serious violation of section 1904.6 for failing to retain the OSHA 200 and its predecessors for five years. This demonstrates that Hern has a history of violating OSHA recordkeeping requirements. Judge Loye found, and we agree, that in refusing to honor the Secretary's warrant and allow the inspection of its records, Hern was not proceeding in good faith.

In its brief, Hern argues that the Secretary is seeking to punish it for taking advantage of administrative and judicial processes to vindicate its "philosophical resistance to OSHA." While it is perfectly legitimate for an employer to use the judicial and administrative processes to vigorously pursue its legal position, the legitimacy of that argument wanes when the employer has exhausted those processes and, as was the case here, continues to resist even after that resistance has resulted in its being held in contempt of court. We recognize that, at the time of the attempted inspection, the district court's contempt finding against

Hern was being appealed in the Ninth Circuit. Rather than continue its refusal to honor the warrant, the proper course of action for Hern would have been to allow the inspection and then move to have any citation dismissed, had it won on appeal. *See Trinity Indus.*, 15 BNA OSHC 1579, 1582 n.4, 1992 CCH OSHD ¶ 29,662, p. 40,184 n.4 (No. 88-1545, 1992) (consolidated), *petition for review filed*, No. 92-2559 (11th Cir. June 18, 1992). Had Hern followed this procedure, it could have avoided the instant citation while fully preserving its right to defend its position vis-a-vis the validity of the warrant. Accordingly, we view Hern's decision to continue to obstruct the Secretary from inspecting its records as indicative of a lack of good faith.

We do not decide here whether the judge erred in considering Hern's financial situation as an aspect of its size when determining the appropriate penalty because Hern has not provided the Commission with sufficient information to allow us to make such a determination. The only evidence submitted in this case regarding Hern's financial situation consists of testimony by Mr. Hern that the company lost $17,000 over the five years prior to 1987. On review, Hern also calls the Commission's attention to *Hern I*, in which the evidence established that Hern had gross annual sales of $500,000 and that the penalty affirmed by the judge in that case amounted to over one-fourth of the company's $50,000 net worth. 16 BNA OSHC at 1215, 1993 CCH OSHD at p. 41,258. On the basis of this information, we are unable to draw any conclusions as to the financial health of Hern. The evidence does show, however, that Hern had only fifteen employees at the time of the citation, and on that basis we agree that Hern is a small employer.

Because we do not find that Hern is entitled to a large penalty reduction due to its financial condition, our consideration of the penalty factors in section 17(j) of the Act does not support the judge's assessment of a $200 penalty. As discussed earlier, we find that Hern's continual obstruction of the Secretary's attempts to inspect its records was not pursued in good faith. Additionally, Hern has a prior history of noncompliance with OSHA recordkeeping requirements. In light of these factors, as well as the other penalty factors set forth in section 17(j) of the Act, we find that the $200 penalty assessed by the judge barely amounts to a 'slap on the wrists.' On the other hand, we find that the $10,000 penalty proposed by the Secretary fails to consider the low gravity of the underlying violation and

the small size of the employer. We therefore conclude that, in light of Hern's history, lack of good faith and small size, and the low gravity of the violation, a penalty of $5000 is appropriate.

*IV. ORDER*

For the reasons stated above, a penalty of $5000 is assessed for Hern's willful violation of 29 C.F.R. § 1904.7.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: February 18, 1994

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | Docket No. 88-1962 |
| HERN IRON WORKS, INC., | : | |
| Respondent. | : | |

## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 18, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

February 18, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-1962

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SECRETARY OF LABOR
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OSHRC DOCKET
NO. 88-1962

# NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 11, 1992. The decision of the Judge will become a final order of the Commission on March 12, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 2, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 11, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 88-1962

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SECRETARY OF LABOR,
Complainant,

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HERN IRON WORKS, INC.,
Respondent,

OSHRC Docket No. 88-1962

APPEARANCES:

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William W. Kates, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington

For the Respondent:
Harvey Richman, Esq., Coeur d'Alene, Idaho

## DECISION AND ORDER

Loye, Judge:

This case is before the undersigned on remand from the Commission. In its remand order, the Commission directed that necessary findings be made, consistent with the order of the United States Court of Appeals for the Ninth Circuit. *See; Dole v. Hern Iron Works, Inc.*, No. 90-70089 (9th Cir. July 8, 1991) [unpublished], *rev'g. Hern Iron Works, Inc.*, 1989 OSAHRC 89/62/B7 (No. 88-1962, 1989)(ALJ).

In his 1989 decision, the undersigned found that on May 24, 1988, Respondent Hern refused to provide its injury and illness records at OSHA's request, contrary to the strictures of 29 CFR §1904.7, but that no violation of the cited standard resulted because the Secretary's attempted inspection was predicated on newly received

employee complaints rather than on a June 11, 1987 warrant. Under Commission precedent §1904.7 inspections may be conducted only with the employer's consent or pursuant to a valid warrant or administrative subpoena. *Taft Broadcasting Co., King's Island Division*, 13 BNA OSHC 1137, 1986-87 CCH OSHC ¶27,861 (No. 82-1016, 1987), *aff'd.*, (6th Cir. 1988).

The Circuit Court overturned that holding, finding that the record contained ample evidence demonstrating that the May 1988 inspection was sought pursuant to the 1987 warrant and that Hern was aware of the Secretary's reliance on that authority.

Hern's intentional violation of §1904.7, then, is clear, and it remains for the undersigned to determine only whether its refusal to provide the Secretary with copies of its records constitutes a "willful" violation.

The Commission has held that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act. Because the question of willfulness is based on the employer's state of mind, a violation cannot be willful if the employer has an objective good faith belief that it is conforming to the requirements of the law. *Secretary of Labor v. Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990).

In its Post Hearing Brief Hern argued that it held a good faith belief in its right to refuse to comply with a court order. Hern's argument rested on its attempts before the Ninth Circuit (in an action reviewing a contempt citation based on an earlier attempt to execute the same warrant) to persuade that Court to adopt an exception to the collateral bar rule, which allows a judicial order to be enforced even though the underlying decision may be incorrect or unconstitutional. Hern's argument was rejected by the Ninth Circuit in *In Re Establishment Inspection of Hern Iron Works*, 881 F.2d 722 (9th Cir. 1989).

Hern does not address this issue in its Brief On Remand and may have abandoned the defense in light of the Ninth Circuit ruling. In any event, it is clear to this judge that Hern's argument is without merit, in that an employer may not in "good

faith" rely on mere speculation that a judicial exception to the accepted operation of law may be created after the fact.

In its Brief on Remand, Respondent maintains that while refusing to provide the requested documents, John Hern held a good faith belief, based on statements made by Compliance Officer (CO) Roger Laws, that Hern could produce the requested documents as late as the informal conference, to be scheduled later, and that no violation would attach until that time (Respondent's Brief On Remand, pp. 3-4).

Hern's argument is unpersuasive. During the attempted inspection, CO Laws clearly indicated that although he personally did not have the authority to issue citations, Hern's failure to turn over the requested records constituted a violation of the cited standard at that time, and that a citation would issue. He then informed Hern of his rights to participate in both informal and formal hearings should he disagree with the allegations contained within the citation, as he routinely does in a closing conference (Tr. 81-82, 109-116; 11/13/91 Tr. 35).

Both prior to and at the time of the attempted inspection, Hern was embroiled in a number of other disputes with OSHA which resulted in litigation in the District and Circuit Courts, *e.g. see, Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838 (9th Cir. 1982) (Tr. 147, 172). Moreover, Hern consulted with his attorneys regarding the requested inspection on the morning of May 24, 1988 (Tr. 174).

Given Hern's lengthy and contentious association with OSHA, and its opportunity to consult with counsel, it is disingenuous of Hern to claim ignorance as to the standard procedures followed by the agency in issuing citations. The undersigned can attribute no good faith motivation to Hern's refusal to comply with the OSHA request on the date of the attempted inspection, and the citation will be affirmed as a "willful" violation.

Penalty

The Secretary has proposed a penalty of $10,000.00. Hern maintains that the cited violation did not constitute a direct threat of injury to any employee, and so should be classified as *de minimis*, and no penalty assessed.

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Co. v. OSHRC*, 554 F.2d 902 (8th Cir. 1977). In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHC ¶15,032 (No. 4, 1972).

As Hern has noted, the gravity of the cited violation is low. No employees were directly exposed to a hazard as a result of Hern's failure to turn over injury and illness records. However, a violation is *de minimis* only when an employer's technical noncompliance with a standard bears a negligible relationship to employee safety or health *and* it would be inappropriate to assess a penalty or enter an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987). It is clear that abatement, i.e. production of the requested records is required, and has in fact been accomplished (Tr. 181). Moreover, because Hern's willful delay in doing so resulted in the needless expenditure of the time and resources of both OSHA and the courts, assessment of some penalty is appropriate.

The Commission has stated, however, that where necessary to best effectuate the purposes of the Act, consideration must also be given to modifying factors such as the financial stability of the employer. *Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1971-73 CCH OSHC ¶15,277 (No. 881, 1972). In *Colonial Craft* the Commission found that the Act's purposes were not served by the assessment of "destructive" penalties.

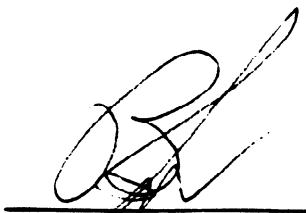
The record establishes that Hern experienced a five year net loss of $17,000.00 in the years prior to 1987 (Tr. 181), although no subsequent financial data was available. Because a small company like Hern cannot continue to sustain large losses, including large OSHA penalties, and remain in business, the Secretary's proposed penalty of $10,000.00 is deemed excessive. A penalty of $200.00 is assessed.

## Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

## Order

1. "Willful" citation 1, item 1 alleging violation of 29 CFR §1904.7 is AFFIRMED and a penalty of $200.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

**Dated:** January 31, 1992