

Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket Nos.
	:	
John B. Coffman, d/b/a	:	97-1426 and 97-1427
Southeast Industrial Painting,	:	
Respondent.	:	

Appearances:

Rafael Batine, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Daniel A. Smith, Esquire
Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

John B. Coffman, d/b/a Southeast Industrial Painting, was a sole proprietorship engaged in tank painting and renovation in 1997. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite in Orange Park, Florida, on August 15, 1997. As a result of this inspection, respondent was issued five citations. Respondent filed a timely notice contesting the citations and proposed penalties. These cases were stayed pending the completion of a related criminal proceeding. Judgment was entered in the criminal case on January 25, 2000. A hearing was held in this matter in Jacksonville, Florida, on March 9, 2000. Prior to the hearing, respondent amended his notice of contest to contest only the proposed penalties. The notice of contest does not place in issue the facts of the violations or the reasonableness of the abatement dates. Respondent asserts that he does not have the financial ability to pay the proposed penalties. The two cases were consolidated for purposes of hearing pursuant to the Secretary's unopposed motion.

The Secretary presented evidence at the hearing relating to factors considered in proposing penalties for the violations in both cases. Respondent presented evidence relating to his claim of financial inability to pay the proposed penalties.

At the conclusion of the hearing, a decision was issued from the bench stating the issues, setting forth my findings of facts and conclusions of law, and assessing total penalties of \$11,400 for both cases. In Docket No. 97-1426, penalties in a total amount of \$5,600 are deemed appropriate and in Docket No. 97-1427, penalties in a total amount of \$5,800 are deemed appropriate.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto and incorporated into this decision.

It is well established that the Commission has the exclusive authority to assess penalties for contested violations. When contested, the Secretary's proposed penalties become advisory and the Commission makes a de novo assessment of penalties. *See e.g. Reich v. Arcardian Corp.*, 110 F.3d 1192 (5th Cir. 1997); *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975); *Hern Iron Works, Inc.*, 16 BNA OSHC 1621, 1993-95 CCH OSHD ¶ 30,363, p. 41,881 (No. 88-1962, 1994).

Penalty assessment factors of gravity of the violations, size of the employer, good faith and history of violations or compliance with the Act must be considered. These factors, however, need not be accorded equal weight by the Commission in determining the appropriate penalty. While gravity is generally the primary element considered, the Commission has wide discretion in penalty assessment. *Orion Construction, Inc.*, 18 BNA OSHC 1867, 1999 CCH OSHD ¶ 31,896, p. 47,220 (No. 98-2014, 1999). Each case must be decided on factors unique to that case.

In this case, the overriding factor is respondent's size. This includes consideration of his financial condition. From its earliest decisions until present, the Commission has assessed

penalties that effectuate the remedial purpose of the Act, to assure a safe and healthful workplace, and that avoid the imposition of destructive penalties. *See Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶ 15,277, p. 20,368 (No. 881, 1972).

As detailed more fully in the bench decision, Mr. Coffman is no longer engaged in tank painting. He had no more than five employees in 1997. He has none now. He drives a truck hauling cattle. He has limited assets. He is supporting four children of his own, and his wife has three other children. 29 U.S.C. § 666(a) requires a minimum penalty of \$5,000 for each willful violation. In light of this statutory requirement, all interrelated violations were grouped to avoid excessive penalties, given respondent's obligations and limited financial resources.

FINDINGS OF FACT AND
AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED that the following penalties are assessed for both cases:

Docket No. 97-1426

Citation <u>No.</u>	Item <u>No.</u>	Assessed <u>Penalty</u>
1	1	\$ 100
1	2-7 (Grouped)	500
2	1a-d	5,000
3	1, 2	<u>- 0 -</u>
	Total	<u>\$5,600</u>

Docket No. 97-1427

<u>Citation No.</u>	<u>Item No.</u>	<u>Assessed Penalty</u>
1	1-10 (Grouped)	\$ 800
2	1, 2 (Grouped)	<u>5,000</u>
	Total	<u>\$5,800</u>

STEPHEN J. SIMKO, JR.
Judge

Date: March 27, 2000