UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MEZNER LUMBER AND SUPPLY COMPANY, dba Mezner Hardwoods Respondent.	DOCKET NO. 17-0121 17-0122

ORDER DENYING RESPONDENT'S PARTIAL MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF INCREASED PENALTIES

The Court has reviewed and considered *Respondent's Motion for Partial Summary Judgment* and *Complainant's Response in Opposition to Respondent's Motion for Partial Summary Judgment.* Respondent argues it is entitled to Partial Summary Judgment on two issues. First, Respondent alleges the increased penalties instituted by Complainant are unconstitutional.[1] Second, Respondent argues the repeat citation based on 29 C.F.R. § 1910.213(r)(4) ("Repeat Citation") is unconstitutionally vague. Complainant disputes both arguments stating the increased penalties are constitutional and the Repeat Citation is not unconstitutionally vague. Based on a thorough review of the parties' respective filings, the Court, pursuant to Commission Rule 10, severs the two issues. In this Order, the Court only addresses the arguments of the Parties as to the constitutionality of the increased penalties to permit any interlocutory appeal on this issue. *See* 29 C.F.R. § 2200.10 and 29 C.F.R. § 2200.73.[2]

[1] Respondent does not argue Complainant miscalculated the penalties under the inflation adjustment formula or did not adequately publish the proposed increases in the Federal Register.

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[2] The Court will issue under separate Order its decision on the second argument raised by Respondent, i.e. whether 29 C.F.R. § 1910.213(r)(4) is unconstitutionally vague.

Summary Judgment Standard

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The Supreme Court has held that a party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only if it might affect the outcome of the case, and thus precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the Court is required to resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the nonmoving party. *Id.* at 255. If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn, summary judgment is improper. *Celotex*, 477 U.S. at 324. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, then there is no genuine issue for trial, and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The judge's function in summary judgment cases is to determine whether there are genuine, material, disputed issues for trial; it is not to weigh the evidence. *Anderson*, 477 U.S. at 249. In addition, the Commission has often stated that it prefers to decide cases on their merits after full consideration at a hearing of all relevant evidence. *Elmer Constr.Corp*., 12 BNA OSHC 1002 (No. 83-40, 1984); *Duquesne Light Co*., 8 BNA OSHC 1218 (No. 78-5034, 1980).

Legislative History

Respondent's *Motion for Partial Summary Judgment* focuses on the statutory maximum penalty allowed for violations of the Occupational Safety and Health Act of 1970 ("OSH Act")[3]. An examination of the Federal Civil Penalties Inflation Adjustment Act of 1990 ("FCPIAA")[4], and its subsequent amendments, reveals the intent of Congress in enacting FCPIAA.[5]

a. The FCPIAA

Most of the features in the FCPIAA can be traced to S. 535 introduced by Senators Lautenberg and Levin in the 101st Congress on March 8, 1989. S. 535 unambiguously defined the "term 'cost-of-living adjustment'" as "the percentage (if any) for each civil monetary penalty by which – (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of the civil monetary penalty was last set or adjusted pursuant to law."[6] In addition, S. 535 replaced earlier bills' provisions for a simple $10 rounding provision with an elaborate, six-tiered mechanism.[7]

In section 2 of the FCPIAA, Congress concluded "the power of Federal agencies to impose civil monetary penalties for violation of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such law and regulations."[8] The impact of many of the civil monetary penalties "has been diminished due to the effect of inflation" which in turn has "weakened the deterrent effect of such penalties."[9] Congress also determined the government did not maintain a comprehensive, detailed accounting

[3] 29 U.S.C. § 651 *et seq*.
[4] Pub. L. 101-410, 104 Stat. 890 (1990), *codified as amended at* 28 U.S.C. § 2461 note.
[5] Neither party examined the legislative history of FCPIAA in their briefs.
[6] FCPIAA, *supra* note 3, § 5(b).
[7] *Id.* at § 5(a).
[8] *Id.* § 2(a)(1).
[9] *Id.* at § 2(a)(2), (3).

of the efforts of agencies to assess civil monetary penalties.[10] FCPIAA addressed this problem by requiring the administration to provide Congress with a complete list of civil monetary penalties, a calculation of the adjustment required for each penalty to keep pace with inflation, and a list of statutory changes necessary to make these adjustments.

FCPIAA set out "to establish a mechanism" that would: (1) allow for regular adjustment of civil monetary penalties; (2) maintain the deterrent effect of civil monetary penalties; and (3) improve the collection of civil monetary penalties.[11] Therefore, as originally enacted, FCPIAA did not authorize federal agencies to adjust for inflation. FCPIAA did not provide for any automatic adjustment of civil monetary penalties covered, as it was acknowledged separate legislation would be required for changes.[12]

In his remarks to the Senate, Senator Levin stated why a mechanism that would allow for adjustment of civil monetary penalties to keep up with inflation was needed. Senator Levin stated:

> We learned that CMPs are so numerous that it is difficult even to list them all. It appears that many CMPs are redundant or obsolete. Others have been eroded by inflation that they no longer have any significant deterrent effect.[13]

Senator Lautenberg, a co-sponsor of FCPIAA, recognized the need to implement a mechanism where civil monetary penalties could be adjusted periodically. Senator Lauttenberg stated as follows:

> Mr. President, when I introduced similar legislation in the 100th Congress, the bill called for automatic annual increases in penalty levels through notices in the Federal Register. In response to concerns raised by the administration, the bill was significantly revised. As modified, the

[10] *Id.* at § 2(a)(4).
[11] *Id.* at § 2(b).
[12] S. Rep. 101-240 (1990) and H. R. Rep. 101-697 (1990).
[13] 136 Cong. Rec. S1494 (daily ed. Feb. 22, 1990) (statement of Senator Levin)

> legislation requires periodic reports designed to enable Congress to pass separate legislation enacting the need for penalty increases.[14]

Representative Conyers echoed the statements of Senators Levin and Lautenberg when S. 535 was brought before the House for a vote. *See* 136 Cong. Rec. H7908 (daily ed. September 24, 1990) (statement of Rep. Conyers).

b. 1996 FCPIAA Amendments.

In 1996, Congress amended the FCPIAA to direct covered federal agencies to make their first inflation adjustments on October 23, 1996, and to make subsequent adjustments "at least once every four years thereafter."[15]

Section 4 of FCPIAA, as amended in 1996, directs "[t]he head of each agency…by regulation" to perform an "inflation adjustment" for each "civil monetary penalty provided by law within the jurisdiction of the Federal agency."[16] FCPIAA then instructed each agency to publish the resulting regulation in the Federal Register.[17]

According to section 5 of the FCPIAA, "[t}he inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment."[18] Section 5 also prescribed an elaborate six tier process for the rounding of any increase determined under the inflation adjustment provision.[19] The 1996 amendments to

[14] 136 Cong. Rec. S1493 (Feb. 22, 1990) (statement of Senator Lautenberg).
[15] Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s)(1)(A), 110 Stat. 1321, 1373. This Act was an omnibus budget bill; therefore, the legislative record consequently left no trace of any discussion in which Congress might have debated the 1996 amendments.
[16] FCPIAA, § 4(1).
[17] *Id.* at § 4(2).
[18] *Id.* at § 5(a).
[19] *Id.*

FCPIAA also imposed a new ten percent cap on the initial inflation adjustment of any civil monetary penalty required under section 4 of FCPIAA.[20]

Section 6 of FCPIAA ensures inflation-adjusted increases are strictly prospective in application.[21] Finally, the 1996 amendments to FCPIAA, exempted four statutes from the inflation adjustment provisions of FCPIAA: the Internal Revenue Code of 1986, the Tariff Act of 1930, the OSH Act, and the Social Security Act.[22]

c. 1998 FCPIAA Amendment

The FCPIAA, again amended in 1998, abolished the President's obligation to provide annual reports under the original statute.[23]

d. Federal Civil Penalty Inflation Adjustment Act of 2015

This leads us to the most recent amendments to the FCPIAA which were enacted in 2015. ("2015 Amendments").[24] Prior to the 2015 Amendments, civil monetary penalties assessed under the OSH Act were not subject to the consumer price index adjustment that other agencies civil monetary penalties were permitted. Section 701 of the 2015 Amendments removed that restriction and permitted civil monetary penalties assessed under the OSH Act to be increased. In addition, section 701 contained provisions for "catch-up" adjustments, and set forth procedures for subsequent adjustments. Congress, through this action, permitted the Occupational Safety and Health Administration ("OSHA") to increase its civil monetary penalties notwithstanding the fact the OSH Act was never amended to increase the maximum penalty amounts contained in statute.

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[20] Pub. L. No. 104-134, § 31001(s)(1), 110 Stat 1321, 1373 (1996).
[21] FCPIAA, § 6.
[22] *Id.* at § 4(1).
[23] Pub. L. 105-362, title XIII, § 1301(a), 112 Stat. 3293 (1998).
[24] Federal Civil Penalties Inflation Adjustment Act of 2015, Pub. L. 114-74, Title VII, § 701 *et. seq.,* Nov. 2, 2015, 129 Stat. 599 which enacted the note and provisions set out as a note under 28 U.S.C.A. § 1.

The 2015 Amendments also added a new section 7 to FCPIAA to: (1) require the Office of Management and Budget to issue guidance to Federal agencies on implementing the inflationary adjustments permitted; (2) require Federal agencies to include information about civil monetary penalties assessed, collected and adjusted in OMB Circular A-135 which agencies are required to complete; and (3) directed the General Accounting Office to annually submit a report to Congress on Federal agencies compliance with FCPIAA.[25]

Analysis and Legal Precedent

Thus, at issue in this case, is removal of the OSH Act from a list of statutes exempted from inflationary civil monetary penalty increases which, in effect, permitted OSHA to now adjust the civil monetary penalties under the OSH Act according to the inflationary provisions of FCPIAA. A "catch-up" adjustment was also authorized for the initial penalty changes. Accordingly, pursuant to the 2015 Amendments, OSHA increased the maximum penalty for a: (1) serious violation from $7,000.00 to $12,471.00; (2) repeat violation from $70,000.00 to $124,709.00; and (3) willful violation from $70,000.00 to $124,709.00.[26]

Respondent argues, due to "flawed legislation" contained in the 2015 Amendments, the statutory limits, as identified above for serious, repeat, and willful violations were left in the statute. Respondent is correct. 29 U.S.C. § 666. Respondent argues until these long-standing statutory maximums are deleted from the OSH Act, or amended, tangential legislation generally authorizing OSHA to increase its civil monetary penalties based on inflation cannot be implemented. In addition, Respondent argues that proposed legislation in the 115th Congress[27] to

[25] *Id.*
[26] The violation in the actions before the Court occurred after November 2, 2015, and was assessed between August 1, 2016 and January 13, 2017; thus, the amounts identified apply. Department of Labor Federal Civil Penalties Adjustment Act Clean Up Amendments, 81 Fed. Reg. 43430 (July 1, 2016).
[27] H.R. 914 and S. 1000, 115th Cong. (2017). Neither of these bills has been enacted into law. Therefore, Respondent's argument these bills demonstrate a congressional intent the OSH Act must be amended to allow the inflation adjustments permitted under FCPIAA to take effect is not persuasive. Simple introduction of a bill in

amend the OSH Act demonstrates the intent of Congress that the OSH Act must be amended before tangential legislation generally authorizing OSHA to increase civil monetary penalties based on inflation can be implemented.

Complainant responds in opposition by arguing the 2015 Amendments expressly required OSHA to adjust the maximum penalty for violations based on a specific, mandated, mathematical formula.

1. Case law.

Our analysis begins with whether the Supreme Court has squarely decided the issue presented. Complainant identified a Supreme Court case which seems to recognize, though not explicitly analyzing the issue, that Congress can authorize civil monetary penalty increases through inflation adjustment legislation, despite leaving contradictory language in the original statute. *Sackett v. E.P.A.*, 566 U.S. 120, at 123 fn. 1 (2012)(noting the "original statute set a penalty cap of $25,000 per violation per day" and the Inflation Adjustment Act of 1990 authorized "the EPA to adjust the maximum penalty for inflation.")

However, since there does not exist a Supreme Court squarely on point, the Court notes the next analysis focuses on whether the Commission has addressed the issue. The parties cited no Commission case law which has addressed this issue.

In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted). These cases invoke the

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Congress demonstrates no intent of Congress. The bills merely express the position of the individual sponsors. Therefore, the Court gives no weight to Respondent's argument in this regard. Also, Respondent cannot point to any legislation passed by Congress between 1996 and 2015 which amended *any* Federal agency statute to reflect an increase in civil monetary penalties when the Federal Agency head has acted under the FCPIAA. (Emphasis added).

jurisdiction of the Seventh Circuit Court of Appeals since the Respondent resides in that circuit, and the inspection took place in that circuit. The Seventh Circuit, as well as the D.C. Circuit Court of Appeals, has not addressed this issue.

However, three circuits have addressed the ability of Federal agencies to increase their civil monetary penalties under the FCPIAA notwithstanding Congress never amending the agency statute which authorized the civil monetary penalties in the first instance. While none of the circuits have addressed the issue in the content of OSHA's authority under the 2015 Amendments, the Court finds these opinions persuasive as they examine the overall authority of Federal agencies to adjust civil monetary penalties under FCPIAA. *See Knapp v. U. S. Dep't of Agric.,* 796 F.3d 445, 464-65 (5th Cir. 2015)(recognizing the Inflation Adjustment Act increased the penalty amount above the original statutory maximum for the Animal Welfare Act); *United States v. EME Home City Gener., L.P.,* 727 F.3d 274, 284 n.12 (3rd Cir. 2013)(noting that the Environmental Protection Act had a statutory maximum, but the Inflation Adjustment Act mandated that the penalty amount increase above this maximum); *McCloy v. U.S. Dep't of Agric.,* 351 F.3d 447, 448 (10th Cir. 2003)(noting the maximum penalty under the Horse Protection Act was increased by the Inflation Adjustment Act.) Respondent directed the Court to no case law which has stated civil monetary penalties could not be adjusted under FCPIAA until the Federal agency statute was amended.[28] This Court finds the above legal precedent establishes OSHA's authority to increase the penalties under the OSH Act notwithstanding that the OSH Act was never amended by Congress to recognize the inflation adjustment.

[28] Federal agencies, other than OSHA, since 1996 have adjusted their civil monetary penalties under the FCPIAA. Respondent can cite to no case law over a 20 year period which states Federal agencies cannot adjust their civil monetary penalties where the maximum amount set forth in their enabling legislation has remained unchanged.

2. Congressional Intent.

The resolution of a potential conflict between federal statutes – in this case, the statutory penalty maximums still contained in Section 17 of the OSH Act, and the 2015 Amendments – depends on an analysis of Congressional intent. *N. Y. Tele. v. N. Y. State Dept. of Labor*, 440 U.S. 519 (1979). The 2015 Amendments clearly expressed Congressional intent to: (1) remove the OSH Act from those statutes previously exempted from civil monetary penalty adjustments; and (2) to permit OSHA to implement a one time "catch-up" increase. The 2015 Amendments clearly expressed Congressional intent to authorize OSHA to modify penalty maximums pursuant to inflationary information and a prescribed formula in the future. When read in conjunction with one another, this Court finds that Congress intended, through the 2015 Amendments, to allow OSHA to increase the maximum penalty for violations at the time of these alleged violations[29], despite leaving the previous maximums in the language of section 17(b) of the OSH Act.

It is clear from the remarks of Senator Levin that civil monetary penalties were numerous and the scope totally unknown to Congress. It would be a daunting task to require Congress every time it desires an increase in a civil monetary penalty to amend the statute that contains the civil monetary penalty maximum. Instead, Congress devised a mechanism where it authorized Federal agency heads to adjust their civil monetary penalties by following the formula set forth in the FCPIAA and publish those increases in the Federal Register. It is clear the intent of Congress was this mechanism would empower a Federal agency head to adjust their civil monetary penalties for inflation without the need of Congress to also pass an amendment to the statute containing the civil monetary penalty. To require Congress to amend the Federal agency statute every time a civil money penalty was adjusted by the Federal agency head under the

[29] OSHA penalty maximums were modified again in January 2017, after the factual events relevant to this case.

FCPIAA would be to render the mechanism of the FCPIAA superfluous.

3. Reconciliation of Two Statutes.

Finally, the Court must read the two statutes (here the OSH Act and the 2015 Amendments) to give effect to each if it can do so while preserving their sense and purpose. *Morton v. Mancari,* 417 U.S. 535, 551 (1974). The Court declines to read the statutes as being in irreconcilable conflict. The two statutes can be reconciled by examining the legislative history. Senator Lautenberg recognized Congress would need to pass "separate legislation" in order to enact penalty increases. Congress, in enacting FCPIAA in 1996, passed the subsequent legislation referred to by Senator Lautenberg to permit civil monetary penalty increases. Congress enacted subsequent legislation to allow civil monetary penalties to be increased irrespective of Congress not amending the Federal agency statute to reflect the inflationary penalty adjustment increase.

An examination of the definition of "civil monetary penalty" set forth in FCPIAA is also helpful to reconcile the FCPIAA and the OSH Act. The definition reads as follows:

> (2) "civil monetary penalty" means any penalty, fine, or other sanction that –
> (A)(1) is for a specific monetary amount as provided by Federal law; or
> (ii) has a maximum amount provided for by Federal law; and
> (B) is assessed or enforced by an agency pursuant to Federal law; and
> (C) is assessed or enforced pursuant to an administrative proceeding or in a civil action in the Federal courts; and
> (3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

See FCPIAA, § 3(2) and (3).

Thus, by its definition a civil monetary penalty that has a maximum amount under Federal law (like the OSH Act) is subject to a Consumer Price Index adjustment as defined in §

3(3) of FCPIAA.

Congress sent a message loud and clear – statutes establishing civil monetary penalties were numerous and many unknown. Congress, even though it did not know the exact universe of civil monetary penalties, made a finding that the deterrent effect of civil monetary penalties was being eroded since Federal agency statutes had not been amended to increase penalties. Congress passed subsequent legislation which established a mechanism which required civil monetary penalties to be increased under an inflation adjustment formula. Congress did not make the actions of Federal agencies permissive; it required the Federal agencies to periodically adjust civil monetary penalties to maintain deterrence.

Congress exercises its oversight by requiring Federal agencies to publish in the Federal Register and requiring the General Accounting Office to report to it annually on Federal agency compliance. To the extent Congress determines the Federal agency had acted *ultra vires,* or did not act at all, it could amend FCPIAA to prohibit the Federal agency from exercising it powers in the future or it could pass overriding legislation. Thus, when reviewing the legislative history, it is clear the two statutes can be read as complimentary to one another as opposed to being irreconcilable.

The legislative history, legislative amendments, and case law leads the Court to conclude OSHA acted as required under the FCPIAA in adjusting its civil monetary penalties and the penalties established are constitutional. The Court finds Respondent failed to establish that it is entitled to judgment as a matter of law. Respondent's *Motion for Partial Summary Judgment* on the issue of the constitutionality of OSHAs increased penalties enacted pursuant to the 2015 Amendments is DENIED.

SO ORDERED.

s/ Patrick B. Augustine

Date: September 6, 2017
Denver, Colorado

Judge Patrick B. Augustine
Judge - OSHRC