United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.

UNITED STATES POSTAL SERVICE, and its Successors,
.,
Respondent.

OSHRC Docket No. 16-0736

ORDER

Respondent filed a timely Notice of Contest (NOC) on February 1, 2016, thereby bringing this matter properly before the Commission. 29 U.S.C. § 659(a). Under Commission Rules, the Secretary was required to file a Complaint by February 22, 2016. The Secretary neglected to do so but then did file an unopposed Motion to File Complaint Out of Time on April 20, 2016. This Court granted this Motion on May 20, 2016. *See* 29 C.F.R. § 2200.5 (permitting extensions of time).

Also on April 20, 2016, the Secretary filed a Motion to Amend the Citation and Complaint. There was no timely response from Respondent on this Motion and, on May 19, 2016, this Court granted the Motion. *See* 29 C.F.R. § 2200.40 (requiring responses to motions to be filed within 10 days of service). Subsequently, on May 20, 2016, Respondent filed a Response to the Motion to Amend Citation and Complaint, even though that Motion had already been granted. A few days later, after having learned of the Court's May 19, 2016 Order granting the Motion to Amend the Citation and Complaint, Respondent filed a Motion to Reconsider Order On Motion to Amend Citation and Complaint on May 25, 2016.

WHEREFORE, PREMISES CONSIDERED, Respondent's Motion to Reconsider Order On Motion to Amend Citation and Complaint in the above referenced matter is GRANTED.

Respondent's NOC indicates that it seeks to contest "the citation" and it specifically

notes that this challenge encompasses "all items, subparts, the proposed abatement dates, the proposed abatement method and the classification of the citation." Thus, by its express terms, the NOC is not limited solely to the merits of the citation. Nor does it indicate that the penalty amount, or any other aspect of the citation, is accepted as proposed. The Court notes that Respondent's NOC is signed by an attorney.

Respondent urges the Court to view its NOC as not challenging the penalty amount and asserts that by omitting such a challenge the Secretary's proposed penalty in the Citation became a final order of the Commission not subject to review.

The Respondent cites *Brennan v. OSHRC & Bill Echols Trucking Co.* (*Echols)*, 487 F.2d 230 (5th Cir. 1973) and *Dan J. Sheehan Co. v. OSHRC*, 520 F.2d 1036 (5th Cir. 1975) as support for its contention that the Commission has no jurisdiction to decide the penalty amount if it is not explicitly raised by the NOC. Both cases involved purported NOCs that did not challenge the merits of the citation. In *Echols,* the employer indicated that the proposed abatement had been implemented and asked "that the penalty be abated." 487 F.2d at 233. The Commission construed the letter as a NOC. *Bill Echols Trucking Co.,* 1 BNA OSHC 1107 (No. 1589, 1973.) It then proceeded to vacate both the citation and the penalty amount, not on the merits, but as a sanction because the Secretary was significantly late in forwarding the NOC to the Commission, as required. *Id.* The Fifth Circuit concluded that the Commission was within its discretion to construe the letter as a NOC of the penalty amount, but that it should have afforded the Secretary a hearing before it dismissed the citation for the late transmittal. 487 F.2d at 234.

In *Sheehan,* the employer filed a letter which explicitly stated "[w]e are not contesting your August 3, 1973 citation" and admitted to the violation. It only asked the agency to "look further into the matter" and "possibly" lift the proposed penalty. The Administrative Law Judge (ALJ) concluded that the letter only challenged the penalty amount and found that the record "shows the nature of the violation." *Dan J. Sheehan Co.*, 2 BNA OSHC 3033 (No. 4298, 1974). He then weighed the penalty factors and assessed a penalty consistent with the amount the Secretary proposed. *Id.* On review, the Court determined that the ALJ could not have reached the merits of the citation given the terms the letter the employer submitted but declined to resolve whether there was a valid NOC at all. 520 F.2d at 1038 (concluding that "at most" the letter was

"a weak attempt to contest the proposed penalty").

At best, both of these decisions suggest that the Fifth Circuit may permit challenges solely to penalty amounts. Neither case addresses the situation we have here with an employer who clearly challenged the merits, abatement, and characterization but alleges that it did not intend to contest the penalty amount.[1] Respondent has not identified any case where either the Commission or a reviewing court determined that the terms of a NOC deprived the Commission of its authority under the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678, to determine penalty amounts. *See* 29 U.S.C. § 666(j). On the contrary, since its early days, the Commission has found that a timely NOC puts in issue not only the violations alleged in the citation but also the assessment of the proposed penalties. *William Turnbull d/b/a Turnbull Millwork Co.,* 3 BNA OSHC 1781 (No. 7413, 1975) (discussing *Echols*); *Florida East Coast Properties, Inc.*, 1 BNA OSHC 1532 n. 3(No. 2354, 1974) (distinguishing challenges to merits only from challenges solely to penalties); *Danco Costr. Co.*, 3 BNA OSHC 1114 (No. 4681, 1975) (consol.) (explaining that although under Fifth Circuit precedence a citation becomes final and unreviewable when an employer contests only a penalty, "the converse is not true."). *Cf. Thorleif Larsen & Son, Inc.,* 1 BNA OSHC 1095 (No. 370, 1974) (refraining from exercising the Commission's right to make a *de novo* penalty determination if there is no objection to the penalty amount from any part and the amount is not "clearly repugnant" to purpose of the Act).

The view that the Commission's jurisdiction to be the final arbiter of penalties is not eliminated if a party fails to explicitly challenge the penalty amount in its NOC is consistent with the express powers granted to it under the Act. "The Commission shall have authority to assess all civil penalties provided in this section." 29 U.S.C. § 666(j). Penalties for violations are assessed by the Commission, not the Secretary. *Long Mfg. Co., N.C., Inc. v. OSHRC*, 554 F.2d 903, 906 (8th Cir. 1977) ("An employer may accept the citation and proposed penalty without protest if he chooses to do so, but in our view if he chooses to contest the matter before the Commission he does not have any vested right … to be free from exposure to a penalty in excess of that originally proposed."). "The Secretary's proposed penalty for a violation is effective only if not contested; once contested, [the Commission] can affirm the proposed penalty, modify it, vacate it, or direct other appropriate relief." *Ca. Stevedore & Ballast Co. v. OSHRC*, 517 F.2d

[1] The Court notes that Respondent's NOC did not evince a clear intent to accept the proposed penalty.

986, 988 (9th Cir. 1975). Thus, the Commission "determines the penalty *de novo*, considering the proposed penalty as, in fact, only a proposal." *Id. See e.g. REA Express, Inc. v. OSHRC,* 495 F.2d 822, 827 (2nd Cir. 1974) (permitting penalty in excess of initial proposal).

The provision of the Act relied on by Respondent does not support a contrary view. 29 U.S.C. § 659(a) states that the employer "has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed penalty." If the employer fails to "contest the citation *or* proposed assessment of penalty" then "the citation *and* the assessment, as proposed, shall be deemed a final order of the Commission." 29 U.S.C. § 659(a) (emphasis added). This suggests that in order for there to be a final order of the Commission, the employer must contest neither the citation nor the proposed penalty.[2] *Id.*

Respondent also asserts that 29 C.F.R. § 1903.17(a) bolsters its position that the Commission has no jurisdiction over the penalty amount if it is not contested by the employer. This regulation indicates that any employer "may" notify the Area Director that it "intends to contest" the citation "or proposed penalty before the Review Commission." 29 C.F.R. § 1903.17(a). If the employer chooses to take this step, then the notice of contest "shall specify whether it is directed to the citation or to the proposed penalty, or both." The regulation does not deprive the Commission of its authority, set forth in 29 U.S.C. § 666(j), to set appropriate penalties for contested citations that come before it. Instead, it informs employers of the right granted to them by the Act and indicates how they are to exercise that right if they so choose.[3] 29 C.F.R. § 1903.17(a).

The Court notes that by granting Complaint's Motion to Amend Citation and Complaint, it is by no means finding that $50,000 would in fact be an appropriate penalty if the Secretary establishes that Respondent violated the Act as alleged and no affirmative defenses are proven.

[2] The Court notes that 29 U.S.C. § 659(c), which concerns the requirement that the Secretary advise the Commission of the employer's NOC, does not discuss the scope of the challenge raised. Rather it says that if the employer notifies the secretary that "he intends to contest a citation" or if an employee alleges "the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing." 29 U.S.C. § 659(c).

[3] The Court notes that Respondent does not allege that the Secretary proposed amending the penalty amount as retaliation for it exercising its right to contest the citation. The Secretary indicates that the penalty amount listed in the citation was the result of clerical error, and there is no allegation otherwise. (Sec'y Motion to Amend Citation and Complaint at ¶3.)

If a violation is established, and depending upon its characterization, a penalty determination will be made based on the factors set forth in the Act. *See* 29 U.S.C. § 666; *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622-24 (No. 88-1962, 1994); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [Act] places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Nothing in this Order shall be construed as limiting either party from presenting evidence related to the characterization of any violation or the appropriateness of any penalty amount.

Finally, the Court finds that Respondent's Motion to Reconsider Order On Motion to Amend Citation and Complaint is solely concerned with the Secretary's request to modify the proposed penalty to $50,000. It raises no objections to the requested changes to rest of the Citation and Complaint. Accordingly, the citation is hereby modified consistent with this Court's May 19, 2016 Order.

THEREFORE, the Complainant's Motion to Amend Citation and Complaint, the Respondent's Response to Motion to Amend Citation and Complaint, and the Respondent's Motion to Reconsider Order on Motion to Amend Citation and Complaint, having come for consideration and it appearing that Complainant's Motion to Amend Citation and Complaint is appropriate it is ORDERED that the Motion is GRANTED.

It is further ORDERED that Respondent's Request for Clarification of Deadline to File Answer having come for consideration and it appearing that the Request is appropriate and well-taken, it is therefore GRANTED. Respondent shall file its Answer by June 15, 2016.

SO ORDERED.

/s/ Covette Rooney
COVETTE ROONEY
Chief Judge, OSHRC

Dated: May 26, 2016
Washington, D.C.