

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2439-93

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS

FLEMING CO. INDUSTRIES, INC. D/B/A
FLEMING HOMES

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS COMMISSION

After our hearing officer issued his recommended order in this case, Fleming Homes petitioned for discretionary review under section 48 (1) of our rules of procedure (ROP).¹ We granted review, inviting the parties to submit briefs. Fleming Homes filed a brief. The secretary responded to the petition for review arguing the penalties as assessed were correct but admitting Fleming to be in "...poor financial condition."

Following a general scheduled inspection of Fleming, the secretary of labor issued one serious citation with 24 items carrying a total penalty of \$10,100 and one non-serious citation with 5 items but no penalty. As stated in the notice of contest and at trial, Fleming contested only the penalties accompanying the serious citation. Transcript of the evidence (TE) 7.

Fleming manufactures mobile homes, employing approximately 130 workers at the time of the inspection. TE 37. Meredith Story,

¹ Enacted as section 48 (1), 803 KAR 50:010.

plant manager for respondent Fleming Homes, testified his company began as an effort to create job opportunities in Fleming County. TE 38. He said the company was heavily in debt with a loss carry forward from 1992 of \$1,008,197 and had never paid a dividend to its stockholders. TE 39. At the close of the hearing, Fleming filed a 1993 financial statement as respondent's exhibit 1. TE 52. Respondent Fleming Homes reported \$68,756 in net income for 1993 with a positive cash flow and we so find. Respondent's exhibit 1, pages 6 and 8.

At the prompting of the hearing officer, the parties agreed Fleming would, after the hearing, file a "supplemental form" indicating it had abated the cited violations. TE 47. In fact, our record contains a submission from Fleming's counsel indicating all serious violations are abated. We infer all non serious violations to be abated as well since they were not under contest.

While respondent Fleming did not file an answer to labor's complaint, the issue whether Fleming could afford to pay the \$10,100 fine was tried by agreement of the parties. TE 5 and 7. Hearing officer Bowman found the company "...not in good financial condition" but upheld the penalties. In its petition for discretionary review, Fleming argued that its poor financial condition, that is, its debt of "\$1.5 million," qualified it for a hardship reduction of the proposed penalty. But we find corporate debt by itself is not an indicator of poor financial condition since it may reveal bad management or then again it may be incurred to take advantage of a new business opportunity or to reduce labor

costs.

It is not enough for a company simply to plead debt or financial hardship; in order to make a case, a company should put on proof of its "net income"² for the period when the citations were issued and penalties proposed. Here we draw an analogy to a company which claims it cannot afford to raise the wages of its employees during collective bargaining. In that situation, the company, to avoid a charge it is not bargaining in good faith, must disclose to the union its financial condition. National Labor Relations Board v. Truitt Manufacturing Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed 1027 (1956). For our purposes the principle is the same: a company's case for consideration of financial hardship must rest on proof of its financial condition.

Proof of net income (after taxes) informs us whether the company is able to pay its expenses out of current income and it also gives us something with which to compare the proposed penalty. Kimmel Iron and Metal Co., Inc., CCH OSHD 22,368. In its brief to us on review, Fleming said its 1993 income was \$26,576. We find no proof of that sum in the record and must take, instead, the net income figure found on page 6 of respondent's exhibit 1 (the 1993 financial statement) which is \$68,756.

The proposed penalty of \$10,100 is 15% of \$68,756 in net income. We then looked to federal review commission cases where

² McDonald v. Lockett, Ky., 307 S.W.2d 924, 926 (1957).

financial hardship was at issue.³ In Kimmel, supra, the administrative law judge reduced the penalty from \$1,550 to \$500. With an annual income of \$7,000, that reduced the penalty expressed as a percent of annual income from 22% to 7%. We conclude as a matter of law that according to the facts of this case, the proposed penalty of \$10,100 is excessive when compared to respondent's net income for the same period. We further conclude that a reduction of the proposed penalty by almost one half will serve to remind Fleming of its obligations to its employees under the act (KRS chapter 338) while at the same time is more in line with its financial condition. Tice Industries, CCH OSHD 19,222. Therefore, we reduce the proposed penalty in this case from \$10,100 to \$5,000 as we may do under our statutory authority. KRS 338.991 (6) and Brennan v. OSHRC and Interstate Glass Co., 487 F.2d 438, 441-442 (8th Cir. 1973), CCH OSHD 16,799.

We affirm the recommended order of our hearing officer to the extent it is consistent with this decision.

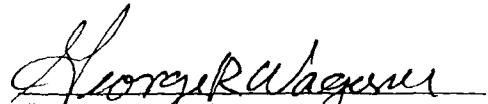
If it has not already done so, the company shall abate all violations immediately upon receipt of this order.

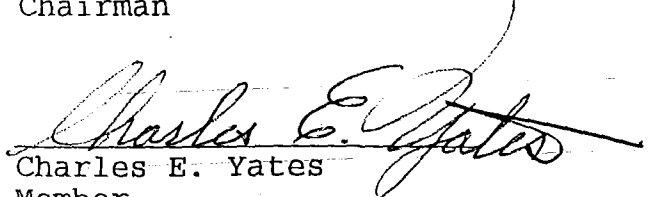
Respondent shall pay the \$5,000 penalty monthly in twelve equal installments to the secretary of labor commencing thirty days from receipt of this decision.

It is so ordered.

Entered this December ²⁸~~20~~, 1995.

³ While we are not subject to federal precedent since Kentucky has its own state program under KRS chapter 338, we often find such precedent helpful as we do here.


George B. Wagener
Chairman


Charles E. Yates
Member

Donald A. Butler
Member