United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. NORTH DAKOTA INNOVATIONS, INC., Respondent.	OSHRC Docket No. 18-0616

Appearances:

Alicia A.W. Truman, Esq., Department of Labor, Office of Solicitor, Denver, CO
For Complainant

Curtis Rangeloff, *pro se*, North Dakota Innovations, Inc., Tappen, ND
For Respondent

Before: Judge Patrick B. Augustine, U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a North Dakota Innovations, Inc. ("Respondent") worksite in Tappen, North Dakota on February 15, 2018. As a result of the inspection, Complainant issued a Citation and Notification of Penalty ("Citation") to Respondent alleging seven serious and three other-than-serious violations of the Act. Respondent timely filed a Notice of Contest ("NOC") with the Commission.

On July 9, 2018, the Court held a pretrial telephone conference with the parties in which Respondent clarified that he only wished to contest the amount of the penalties. (Order, July 9, 2018). Subsequently, Respondent withdrew his NOC as it relates to the citations and classification. *Id*. The withdrawal was affirmed in a second pretrial telephone conference on August 2, 2018. (Order, Aug. 7, 2018). Accordingly, the amount of the penalties is the only issue left before the Court. Both parties agreed to submit the penalty issue to the Court on argument and stipulation under Commission Rule 61, which states, in part, "[A] case may be fully stipulated by the parties and submitted to the commission or Judge for a decision at any time." 29 C.F.R. § 2200.61 (2018). The Court granted the parties two weeks to submit their stipulations and argument. (Order, Aug. 7, 2018). An additional two weeks were provided for both parties to submit Reply Briefs. *Id*.

During the July 9, 2018 pretrial conference, Respondent raised inability to pay as a part of its challenge to the penalty amount. (Order, July 9, 2018). The Court ordered Complainant to produce a list of documents necessary to consider reducing the penalty based on financial hardship. *Id*. The Court then required Respondent to produce those documents for Complainant. *Id*. Complainant requested signed tax returns and financial statements for the last three years and bank statements from the last year. (Req. for Conference Call, July 31, 2018). Respondent only provided four months of bank statements—April through July of 2018—as well as various annual lease payments for industrial equipment. (Resp't Rule 2200.61 Submission). Respondent stated that no further documentation would be produced. (Req. for Conference Call, July 31, 2018).

II. Jurisdiction

The parties have stipulated that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Order, July 9, 2018). Further, Respondent conceded that, at all times relevant to this matter, it was an employer engaged in a

business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

III. Stipulations

As previously noted, Respondent withdrew his contest of the citation items and their associated classifications. In doing so, Respondent agreed to the factual basis supporting the finding of violations and their classification. Based on the partial withdrawal of the NOC, the following disputed issues remain:

Docket Number 18-0616 (OSHA Insp. No. 1295519)

Citation 1, Items 1a, b and c: Respondent's contest was withdrawn for all elements *except* the amount of the proposed penalty.

Citation 1, Items 2a and b: Respondent's contest was withdrawn for all elements *except* the amount of the proposed penalty.

Citation 1, Items 3a and b: Respondent's contest was withdrawn for all elements *except* the amount of the proposed penalty.

Citation 2, Items 1, 2 and 3: Respondent's contest was withdrawn for all elements.

IV. Factual Background

Respondent is a flax grain seed handling company owned by Curtis Rangeloff. (Ex. 2). The company consists of five employees, four of which are members of the Rangeloff family. (Ex. 2); (NOC). Respondent owns and operates a grain elevator in Tappen, North Dakota. (Ex. 2).

Complainant received a complaint involving Respondent that related to the Regional Emphasis Program on Grain Handling Facilities and subsequently scheduled an inspection of Respondent's elevator. *Id*. At the time of the inspection, a written safety and health plan was in place. *Id*. Respondent hired a safety consultant four months before the inspection; the consultant

was actively in the process of implementing the grain handling program elements at the time of the inspection. *Id*. Despite these efforts, Complainant found multiple violations during the walkthrough inspection. *Id*.

Complainant observed an exposed floor hole adjacent to a sifter machine that was operated daily. *Id*. The hole was 14 inches wide by 72 inches long and dropped 10 feet to the back hopper. *Id*. The grating cover had been removed, which violated the standard for an employer to protect each employee from a fall hazard greater than four feet. *Id*. Complainant issued Citation 1, Item 1a for the violation. *Id*.

Citation 1, Items 1b and 1c were issued for an auger that was missing the required guard. *Id*. The unguarded auger exposed employees to unenclosed pulleys and belts which violated standards to protect employees against caught-in and amputation hazards. *Id*. Complainant grouped the three citations and considered each of the citations to have a high severity due to the likelihood of the hazards to produce serious and potentially fatal injuries. *Id*. However, Complainant considered the probability of injury to be low and therefore made a moderate gravity determination. *Id*. An initial penalty of $9,239 was calculated for the three violations. *Id*.

The next group of citations were related to dust accumulation and employee exposure to fire and explosion hazards. *Id*. Excess grain dust deeper than 1/8 inch was found in "priority housekeeping areas."[1] *Id*. This distribution area had dust accumulation as high as 3 to 4 inches and the 12-foot-deep boot pit had been filled with grain dust. *Id*. Respondent informed Complainant that the last time either area was cleaned was August 2017. *Id*. Complainant issued Citation 1, Item 2a for failing to develop and implement a housekeeping program to reduce grain dust accumulation

[1] The violations were cited under 29 C.F.R. 1910.272(j)(2) which defines "priority housekeeping areas" as "(A) Floor areas within 35 feet (10.7 m) of inside bucket elevators; (B) Floors of enclosed areas containing grinding equipment; (C) Floors of enclosed areas containing grain dryers located inside the facility."

and Citation 1, Item 2b for failing to remove grain dust accumulation that exceeded 1/8 inch in priority areas. *Id*. Complainant grouped the two items and assessed the severity, probability, and gravity of the violations as high, with an initial calculated penalty of $12,934. *Id*.

Complainant observed additional fire and explosion hazards related to electric equipment. *Id*. A general service power tap, powered by an installed general service electrical receptacle, was energized and used daily, but it was not designed for safe use in a dust heavy location. *Id*. Additional equipment, such as a general service barrel vacuum and general service Shop-Vac vacuum, were not approved for the hazardous location due to the ignitable properties of the dust present. *Id*. Complainant issued Citation 1, Items 3a and 3b for violating the standard to provide electrical equipment and devices designed and approved to be operated in hazardous locations with combustible properties. *Id*. The actual dust in the area was limited and the electrical equipment was left permanently plugged in (limiting the opportunity to produce sparks) so the Complainant found the severity, probability, and gravity of the violations to be lesser. *Id*. Complainant calculated the initial penalty as $5,543. *Id*.

The final set of violations related to continual maintenance of an effective safety program. *Id*. Citation 2, Item 1 was issued for failing to post required danger signs related to confined spaces. *Id*. Respondent claimed it provided monthly safety training to employees but was unable to produce training records to the inspector. *Id*. Complainant issued Citation 2, Item 2 for not providing training at least annually. *Id*. Similarly, Complainant issued Citation 2, Item 3 because Respondent was unable to provide required certification records of each preventive maintenance inspection despite claiming that preventative maintenance had been implemented. *Id*. Each of the violations were considered other-than-serious, and no penalty was assessed. *Id*.

Complainant calculated penalties for each citation in accordance with the OSHA Field Operation Manual. (Ex. A). Complainant applied a 70% reduction for size because Respondent has fewer than 10 employees. *Id*. The initial penalties of $9,239; $12,934; and $5,543 were reduced to $2,772; $3,880; and $1,663 respectively with the size reduction applied. (Ex. 2). Complainant did not apply a good faith reduction because "the employer did not demonstrate any effort to implement an effective workplace safety and health management system." (Ex. A). Complainant also did not apply a reduction for history because the employer had not been inspected by OSHA in the previous five years. *Id*. The final proposed penalties totaled $8,315. *Id*.

Respondent states he is unable to pay the penalties in full in light of North Dakota Innovation, Inc.'s financial hardships. (NOC). Respondent originally milled flax for Ag Motion at a rate of up to six loads per week until Ag Motion was purchased, reducing Respondent's processing to 1–2 loads of milling every other week. (Resp't Rule 2200.61 Submission). Respondent claims it is barely able to make payroll and various monthly payments with the current work load. *Id*. Respondent further states that he has already spent $15,000 on electrical work to abate the Citations and that any penalty higher than $400 would be financially disastrous. *Id*.

V. Controlling Case Law

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business[2],the

[2] Size refers to the number of employees of Respondent but may include financial condition. *See e.g., Colonial Craft Reprod*., 1 BNA OSHC 1063, 1064 (No. 881, 1972) (size includes financial condition); *Jasper Constr*., Inc., 1 BNA OSHC 1269, 1270 (No. 119, 1973) (size is determined by looking at both "gross dollar volume and the number of persons employed").

gravity of the violation[3], (3) the good faith of the employer[4], and (4) the employer's prior history of violations[5]. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

When considering penalty factors, the Commission can apply different standards to each factor than those used by OSHA. *Pentecost Contracting Corp.*, 17 BNA OSHC 1429 (No. 92-3789, 92-3790, 1995) (A.L.J.) ("Although the language in the Field Operations Manual is absolute, the FOM is not binding on the Commission…"); *see Valdak Corp.*, 17 BNA OSHC at 1135. For history, OSHA only considers inspections and violations that occurred within the previous five years. U.S. OCCUPATIONAL SAFETY AND HEALTH ADMIN., *CPL-02-00-160, Field Operations Manual* 6–7 (2016), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf [hereinafter *FOM*].[6] The Commission is not similarly limited. For example, in *American Stair*

[3] Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See e.g., Capform, Inc*., 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished). *See also Ernest F. Donley's Son, Inc*., 1 BNA OSHC 1186 (No. 43, 1973) (viewing gravity as the probability of an accident's occurrence and the extent of exposure). "A lack of injuries is not a measure for determining gravity or any other penalty factor." *Altor Inc*., 23 BNA OSHC 1458, 1468 (No. 99-0958, 2011), *aff'd* 498 F. Appx. 145 (3d Cir. 2012) (unpublished).

[4] Good faith entails assessing an employer's health and safety program, its commitment to job safety and health, its cooperation with OSHA, and its efforts to minimize any harm from the violation. *Monroe Drywall Constr., Inc*., 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013); *Nacirema*, 1 BNA OSHC at 1002.

[5] History, examines an employer's full prior citation history, not just prior citations of the same standard. *Manganas Painting Co*., 21 BNA OSHC 2043, 2055 (No. 95-0103, 2007) (Consol.) (history includes prior uncontested citations).

[6] The manual contains only guidelines for the execution of enforcement operations. Moreover, the guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straight jacket. They do not have the force and effect of law nor do they accord important procedural or substantive rights to individuals. *See Brennan v. Ace Hardware Corp*. 495 F.2d 368, 376 (8th Cir. 1974); *McCullough v. Redevelopment*

Corporation, 6 BNA OSHC 1899 (No. 77-4048, 1978) (A.L.J.), the only fact relevant to the history factor was that the employer did not have an unfavorable history. The Court considered the history factor positively—among many other factors—when reducing two proposed $10,000 penalties to $2,000 and $300. *Id*.

The Commission also has discretion to consider good faith in broader terms than those established by the FOM. *Pentecost Contracting Corp.*, 17 BNA OSHC at 1429; *see Valdak Corp.*, 17 BNA OSHC at 1135. While OSHA looks for a documented and effective safety and management program, the Commission makes a more holistic examination of an employer's safety program and overall efforts toward employee safety. *FOM* at 6–7; *Natkin & Co., Mechanical Contractors*, 1 BNA OSHC 1204 (No. 401, 1973) ("The extent of an employer's good faith is determined by an examination of its overall safety program."). As such, the Commission has considered partial compliance with OSHA standards to be enough to support a finding of good faith. *Monroe Drywall Construction, Inc.*, 24 BNA OSHC 1209 (No. 12-0379, 2013). *De novo* review of penalty determinations allows the Commission to make more holistic decisions based on a broader consideration of relevant factors. *Pentecost Contracting Corp.*, 17 BNA OSHC at 1429; *see Valdak Corp.*, 17 BNA OSHC at 1135.

Although ability to pay is not one of the four consideration criteria, the Commission has considered financial hardship in certain cases. *Colonial Craft Reproductions, Inc.*, 1 BNA OSHC 1063 (No. 881, 1972) (considering a large operations loss for a small family-run business); *Tice*, 2 BNA OSHC 1489 (No. 1622, 1975) (considering the "marginal financial situation" of a company with four employees); *Ohio State Home Services, D/B/A Everyday Waterproofing*, 15 BNA OSHC 1492 (Nos. 91-1085, 91-1448, 1992) (considering "serious financial difficulties due to economic

Authority of Wilkes Barre, 522 F.2d 858, 867-868 n. 27 (3d Cir. 1975) and *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538-539. (1970).

conditions in the area and that imposition of the full penalties proposed by the Secretary may have dire consequences upon Respondent's ability to continue its operations."). OSHA's guidance on penalty determination solely uses number of employees to determine size of the employer's business. *FOM* at 6–9. The Commission is not bound by the methods used by OSHA inspectors and instead can consider both number of employees *and* economic status of an employer when determining the size factor. *Jasper Construction, Inc.*, 1 BNA OSHC 1269 (No. 119, 1973).

Complainant offers three cases to support their position that inability to pay should not be considered in penalty determination. The Court does not find any of the cases cited by Complainant to be controlling nor persuasive. In *Dream Set Fashion, Inc.*, 16 BNA OSHC 1876 (No. 92-2962, 1994), the Commission explicitly considered the fiscal loss of the employer in a fiscal year. The Commission found that the loss did not outweigh the other factors in the penalty determination, not that the fiscal difficulties should not be considered at all. *Id*. Both of Complainant's remaining cases, *Pentecost Contracting Corp.*, 17 BNA OSHC at 1429 and *Venago Environmental, Inc.*, 18 BNA OSHC 1785 (No. 98-0408, 1999) (A.L.J.), are non-binding on this Court and their use by Complainant is unpersuasive. The court in *Pentecost Contracting Corp.* cites the decision in *Dream Set Fashion, Inc.* to support an argument that inability to pay should not be considered. 17 BNA OSHC at 1429. For reasons already discussed, *Dream Set Fashion, Inc.* does not support this argument. The Court in *Venago Environmental, Inc.* simply states "the financial condition of the employer is not one of the four factors the Commission is *required* to consider in arriving at an appropriate penalty." 18 BNA OSHC at 1785 (emphasis added). The relevant question is whether the Commission *can* consider inability to pay, not whether it *must*. Inability to pay is one fact among many considered by the Commission when exercising its discretion in assessing penalties.

Respondent asserts an inability to pay which operates as an affirmative defense. Thus, Respondent bears the burden of proof to establish its inability to pay. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993) *aff'd*, 28 F.3d 1213 (6th Cir. 1994). An employer is not entitled to a penalty reduction where its claim of financial harm is unsubstantiated. *Hern Iron Works, Inc.,* 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). While the Commission can consider a claim of financial harm, it will only do so if the claim is substantiated. *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553 (No. 94-1979, 2009). The Commission must be able to draw a clear conclusion about the financial health of an employer based on the evidence provided. *Id*. Testimony about financial hardship alone is insufficient for the Court to justify a penalty reduction based on Respondent's purported inability to pay. *Hern Iron Works, Inc.*, 16 BNA OSHC at 1619.

VI. Discussion

Citation 1, Items 1a, 1b and 1c

For Citation 1, Items 1a, 1b and 1c, Complainant assessed the severity as high, the probability as lesser, and the overall gravity as moderate. The gravity determination is appropriate for the fall and caught-in/amputation hazards present and does not need to be revisited. Similarly, the size reduction of 70% is appropriate for the small number of employees at North Dakota Innovations, Inc. Complainant did not award reductions for the history and good faith elements of the penalty determination.

Lack of bad history is not enough to award a large reduction on the history factor alone, but it can factor positively into the overall penalty determination. The FOM dictates that history reductions that reward prior compliance are solely available to employers who have been evaluated by OSHA in the last five years. *FOM* at 6–7. Under this standard, employers who have a history of compliance but have not been recently evaluated by OSHA are ineligible to receive fitting

penalty reductions. A lack of evidence should not support a presumption of bad history and justify the categorical exclusion of an employer from potential penalty reductions. The choice in *American Stair Corporation* to factor history positively into the penalty determination where there is no evidence of history is persuasive. 6 BNA OSHC 1899 (No. 77-4048, 1978) . In this case, Complainant did not provide evidence of Respondent's inspection history other than a lack thereof. No facts demonstrate the Respondent has a history of non-compliance with relevant statutes. As such, the Court will consider history positively in the penalty determination.

Good faith should also factor positively into the balancing of the different penalty factors. Respondent had a written safety plan and hired a safety consultant to help implement it to provide a safe work environment. Although violations of safety standards were present, Respondent was at least attempting to achieve compliance with OSHA standards and willingly cooperated throughout the inspection. The Commission looks at overarching efforts toward achieving workplace safety and considers partial compliance when evaluating good faith; Respondent met this standard and is entitled to some positive consideration of good faith for penalty determination. *Natkin & Co., Mechanical Contractors*, 1 BNA OSHC at 1204; *Monroe Drywall Construction, Inc.*, 24 BNA OSHC at 1209.

Considering the low possibility of injury, and factoring in considerations for good faith and history, the Court assesses a $1,750 penalty.

Citation 1, Items 2a and 2b

For Citation 1, Items 2a and 2b Complainant assessed the severity as high, the probability as high, and the gravity as high. In light of the safety concerns associated with fire and explosion on a dust heavy worksite, the gravity determination is appropriate. A proper size reduction has already

been applied. The same considerations for good faith and history used for Citation 1, Items 1a, 1b and 1c apply for this citation as well. The Court assesses a $2,500 penalty.

Citation 1, Items 3a and 3b

For Citation 1, Items 3a and 3b Complainant assessed the severity, probability and gravity as lesser. Considering the limited amount of dust and low chances of spark associated with the cited equipment the gravity determination is appropriate. Applying the same considerations in the former two penalty determinations and considering that each of the gravity factors are in the lowest range possible, the Court assesses a $500 penalty.

Citation 2, Items 1, 2 and 3

Citation 2, Items 1, 2 and 3 were classified as other-than-serious and were issued a $0 penalty. The evaluation of the penalty for the three recordkeeping violations is appropriate and the Court assesses no penalty.

Inability to Pay

As previously stated, Respondent bears the burden to prove that it warrants a further reduction in penalties due to its inability to pay beyond the reduction it has already received in its size reduction credit. Notwithstanding Respondent's claimed inability to pay, no further penalty reductions will be applied[7]. The Court requested Respondent to comply with Complainant's request to present signed tax returns and financial statements for the last three years and bank statements from the last year. Respondent never produced the documents and leaves the Court without sufficient evidence to draw a clear conclusion about the financial health of North Dakota

[7] The penalties assessed already consider, to some extent, Respondent's ability to pay. Complainant provided the maximum penalty reduction available for a company of Respondent's size. There is a built-in presumption in the size reduction that a 70% reduction would offset the financial hardship that a full penalty would cause a small business. *Natkin & Co., Mechanical Contractors*, 1 BNA OSHC at 1204 ("Consideration for employer size is based upon factors extraneous to safety and health and is primarily an attempt to avoid oppressive penalties."). Additionally, Complainant made multiple strategic choices while grouping citations which significantly decreased the initial penalty total and benefited Respondent.

Innovations, Inc. The four months of bank statements provided by Respondent do not provide an adequate basis to substantiate Respondent's claim. An unsubstantiated claim of inability to pay will not be considered by the Court. *E. Smalis Painting Co., Inc.*, 22 BNA OSHC at 1553.

VII. Order

The foregoing Decision and the partial withdrawal of Respondent's Notice of Contest relating to the classifications of the Citation issued constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Items 1(a), (b) and (c) is AFFIRMED as a GROUPED SERIOUS citation and a penalty of $1,750 is ASSESSED.
2. Citation 1, Items 2(a) and (b) is AFFIRMED as a GROUPED SERIOUS citation and a penalty of $2,500 is ASSESSED.
3. Citation 1, Items 3(a) and (b) is AFFIRMED as a GROUPED SERIOUS citation and a penalty of $500 is ASSESSED.
4. Citation 2, Item 1 is AFFIRMED as an OTHER-THAN-SERIOUS citation and a penalty of $0 is ASSESSED.
5. Citation 2, Item 2 is AFFIRMED as an OTHER-THAN-SERIOUS citation and a penalty of $0 is ASSESSED.
6. Citation 2, Item 3 is AFFIRMED as an OTHER-THAN-SERIOUS citation and a penalty of $0 is ASSESSED.

/s Patrick B. Augustine

Date: October 25, 2018
Denver, Colorado

Judge Patrick B. Augustine
Judge, OSHRC