

2554

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Kenneth Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,
Complainant,

vs.
PART AND

Koch Refining Company,
MOTION IN

RESPONDENT'S

and

Oil, Chemical, and Atomic Workers
International Union, Local 6-662,

Respondent,
Authorized Employee Representative.

ORDER DENYING IN

GRANTING IN PART_
COMPLAINANT'S

LIMINE AND

MOTION TO DISMISS

On May 5, 1989, Administrative Law Judge Jon L. Lunde issued an order in this matter disapproving a settlement agreement that had been reached between Complainant and Respondent. The disapproval was based upon the Authorized Employee Representative's (OCAW) objection and a determination that the law allowed OCAW to contest the citation and penalty. The parties were then to engage in discovery and settlement negotiations. No negotiations took place.

In a letter to Judge Lunde dated August 2, 1989, OCAW stated its view of the facts and argued that the proposed penalty was insufficient, that Respondent should have been charged with a willful or repeated violation of Minn. Stat. 182.653, subd. 2, and that the maximum penalty should be assessed. In addition, OCAW suggested that Respondent also should have been charged with a violation of Minn. Stat. 182.653, subd. 4b. On August 17,

1989, Complainant filed objections to OCAW's "arguments" and stated that the issues other than the amount of the penalty could not be considered in this proceeding. On August 29, 1989, Judge Lunde notified all parties that Complainant's August 16th letter should be treated as a Motion in Limine and that briefs should be filed by all parties according to a briefing schedule set forth in that notice. Complainant filed a brief in support of its Motion in Limine on September 19th and OCAW filed a reply on October 2, 1989.

On August 31, 1989, Respondent filed a motion requesting that the issues raised by OCAW in its August 2, 1989, letter be dismissed. OCAW responded to the dismissal motion on September 19 and Respondent filed a reply on September 29, 1989.

On October 12, 1989, Judge Lunde asked the parties to submit evidence and argument regarding the legislative history of certain difference in the Minnesota statutes from the federal OSHA laws upon which they were based. Due to Judge Lunde's case load, this matter was subsequently reassigned to the undersigned Administrative Law Judge.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the following Memorandum,

IT IS HEREBY ORDERED that:

1. OCAW's contest of the type of violation and amount of penalty is properly before the Minnesota Occupational Safety and Health Review Board (Board), evidence thereon may be presented at a hearing and a determination thereof may be made by the Administrative Law Judge and the Board.

2. OCAW's request that an additional citation not issued by the Commissioner be considered by the Board and the Administrative Law Judge is not within the jurisdiction of the Board.

3. The affidavit of an author of the 1973 legislation submitted by OCAW is rejected as untimely and also because it is not proper evidence of legislative intent.

4. Consistent with the foregoing, Complainant's Motion in Limine and Respondent's Motion to Dismiss are DENIED in part and GRANTED in part.

5. A conference to determine a hearing date and determine the status of discovery will be held January 9, 1990, at 9:00 a.m. at the Office of Administrative Hearings.

Dated this _____ day of December, 1989.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

I.
BACKGROUND

A. The Citation and Penalty Assessed.

On December 15, 1987 one of the Respondent's employees was severely burned while transferring flammable liquids from a semi-trailer into a deposit pit at

the Respondent's refinery As a result of the burns sustained, the employee died the following day. On January 13, 1988, after the incident had been investigated by the Minnesota Department of Labor and Industry, a citation was issued charging the Respondent with a violation of Minn. Stat. 182.653, subd. 2, the so-called general duty clause. The citation alleged that the Respondent failed to establish and follow safe working procedures for the disposal of butane and propane hydrocarbons near an API oil-water sewage pit at the Respondent's refinery. The violation was classified as serious and a penalty of \$602 was proposed.

B.State and Federal OSHA Statutes

Minn. Stat. 182.66, subd. 1, provides:

After an inspection or investigation, if the commissioner believes that an employer has violated a requirement of section 182.653, or any standard, rule or order adopted pursuant to this chapter, the commissioner shall, with reasonable promptness and in no event later than six months following the inspection, issue a written citation to the employer by certified mail. The citation shall describe with particularity the nature of the violation, including a reference to the provision of the act, standard, rule or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

This section is modeled after a similar provision in the Occupational Safety and Health Act of 1970 (the "Federal Act"), 29 U.S.C. 658(a).

Minn. Stat. 182.661, subd. 1, provides:

If, after an inspection or investigation, the commissioner issues a citation under 182.66, the

commissioner shall notify the employer
by certified mail of the penalty, if any, proposed to
be assessed under section 182.666 and that the employer has
15 working days within which to notify the commissioner
in writing that the employer wishes to contest the
citation, proposed assessment of penalty, or the period_of
time fixed in the citation given for- correction of
violation. A c o p_y - of
of penalty shall th, citation and the proposed assessment
representative also he mailed to the-bargaining
and, i_n
the case of the- death of an employee, to
the next of kin if requested and designated
representative of the employee if known to the department
of labor and industry. If within 15 working days
from receipt of the notice issued by the commissioner the
employer fails to notify the commissioner in writing
that the employer intends to contest the citation or proposed assessment of

penalty , and no notice contesting either the citation,
the type of violation, proposed _penalty, or the
time fixed for abatement in thy citation is filed
by any employee or representative of employees under
subdivision 3 within such time, the citation and
assessment, as proposed, shall be deemed a find order of the
board and not subject to review by any court or agency.
[emphasis added].

The underlined text does not appear in the Federal Act provision
upon which this subdivision is modeled, 29 U.S.C. 659(a).

Minn. Stat. 182.661, subd. 3, provides:

If an employer notifies the commissioner
that the employer intends to contest the citation cm the
proposed assessment of penalty or the employee or the
employee representative notifies the commissioner
that the employee intends to contest the time fixed for
abatement in the citation issued under section
182.66, the citation, the type of alleged violation, the
proposed penalty, or notification issued under subdivisions
I or 2, the board shall conduct a hearing in accordance
with the applicable provisions of chapter 14 for
hearings in contested cases . The rules of procedure
prescribed by the board shall provide affected
employees or representatives of affected employees an opportunity
to participate as parties to hearings under
this subdivision.1/

Minn. Stat. 182.664, subd. 2, provides:

The function of the review board shall be to
review contested citations issued under section
182.66,

section 182.666 that are not precluded from review by
section 182.661 and all final orders of the
commissioner in contested cases. The board may affirm, modify or
revoke a citation, monetary penalty or any contested
order of the commissioner.

The parallel Federal Act provision, 29 U.S.C. 659(c), provides:

If an employer notifies the Secretary that he
intends to contest a citation issued under section
9(a) or notification issued under subsection (a) or (b) of
this

References to the type of violation and proposed penalty were
added to Minn. Stat. 182.661, subs. I and 3, by Minn. laws 1975, Ch. 375.

section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that 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 (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

Minn. Stat. 182.666 classifies violations and establishes the fines that may be imposed for the violations. At the time of the violation alleged in this case, the statute read, in part, as follows:

Subdivision 1. Any employer who willfully or repeatedly violates the requirements of section 182.653, or any standard, rule, or order promulgated under the authority of the commissioner as provided in this chapter, may be assessed a fine not to exceed \$10,000 for each violation.

Subd. 2. Any employer who has received a citation for a

serious violation of its duties under section 182.653, or any standard, rule, or order promulgated under the authority of the commissioner as provided in this chapter, shall be assessed a fine not to exceed \$1,000 for each such violation.

Minn. Stat. 182.666 (1987 Supp.).2/ These provisions are substantially identical to 29 U.S.C. 666 (a) and (b).

Serious violations are defined in Minn. Stat. 182.651, subd. 12, as follows:

"Serious violation" means a violation of any standard, rule, or order other than a de minimus violation which is

In 1988 the statute was amended to increase the amount of the fines that can be imposed for OSH violation!;. The maximum fine for willful or repeated violations under subdivision 1 was increased to \$20,000. The maximum fine under subdivision 2 was increased to \$2,000 and subdivision 2 was amended to state that if a serious violation caused or contributed to the cause of the death of an employee, the employer shall be assessed a fine of up to \$10,000.

the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Except for the first sentence, this provision is the same as 29 U.S.C. 666(k).

Minn. Stat. 189.666, subd. 6, (Supp. 1987) provides:

The commissioner shall have authority to assess all proposed fines provided in this section, giving due consideration to the appropriateness of the fine with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.-/

29 U.S.C. 666(i) provides:

The 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.

II.

THE BOARD HAS JURISDICTION TO RAISE THE DEGREE OF A VIOLATION WHERE EMPLOYEES RAISE THE ISSUE

OCAW desires to present evidence that Respondent's violation of the general duty clause was willful or repeated rather than serious and to argue that the penalty assessed should be increased to reflect its willful or repeated nature. Complainant and Respondent both argue that the issues OCAW seeks to raise may not be considered in this proceeding because the Board has no authority to increase the type of violation from serious to willful or repeated.

3/ The word "Only" was inserted at the beginning of this subdivision in 1987. Minn. Laws. 1989, ch. 46, 8.

The Federal Occupational Safety and Health Review Commission (Commission) has authority to assess penalties for OSH violations. 29 U.S.C. 666(i). In addition, it has authority to affirm, modify or vacate a citation or "proposed" penalty issued by the Secretary of Labor (Secretary). 29 U.S.C. sec. 659(c). Under the Federal Act, it has been held that the Commission is the final arbitrator of penalties and if a penalty proposed by the Secretary is contested, the Secretary's proposed penalty is advisory only. Brennan v. OSHRC (Interstate -Glass _Co.), 487 F.2d 438 (8th Cir. 1973), 1973-1974 OSH Dec. (CCH) 1paragraph 16,799. Hence, it has been held that the Commission has authority to increase a penalty proposed by the Secretary on its de novo review. See, e.g., Brennan v. OSHRC supra California Stevedore and Ballast Co. v. OSHRC 517 F.2d 986, 988-89 (9th Cir. 1975), 1974-1975 OSH Dec. (CCH) paragraph 19,671.

The Commission has held that while it has authority to increase a fine within the range authorized for a particular type of violation, and has authority to reduce a fine and the type of violation (e.g., from willful to serious), it has no power to increase the type of a violation. In the leading case addressing the issue, Wetmore & Parman, Inc., 1971-1973 OSH Dec. (CCH) 1paragraph 15,400 (1973), a Commission majority held that the Commission does not have the power to increase the degree of a violation alleged by the Secretary because the exercise of such power would destroy the Commission's impartiality as an adjudicative body. It stated:

As was said above, traditional courts do not and cannot supervise the prosecutor by dictating the charges that he must bring before them. Were they to do so they would violate fundamental concepts of fairness in that such action would nullify the principle of the impartiality of the courts. Similarly, if we were to find a greater violation in kind than that alleged by the Secretary we

of necessity diminish our own impartiality
Under such
conditions we would be in the
position of supervising the
Secretary in his discretionary role of prosecutor.

We do not think that this was the kind of fairness
that
Congress intended. It is for
these reasons that we believe ourselves without authority,
absent the consent of the Secretary, to find a violation
of a degree higher than that charged by the Secretary. * * *

Accord: M.A., Swatek & Co., 1971-1973 OSH
Dec. (CCH paragraph 15,672 (1973), petition
for review dismissed, No. 73-1445 (10th
Cir. 1973); Dundas Pallet Co.,
1971-1973 OSH Dec. (CCH) paragraph 15,467 (1973).

Based on the Wetmore & Parman line
of Commission decisions, Complainant
argues that OCAW's requests that the citation
be changed from serious to
willful or repeated cannot be considered in
this proceeding. Complainant
argues that if the Board permits OCAW to proceed with its
allegations, the
Board would, in effect, usurp the
Commissioner's prosecutorial discretion.
Complainant also claims that if the
Legislature had intended to permit
employees to have prosecutorial functions, it would have
provided them with a
private right of action. Since the Legislature
has not done so, it is the
Complainant's position that OCAW's arguments
regarding the degree of the
violation cannot be considered.

The Board is an adjudicative body having powers virtually identical to those held by the Commission. Although Minn. Stat. 182.666, subd. 6, unlike its federal counterpart (29 U.S.C. 666(i)), states that the Commissioner (not the Board) has authority to assess fines, it is clear that the fines assessed by the Commissioner are mere proposals that can be modified by the Board. Minn. Stat. 182.661, subs. 1 and 3, as well as 182.666, subd. 6, refer to the fines assessed by the Commissioner as "proposed" fines. Moreover, Minn. Stat. 182.664, subd. 2, authorizes the Board to affirm, modify or revoke a monetary penalty of the Commissioner. Thus, the Board's powers are the same as the Commission's. Nonetheless, even though the Commission has refrained from increasing the type of violation, because of the significant differences between the Minnesota and Federal Acts, it does not automatically follow that the Board can not or should not do so. Further inquiry is necessary.

The Minnesota Act may not give employees a private right of action in court, but it does give employees broad rights to raise issues before the Board that they can not raise under the Federal Act. Among other things, Minn. Stat. 182.661, subs. 1 and 3, authorize employees and their authorized representatives to contest the "citation", "type of violation" and the "proposed penalty" set by the Commissioner. Under the Federal Act, employees have no right to file contests on those issues and can only contest the time set for abatement. Hence, federal precedents regarding the Commission's lack of willingness to consider the "type of violation" charged are of little precedential value here.

The plain language of Minn. Stat. 182.661, subd. 3, authorizes employees and their authorized representatives to contest the "type of violation" alleged by the Commissioner, as well as the amount of the proposed penalty. The reference to the "type of violation" must mean the degree of violation set forth in Minn. Stat. 182.666, which categorizes violations as willful or

repeated, serious, and non serious. Since the Legislature gave employees broad rights to protest citations issued by the Commissioner, the Legislature clearly intended that employees have input into the penalty-setting process. There is no apparent reason why employees would only have a interest in reducing penalties or vacating citations. On the contrary, it is more likely that employees would want to participate in proceedings concerning the type of violation charged and the amount of the penalty proposed in order to promote their own safety on the job. In order to obtain compliance with safety requirements, the Legislature must have concluded that employees should be able to argue for penalties that would encourage employer compliance with OSH standards. While there may be cases where employees oppose a citation because it might seem not to promote safety or for some other reason, it is equally true that employees may want to advocate harsher penalties to better encourage compliance with safety requirements. Since the Legislature did not choose to limit employee participation to arguing that the Commissioner's citation and penalty be affirmed, reduced (as opposed to "modified") or vacated, there is no reason for reading the statute in the manner argued by Complainant and Respondent.

The Legislative history supplied by the parties supports the foregoing interpretation of the statutes. When Minn. Stat. 182.661, subd. 1 was adopted in 1973, the only significant difference from its federal counterpart was that it gave employees the right to contest the citation as well as the right to contest the time set for abatement as is allowed under the Federal Act. This provision was inserted by a Representative Irvin Anderson during a

committee hearing at which time Representative Anderson described the insertion and simply stated: "He believe it adds . . . clarification." Affidavit of Patricia A. O'Leary, Exhibit A. It obviously did more than that. In 1975, the provisions at issue in this matter were added. The definition of "serious violation" was amended to automatically include any violation that was the proximate cause of the death of an employee. Minn. Laws 1975, Ch. 375, I

A requirement that the penalty, as we I 1 as the citation, be posted at the work place and that it be for a minimum of 15 days was added. Minn. Laws 1975, Ch. 375, 2. Finally, the specific authority for employees to contest the type of violation and proposed penalty was added. Minn. Laws 1975, Ch. 375, 3 and 4. The bill containing the amendments was supported by Representative Norman Prahm before the House Labor Management Relations Subcommittee on April 10, 1975. The proposed bill arose out of the death of an employee that had occurred at a Blandin Paper Company mill. The OSHA investigation of the accident was described to the subcommittee by Frank Hendricks of the Independent Union of Paper Mill Workers. The Department had conducted an OSHA investigation and issued a citation classified as non-serious and assessed a penalty of \$150.00. The citation, but not the penalty, was posted for three days. A Union representative saw the citation and called the Department about the matter. The Union felt that it was a very dangerous situation and that it should have been a serious type of violation. The Union could not find any existing law describing whether and how they could contest the type of violation and penalty. Ultimately, they wrote to the Department, but their objection was dismissed because it was not filed within the fifteen days. The Union was subsequently granted some type of hearing, but it does not appear from the record what that was or what occurred. Affidavit of Nancy J. Leppink; Affidavit of Patricia A. O'Leary, Exhibit C.

The Commissioner of the Department also testified before the

subcommittee. He noted that the penalty assessment procedure was actually a mechanical procedure following guidelines and making adjustments based on good faith size and history. He felt that giving the right to employees to contest the type of violation and the proposed penalty undermined the Commissioner and the safety professionals on the Department staff.

Affidavit of Patricia A. O'Leary, Exhibit D. Harry Peterson of the Minnesota Association of Commerce and Industry also testified before the subcommittee. He opposed the changes, suggesting that they would create an avalanche of paperwork, that it would set up "a series of harassments" in the form of appeals by individuals and bargaining agents, that the Board was already overloaded and that it went beyond what was needed. He also noted that victims in a criminal matter don't have a right to object to the sentence imposed by a judge, suggested that assessing punitive fines wouldn't necessarily prevent an accident from occurring a second time and argued that it was too early to do anything because the act had only been adopted two years before.

Affidavit of Patricia A. O'Leary, Exhibit F. Bruce Swanson, Deputy Commissioner of the Department testified on the bill too. He suggested that the type of violation was already subject to employee contest because employees already had the right to contest the citation itself. He felt that the contest of the citation obviously included a contest of the nature or type of violation indicated. He saw no good reason for allowing employees to contest the amount of penalties. He also felt that it would infringe upon the safety professionals in the Department who were required to assess penalties following certain guidelines set out in the compliance manual. He noted that under the present regulations, employees may participate in contested cases as parties and offer evidence to the Board on the matter of employer good faith and other matters concerning the size of the penalty - He also noted that the courts had held the Minnesota Act to be remedial and not punitive, and, thus, to be broadly interpreted to accomplish

its purposes. He was afraid that if the Minnesota Act became punitive or quasi criminal in nature, employers might be more successful in arguing that the act should be strictly construed. Affidavit of Patricia A. O'Leary, Exhibit G.

After hearing these arguments about the prosecutorial power of the Department and the burdens that would be placed upon the Board, the Legislature enacted a bill expanding the rights of employees and their representatives to be informed about and to contest the citations and penalties issued by the Department and, expressly, to allow employees to argue that both the type of violation and the penalty assessed should be increased.

Since employees in Minnesota do have statutory authority to contest the type of violation and the penalty proposed by the Commissioner, permitting the employees to raise those issues is not inconsistent with the federal precedents relied upon by the Complainant and Respondent. The Board's "impartiality" is not impaired when a union raises a "type of violation" issue. In such a proceeding, the Board is not raising an issue on its own motion, but is considering an issue raised by a party. Considering an issue raised by a party pursuant to statutory authorization is wholly consistent with the Board's adjudicative functions and is exactly what the Board is required to do under Minn. Stat. 182.664, subd. 2.

Nor is the Commissioner's prosecutorial discretion usurped by the Board. The Commissioner is not required to issue a citation. It is also true that the Commissioner probably can, at any time, withdraw a citation that was previously issued, even if an employer or union objects. *Cuyahoga-Valley Ry. Co. v. United Transportation Union*, 474 U.S. 3. The Commissioner still has total control over issuing citations and proposed penalties. Moreover, the "type of violation" is a part of the mechanism under Minn. Stat. 182.666 for determining the amount of the penalty. It is not a part of the "citation" under 182.66. Thus, in spite of the *Wetmore & Parman* line of Commission decisions, it would seem that determining the type of violation is an integral part of determining the penalty, and entirely within the Board's adjudicatory function and statutory responsibility. Permitting employees to advocate the imposition of a higher type of violation, along with a higher penalty, when a citation has been issued does not shift the prosecutorial discretion invested in the Commissioner to the Board. The Board remains a neutral arbiter; it does not assess penalties. Employees may be viewed as having some "prosecutorial power", but only to the extent expressly allowed by statute. In 1975, the

Legislature heard arguments from the Department regarding this intrusion into the Department's authority and rejected them.

III

The Union's Failure to File ; Notice of Contest Challenging the Type of Violation Does Not Deprive thy Board of Jurisdiction to Consider thy Issue

Complainant and Respondent first argue that "Respondent did not intend to challenge the type of violation issued by the Commissioner", and, since the OCAW did not file a Notice of Contest challenging the type of violation, the type of violation originally alleged by the Commissioner has become a final order of the Board and is not now subject to review. The Complainant's argument is based on the provisions of Minn. Stat. 182.661, subd. I.

Under the Federal Act, the Commission has held that an employer may contest the citation, or a penalty, or both, but when the notice of contest is

clearly limited to one issue, the other becomes the final order of the Commission. The Commission has limited the harsh application of that interpretation by allowing subsequent communications "to clarify" the intent of the employer to place the previously uncontested issue into contest as well. Florida-East Coast Properties, Inc., 1973-74 OSH Dec. (CCH) paragraph 17,272; Turnbull Millwork Company, 1975-76 OSH Dec. (CCH) paragraph 20,221,

On February 5, 1988, Complainant received Respondent's Notice of Contest.

It stated as follows:

This letter is to advise you that Koch Refining Company is hereby contesting Citation No. 1, Item No. 1, concerning the failure to establish and follow a safe work procedure for disposing of butane and propane hydrocarbons and the penalty in the above subject case.

Counsel for Complainant and Respondent would have us believe that by this language Respondent never intended to contest the type of violation. Therefore, they argue, under the Florida East Coast Properties rule, the type of violation has now become the final order of the Board. The argument must be rejected for at least the following reasons:

- a. As the Florida East Coast Properties cases note, there are only two things to contest: the citation and the penalty. That is all the federal statutes, 29 U.S.C. 659 (a) and (c), allow. The Minnesota Act allows the employer also to contest the period for abatement, but the abatement date is really a part of the citation. Minn. Stat. 182.66, subd. 1. See, 29 U.S.C. 659(c) ("Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation . . .") Thus, by contesting the citation, the abatement date is automatically placed into contest. The provision was probably added to the Minnesota Act for clarification. On the other hand, Minn. Stat. 182.661, does not, strictly speaking, allow an employer to contest the "type of violation", Respondent's claims in its brief to the contrary notwithstanding. Only employees are allowed to do that. Again, however, it would appear that employers are allowed to contest the type of violation because it is a part of the mechanism of determining the penalty incorporated within any contest of the penalty. -/ Respondent contested everything it could, the citation (which included the abatement period) and the penalty (which included the type of violation). OCAW is correct in arguing that Respondent's contest amounted to a general denial.
- b. If Respondent's position were adopted, no employer that failed to specifically contest the "type of violation" would ever be able to argue that the type of violation

4/ As noted above, a former official of the Department was of the opinion that contesting the citation automatically included a contest of the type of violation.

example, serious to non-serious, and the Board would not have authority to do so. Nor would the Commissioner be able to settle a case by reducing the type of violation and, thereby, the amount of the penalty. Clearly, that is not the case. As discussed above, the Board can reduce the type of violation in contested cases (even the Commission does that) and there may be settlements where the type of violation is reduced.

C. Where the jurisdiction of the Board is invoked by an employer contest, and employees elect party status, the Board may consider any issue thereafter raised by the employees. OCAW v, OSHRC, 671 F.2d 643 (DC Cir. 1982), cert. den., 459 U.S. 904 (1983), 1982 OSH Dec. (CCH) 1paragraph 25,938. Moreover, even if the Commissioner and employer settle the matter, the employees may continue to object to any of the matters to which they could have filed a contest had the employer not filed a contest first. Donovan Y. Allied Industrial Workers (Whirlpool), 722 F.2d 1415 (8th Cir. 1983), 1983-84 OSH Dec. (CCH) paragraph 26,747. In Minnesota, employees can object to everything, not just the period for abatement. So it makes no difference what issues the employer contested or didn't contest.

Secondly, the Complainant and Respondent argue that the failure of OCAW to file its own notice of contest within 15 days bars the issue from being considered. As Judge Lunde noted in his Order Disapproving Settlement Agreements, Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3rd Cir.),

1980 OSH Dec. (CCH) 1paragraph 24,509, cert.
den., 449 U.S. 1061 (1980), addressed this
issue as follows:

Our view, (I necessity, rejects
the argument advanced by union in this case was
not a proper party in proceedings because it
failed to file a notice with the Secretary within 15
days of the citation as required by section 10(c) of
the Act, 29 U.S.C. 659(c). We do not read section
10(c) so grudgingly. If the employer files a notice of
contest, as happened in this case, then the union is not
required to file its notice within 15 days of the
citation because the employer's notice of contest has effectively
triggered a hearing. Once the hearing
mechanism is instituted, affected employees may elect to
participate as parties at any time prior to the commencement
of the hearing before the ALJ as provided by 29 C.F.R.
2200.20. * * * The fifteen-day time limit for
employee filing under section 10(c) is operative only when
the employer has not contested the citation and a
hearing is desired by the employee or his
representative. Under these circumstances the time limit
operates as a Fail-safe mechanism to ensure employees
the opportunity for a hearing.

In its supplemental reply, Complainant argues that in the present case, OCAW is not using its party status to object to the terms of a settlement agreement but to circumvent the requirements of Minn. Stat. 182.661 relating to contests of type of violation and proposed penalty as issued. Complainant notes that under the Board's rules, employees may elect party status up to five days before the hearing, are not required to indicate the scope of their intended participation and are not required to submit pleadings or comply with any notice or posting requirements. Therefore, they suggest, simple fairness requires that their participation be limited to the issues presented by the Commissioner and the contesting parties.

The decision in Judge Lunde's prior order is sound. The Complainant and Respondent knew sufficiently early that OCAW was interested in the results of Respondent's contest of the citation and penalty. When that resulted in a settlement OCAW found unacceptable, it was clear that their reasons included the size of the penalty and the seriousness of the violation. It is difficult to see how Complainant or Respondent were prejudiced by any delay that may have occurred in OCAW formulating and stating its specific objections more clearly.

IV.

NO ADDITIONAL CITATION AND PENALTY MAY BE CONSIDERED

It is not clear whether OCAW wants an additional citation considered; it is clear that it can't be done. In their letter to Judge Lunde of August 2, 1989, after reciting its version of the facts, counsel for OCAW stated: "Not only is this a violation of subdivision 2 of section 182.653, for which Koch was cited, but a clear-cut violation of subdivision 4b as well." In its Memorandum in Opposition to Respondent's Objection and Motion to Dismiss, OCAW specifically stated that it was not requesting that Koch be cited for a violation under subdivision 4b, but in its Memorandum Opposing Complainant's Motion in Limine, it argued that raising the issue of a violation of a standard not cited by the Commissioner is appropriate and that the Board has the power to "expand upon the Commissioner's citations and penalties." Nothing in the statutes authorizes such a thing. Under Minn. Stat. 182.661, only citations and penalty assessments that have been issued may be contested. Under Minn. Stat. 182.664, subd. 2, the function of the Board is limited to reviewing

contested citations issued under 182.66, contested monetary penalties assessed under 182.666 that have not become final orders under 182.661 and final orders of the Commissioner in contested cases. Where the Commissioner has not issued a citation and a penalty, there is nothing for the Board to review. For the Board to issue citations and assess penalties where none exist would be to usurp the Commissioner's prosecutorial discretion.

V.

OCAW's EVIDENCE OF LEGISLATIVE INTENT MUST BE REJECTED

On October 24, 1989, Counsel for OCAW called the ALJ to request an extension in time for filing the supplemental material on legislative intent. The ALJ granted an extension to November 30, 1989. By letter dated December 1, 1989, and received December 4, 1989, by the ALJ, OCAW filed an unnotarized Affidavit of Irvin Anderson, the chief author of the Minnesota Occupational Safety and Health Act of 1973. The affidavit stated what Mr. Anderson claimed to have been the Legislature's intent in adopting the Act. The late filing of the affidavit is particularly perplexing because the extension was granted to

allow OCAW's counsel additional time to do what they had not even started, it was a minimal effort, and it was late. Moreover, it was not proper evidence of Legislative intent. Matter of State Farm. Mut. Auto . Ins., 392 N.W.2d 558, 569 (Minn. App. 1986).

S.M.M.