



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

Office of
 Executive Secretary

Phone: (202) 606-5400
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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 93-2428
	:	93-2429
MRC TECHNOLOGIES, INC. ,	:	
	:	
Respondent.	:	

ORDER

On April 22, 1996, these cases were directed for review by Commissioner Daniel Guttman after the Secretary filed a petition for discretionary review taking exception to the administrative law judge's reduction of the proposed penalties for one willful and twenty-eight serious violations. On May 3, 1996, the Secretary filed a motion to vacate direction for review stating in part that the Secretary has concluded that no further appeal of the judge's decision in these cases is warranted. He requests that the judge's decision and order be deemed final in all respects.

Inasmuch as the Secretary no longer takes exception to the administrative law judge's decision, we construe the Secretary's motion as a motion to withdraw his petition for discretionary review and we grant the motion. Accordingly, the administrative law judge's decision is affirmed as a final order of the Commission without review of the exceptions taken by the Secretary in his petition for discretionary review.

So ordered.

BY DIRECTION OF THE COMMISSION

Ray H. Darling, Jr.
 Executive Secretary

Date: May 16, 1996

93-2428

93-2429

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
Laura V. Fargas
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Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen
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Morton H. Abramowitz, Esquire
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Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
Review Commission
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SECRETARY OF LABOR
Complainant,
v.
MRC TECHNOLOGIES, INC.
Respondent.

OSHRC DOCKET
NOS. 93-2428
93-2429

**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 March 21, 1996. The decision of the Judge will become a final order of the Commission on April 22, 1996 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 April 10, 1996 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: March 21, 1996

DOCKET NOS. 93-2428 & 93-2429

NOTICE IS GIVEN TO THE FOLLOWING:

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	:	
Complainant,	:	OSHRC
	:	Docket Nos. 93-2428
	:	93-2429
v.	:	
	:	
MRC TECHNOLOGIES, INC.	:	
	:	
Respondent.	:	

Appearances:

Janice Silberstein, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

Morton H. Abramowitz, Esq.
 Niagara Falls, New York
 For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

MRC Technologies, Inc. (MRC), was cited on July 29, 1993, for numerous serious and nonserious violations of various safety and health standards. In addition, MRC was also cited for willful violation of a crane safety standard. The Secretary proposes that penalties be assessed in the total amount of \$35, 250, including \$10,500 for the willful violation. At the commencement of the hearing MRC stipulated to the existence of the violations, but challenged the assessment of the proposed penalties on the ground of financial hardship.

The three citations in Docket No. 93-2428 contain 26 serious violations, one willful and 5 nonserious. The second case comprises two serious and two nonserious violations. Under the

penalty provisions of 29 U.S.C. § 666 of the OSH Act, a willful violation may be assessed as much as \$70,000 but not less than \$5,000. A penalty of up to \$7,000 may be assessed for each serious or nonserious violation.

Section 17(j) of the Act, 29 U.S.C. § 666(j),¹ provides that penalties be assessed on the basis of four factors: the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. The statute does not mandate consideration of each of these factors nor does it indicate what weight to give each factor. Instead, they are to be given "due consideration" *Southwest Refractory, Inc. v. Secretary of Labor*, No. 94-9514, 1996 WL 1147 (10th Cir. Jan. 2, 1996).

The Secretary called as his witnesses two compliance officers who conducted the inspections in the two cases. Their testimony conformed with the formulas devised by the Secretary to promote consistency in calculating penalties for each type of violation.² For each of the violations, the compliance officers recounted their assessments of the severity and probability of the injury or illness which could occur as a result of each violation. FIRM provides that "[a] maximum penalty reduction of 60 percent is permitted for small businesses." A "small business" is defined as one having one to twenty-five employees. Because it had eighteen employees at the time of the OSHA inspection, MRC was given a 60 percent reduction for size (Tr. 17). The Secretary acknowledged that all violations were corrected by the time a follow-up inspection was done by OSHA on December 21, 1993 (Tr. 85).

¹The 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. 29 U.S.C. § 666(j).

²OSHA's Field Inspection Reference Manual (FIRM) outlines the penalty structure as a general guideline. The gravity of the violation is the primary consideration in assessing penalties. While evaluating the gravity factor requires consideration of numerous elements for classifying a hazard, the "size of the business" is "measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months." FIRM, IV-7,8,13.

In support of its case, MRC focused on two points: Douglas Ferguson, a member of MRC's management, testified that among his principal responsibilities since the 1993 inspection was to monitor compliance with the OSHA safety and health regulations (Tr. 152-53, 155). Two other witnesses were called and documents were presented to describe MRC's financial condition. Jean Rowley, formerly employed as executive vice president of Marine Midland Bank, began his business relationship with MRC in 1992 in connection with a loan in the amount of \$450,000 furnished by the New York Business Development Corp. (NYBDC) to MRC and secured by a mortgage on the latter's business property and manufacturing equipment which was the subject of the OSHA inspection (Tr. 122, 128-29).

Three other major creditors whose loans totaled approximately \$300,000 are also secured by liens on the business property and manufacturing equipment: the Regional Development Corp.; the Buffalo Enterprise Development Corp; and the Small Business Administration (SBA). The first two lenders are quasi public institutions which provide financial assistance to foster job opportunities in the region (Tr. 139; R-3). The SBA is a federal financial assistance agency.

Rowley testified that in early 1994, NYBDC brought foreclosure action against MRC but subsequently agreed not to seek a remedy under the mortgage lien in consideration of receiving the monthly payments from a recent leasing arrangement between MRC and an independent firm for the lease of a certain portion of the space at MRC's facility (Tr. 149-51; Exh. R-5). All of the secured loans were delinquent save that with the SBA, and each of those creditors agreed to forbearance of efforts to collect the indebtedness so long as the SBA loan payments remain current (Tr. 131-32; Exh. R-3). Rowley expressed concern for MRC's financial viability inasmuch as it was operating at a loss mitigated somewhat by proceeds from the sale of equipment (Tr. 130, 132; Exh. R-3).

James Leimkuehler, MRC's sole stockholder and president, testified that the firm's major business involved the repair of stone-crushing equipment which was directly related to road construction, a business that had suffered a downturn in recent years. He currently employed six or seven full-time workers and just a few months previously, that number was down to only two or three employees along with some part-time workers. The company was operating on a month-to-month basis but he expressed some hope that employment could rise to as much as twenty people if business improved and the company operated with care. He noted that he had an agreement with

his creditors to limit his salary to \$69,000 a year until all secured debt payments were current (Tr. 178; Exh. R-3).

The Secretary objected to the presentation of evidence regarding MRC's financial condition, claiming that it was not relevant to the statutory penalty criteria (Tr. 123). This position is at odds with the cases decided by the Commission and the courts of appeals.

There is nothing in the OSH Act which lends support to the Secretary's narrow view of measuring the size of the employer's business simply on the basis of the maximum number of employees. In evaluating the facts of each case, the Commission considers the dollar volume of the business, the total number of employees, and the employer's financial condition. In *Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1065, 1972 CCH OSHD ¶ 15,277 (NO. 881, 1972), the Commission summarized some principles applicable to the present case:

Size has a direct correlation to an employer's financial condition and to the number of employees. Respondent here is operating at a deficit and with less than 10 part-time employees. Adjustment of the penalty for the employer's size is primarily an attempt to avoid destructive penalties, and must be of major consideration here. The primary objective of the Act is to secure a safe and healthful work place, and we are convinced that in the circumstances of this case this objective would be better served by the non-assessment of penalties.

See also: *Tice Industries*, 2 BNA OSHC 1489, 1975 CCH OSHD ¶ 19,222 (No. 1622, 1975); *Penn Central Transportation Co.*, 3 BNA OSHC 1856, 1975 CCH OSHD ¶ 18, 788 (No. 5796, 1975); *Specialists of the South, Inc.*, 14 BNA OSHC 1910, 1990 CCH ¶ _____ (No. 89-2241, 1990); *Desarrollos Metropolitanos, Inc., v. OSHRC*, 551 Fed.2d 874, 877, (1st Cir. 1977).

Clearly, it would be unreasonable to ignore the difficult financial conditions under which MRC must manage its affairs. It has demonstrated good faith by accomplishing full abatement and establishing a monitoring procedure to ensure future compliance. In keeping with the Commission's doctrine of avoiding destructive penalties, the penalty for the willful citation is reduced to the statutory minimum of \$5,000 and the remaining penalties are also modified to a total amount of \$1,000.

Based upon the foregoing finds and conclusions, it is
ORDERED that the citations are affirmed and penalties in the total amount of \$6,000 are assessed.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: March 8, 1996
Boston, Massachusetts