

Eagle Boats, Inc.,
Petitioner,

v.

Secretary of Labor,
Respondent.

OSHRC Docket No. **99-1638**
(PMA)

Appearances:

Mr. F. Samuel Oosterhoudt, III
Eagle Boats, Inc.
Lake City, Florida
For the Petitioner

Melisa J. Anderson, Esq.
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For the Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER DENYING
PETITION FOR MODIFICATION OF ABATEMENT AND
AFFIRMING THE ABATEMENT DATE SET BY THE SECRETARY

Eagle Boats, Inc. (Eagle), filed its fourth petition for modification of abatement date (PMA) on August 25, 1999, in regard to two citations that the Secretary had issued on July 24, 1998. The Secretary filed an objection to Eagle's PMA on September 17, 1999, stating that Eagle had not made a good faith effort to correct the violative conditions.

The undersigned held a hearing in this contested matter on November 23, 1999. Eagle was represented *pro se* by its president Sam Oosterhoudt at the hearing. For the reasons set out below, Eagle's PMA is denied.

Background

The Secretary issued a citation to Eagle for 10 alleged serious violations and 1 alleged other-than-serious violation of the Occupational Safety and Health Act of 1970 (Act) on April 7, 1998. The abatement date for each of these alleged violations was May 10, 1998. Eagle did not contest the alleged violations and the citations became final orders on May 4, 1998 (Tr. 42). Eagle paid the proposed penalty of \$675.00 (Tr. 12).

The Secretary conducted a follow-up inspection on June 18, 1998, and issued citations for failure to abate (FTA) on July 24, 1998, proposing penalties of \$66,000.00. Eagle did not contest the citations for FTA. At the time of the hearing, Eagle had not paid the penalties (Tr. 14).

The Secretary conducted another follow-up inspection on September 16, 1998, and discovered that Eagle had corrected four of the eleven FTA items (Tr. 44-45).

Following the third OSHA inspection, Eagle submitted its first PMA with OSHA on September 17, 1998. Because it was incomplete, Eagle re-submitted the PMA on September 21, 1998. OSHA granted the PMA on October 13, 1998 (Exh. S-1; Tr. 45-46).

Eagle submitted a second PMA, also incomplete, on December 18, 1998. After receipt of the completed PMA, OSHA granted the PMA on February 2, 1999. In its second PMA, Eagle stated (Exh. S-2):

Eagle Boats has a building currently under development, and construction won't be completed until early March. If Eagle Boats could extend the abatement until March 15, all problems will be resolved to OSHA standards.

Eagle submitted a third PMA on May 14, 1999, stating that its new building "wasn't quite finished but should be finished in August." OSHA granted the PMA on June 1, 1999 (Tr. 49).

Eagle submitted its fourth PMA (incomplete) on August 2, 1999. Eagle submitted a complete PMA on August 23, 1999. This PMA is the subject of this proceeding.

Eagle stated that construction on its new building would now begin in Spring 2000. Eagle would work to bring its current facility into compliance. Eagle stated that it had purchased a gel spray booth and that it sought the assistance of the State Consultation Group in abating the violations at its current facility (Exh. S-4; Tr. 49-50).

OSHA conducted a monitoring inspection on August 11, 1999, and found that most of the original 11 violations were not abated, including some which had previously been corrected, such as placing "no smoking" signs in the spray booth area (Tr. 50-51). OSHA denied Eagle's fourth PMA (Tr. 50).

Eagle's Status as a Corporation

At the hearing, Oosterhoudt claimed that Eagle was no longer doing business because it had gone "bankrupt" (Tr. 3). When asked if Eagle had filed for bankruptcy, Oosterhoudt replied, "No, ma'am. The bank just closed the account out and it was gone." (Tr. 4). Oosterhoudt stated that he was now working as the national sales manager for Luton Marine Corporation, which engages in the same kind of business and uses the same facility as Eagle. When asked if he sold Eagle to Luton, Oosterhoudt replied, "Well, I didn't sell it. It was bought – the assets were purchased by Luton Marine" (Tr. 4).

Eagle presented no evidence other than Oosterhoudt's cryptic testimony to support its claim that Eagle was no longer a corporation. Eagle adduced no documents, bank statements, or records establishing either Eagle's "bankruptcy" or the purchase of its assets by Luton. For the purposes of this proceeding, Eagle will be considered the employer.¹ The existence of a successor corporation was not addressed at the hearing.

Discussion

Commission Rule 37(a) provides:

An employer may file a petition for modification of abatement date when such employer has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond the employer's reasonable control.

Commission Rule 37(d)(3) provides:

An employer petitioning for modification of the abatement period shall have the burden of proving in accordance with the requirements of 10(c) of the Act, 29 U.S.C. § 659(c), that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's control.

In accordance with Commission Rule 37, Eagle has the burden of proving (1) that it has made a good faith effort to comply with the abatement requirements of the citation, and (2) that abatement has not been completed because of factors beyond Eagle's control. It is unnecessary

¹ Eagle did not comply with Commission Rule 37(d)(4), which required it to file a declaration of all parent, subsidiary or affiliate corporations.

to discuss the second element of Eagle's burden of proof because the company has fallen far short of establishing that it made good faith efforts to comply with the abatement requirements. In fact, the record tends to establish bad faith and a pattern of deception on the part of Eagle.

On December 18, 1998, Eagle stated that its new facility was "under development, and construction won't be completed until early March [1999]" (Exh. S-2). On January 8, 1999, Eagle stated that it was "currently building a new plant" and expected it to be complete and ready for occupation by May 15, 1999 (Exh. S-2). In its current PMA, Eagle stated that it is seeking bids for the construction of the new building but that construction would not begin until Spring 2000 (Exh. S-4).

As proof of its intent to build a new plant, Eagle offered two Polaroid photographs showing an empty field with a fence in front of it (Exh. P-1). Eagle did not provide an address or street name for this property. The photographs do not show signs on the property announcing it as the future site of any business. As of the hearing date, Eagle did not have building permits for the property (Tr. 20). Eagle introduced blueprints for a new facility (Exh. P-5). The blueprints are stamped "FOR APPROVAL PURPOSES ONLY." Eagle has failed to introduce any evidence that it actually owns the property shown in Exhibit P-1 or that it has any intention of building a new plant. In fact, Oosterhoudt states that he wants to sell the business and purportedly will build a new facility (Tr. 22):

just simply to make us worth more money. I mean that's done all the time. If you have got a company in business in its own facility, in its own place, certainly we'd sell the whole facility and make more money.

The prospect of Eagle's new facility appears speculative in these circumstances.

Eagle's evidence with regard to abatement of violative conditions at its existing facility is similarly suspect. Eagle introduced into evidence an invoice from American Recycling & Metals to show that Eagle's had purchased high-capacity blowers for the spray booth, in abatement of item 36, for the violation of § 1910.107(b)(5)(i) (Exh. P-3). On cross-examination, Oosterhoudt admitted that the fans do not fit the space where Eagle intended to put them. The fans are not plugged in and have never been used at Eagle's plant (Tr. 74-75).

Eagle represented in its fourth PMA that it had sought assistance in its abatement of the violations from the Florida Division of Safety's State Consultation Service (Exh. R-4). When OSHA contacted that agency, the State Consultation Service informed OSHA that it had no record of Eagle seeking its assistance (Tr. 51).

Oosterhoudt stated at the hearing that Eagle had joined the Northeast Florida Safety Council (NFSC), a local trade association which sponsors safety and health training courses and other activities for its members (Tr. 17, 66). As evidence of its membership, Eagle submitted a fax cover sheet addressed to Eagle's representative George Magee. The cover sheet states, "We're so happy to have you coming into membership! Here is the invoice for the membership fee. I will also mail the original" (Exh. P-2).² Eagle offered no other evidence to corroborate its claim that it joined the NFSC; no receipt for its membership fee; no letter stating that Eagle is a member of the organization; and no certificates for training offered by NFSC. The fax cover letter by itself fails to establish anything more than that Eagle contacted NFSC and expressed an interest in joining the organization.

Eagle has failed to establish that it made any good faith efforts to abate the violations cited by OSHA over a year and a half ago. On the contrary, the record establishes that Eagle has used PMAs to delay and deceive OSHA. Its pattern of duplicity extended into the instant proceeding. Eagle misrepresented its efforts to comply with the cited standards.

Eagle's PMA is hereby denied.

FINDINGS OF FACT 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

² In her post-hearing brief, the Secretary moves to reopen the hearing record to offer rebuttal evidence to Exhibit P-2. The Secretary states (correctly) that Eagle did not provide its proposed exhibits to her prior to the hearing, contrary to the pre-hearing order. Because of the disposition of the case, the undersigned hereby denies the Secretary's motion.

The third and last abatement date modification accepted by the Secretary extended the date by which the violations were to be corrected until August 1, 1999. Although a fourth PMA was

timely filed, it was properly objected to by the Secretary. Based upon the foregoing decision, it is hereby ORDERED that Eagle Boat, Inc.'s petition for modification is DENIED. The abatement date of August 1, 1999, is affirmed.

NANCY J. SPIES
Judge

Date: December 27, 1999