

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

**SESSION LAW 2005-133
HOUSE BILL 874**

AN ACT TO CHANGE THE TITLE OF THE SAFETY AND HEALTH REVIEW BOARD UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF NORTH CAROLINA TO THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, TO CHANGE THE TITLE OF THE OFFICE OF OCCUPATIONAL SAFETY AND HEALTH TO THE OCCUPATIONAL SAFETY AND HEALTH DIVISION, AND TO RESTORE THE AUTHORITY OF THE BOARD TO ASSESS PENALTIES IN THE CASE OF AN APPEAL.

The General Assembly of North Carolina enacts:

SECTION 1. Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term "Commission" for the term "Board" wherever that term appears in the General Statutes in relation to the Act.

SECTION 2. G.S. 95-126(b)(2) reads as rewritten:

"(b) Legislative findings and purpose:

- ..
- (2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources:
- a. By encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at the place of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
 - b. By providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
 - c. By authorizing the Commissioner to develop occupational safety and health standards applicable to business giving consideration to the needs of employers and employees and to adopt standards promulgated from time to time by the Secretary of Labor under the Occupational Safety and Health Act of 1970, and by creating a safety and health review ~~board~~commission for carrying out adjudicatory functions under this Article;
 - d. By building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;
 - e. By providing occupational health criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

- f. By providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;
- g. By providing an effective enforcement program which shall include a prohibition against giving advance notice of an inspection and sanctions for any individual violating this prohibition;
- h. By providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problem;
- i. By encouraging joint employer-employee efforts to reduce injuries and diseases arising out of employment;
- j. By providing for research in the field of occupational safety and health, by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;
- k. By exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;
- l. By authorizing the Commissioner to enter into contracts with the Department of Health and Human Services, or any other State or local units, to the end the Commissioner and the Department of Health and Human Services and other State or local units may fully cooperate and carry out the ends and purposes of this Article.
- m. The General Assembly of North Carolina appoints and elects the North Carolina Department of Labor as the designated agency to administer the Occupational Safety and Health Act of North Carolina."

SECTION 3. G.S. 95-127(2) reads as rewritten:

"(2) The term "~~Board~~'Commission' means the ~~Safety and Health Review Board~~North Carolina Occupational Safety and Health Review Commission established under this Article."

SECTION 4. G.S. 95-133 reads as rewritten:

"§ 95-133. Office of Director of Occupational Safety and Health; powers and duties of the Director.

(a) There is hereby created and established in the North Carolina Department of Labor a division to be known as the ~~Office of Occupational Safety and Health~~Health Division. The Commissioner shall appoint a Director to administer this division who shall be subject to the direction and supervision of the Commissioner. The Director shall carry out the responsibilities of the State of North Carolina as prescribed under the Occupational Safety and Health Act of 1970, and any subsequent federal laws or regulations relating to occupational safety and health, and this Article, as written, revised or amended by legislative enactment and as delegated or authorized by the Commissioner. The Commissioner shall make and promulgate such rules, amendments, or revisions in rules, as he may deem advisable for the administration of the office, he shall also accept and use the services, facilities, and personnel of any agency of the State or of any subdivision of State government, either as a free service or by reimbursement. The Director shall devote full time to his duties of office and shall not hold any other office. The Director, subject to the approval of the Commissioner, shall select a professional staff of qualified and competent employees to assist in the

statewide administration of the Article. All of the employees referred to herein shall be under the classified service, as herein defined in G.S. 95-127, subdivision (3).

(b) Subject to the general supervision of the Commissioner and Deputy Commissioner, the Director shall be responsible for the administration and enforcement of all laws, rules and regulations which it is the duty of the ~~Office~~ Division to administer and enforce. The Director shall have the power, jurisdiction and authority to:

- (1) Uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina;
- (2) Make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out;
- (3) Make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the enforcement of this Article and all lawful regulations issued thereunder;
- (4) Report to the Federal Occupational Safety and Health Administration any information which it may require;
- (5) Recommend to the Commissioner such rules, regulations, standards, or changes in rules, regulations and standards which the Director deems advisable for the prevention of accidents, occupational hazards or the prevention of industrial or occupational diseases;
- (6) Recommend to the Commissioner that he institute proceedings to remove from his or her position any employee of the Office who accepts any favor, privilege, money, object of value, or property of any kind whatsoever or who shall give prior notice of a compliance inspection of a work place unless authorized under the provisions of this Article;
- (7) Employ experts, consultants or organizations for work related to the occupational safety and health program of the ~~Office~~ Division and compensate same with the approval of the Commissioner;
- (8) Institute hearings, investigations, request the issuance of citations and propose such penalties as he may in his judgment consider necessary to carry out the provisions of this Article;
- (9) The Commissioner shall have the power and authority to issue all types of notices, citations, cease and desist orders, or any other pleading, form or notice necessary to enforce compliance with this Article as hereinafter set forth. The Commissioner is also empowered and authorized to apply to the courts of the State having jurisdiction for orders or injunctions restraining unlawful acts and practices prohibited by this Article or not in compliance with this Article and to apply for mandatory injunctions to compel enforcement of the Article, and the Commissioner is authorized, and further authorized by and through his agents, to institute criminal actions or proceedings for such violations of the Article as are subject to criminal penalties. The Director shall recommend to the Commissioner the imposition and amount of civil penalties provided by this Article, and the Commissioner may institute such proceedings as necessary for the enforcement and payment of such civil penalties subject to such review of the ~~Board~~ Commission as hereinafter set forth.
- (10) The Director may recommend to the Commissioner that any person, firm, corporation or witness be cited for contempt or for punishment as of contempt, and the Commissioner is authorized to enter any order of contempt or as of contempt as he may deem proper and necessary, and

any hearing examiner may recommend to the Commissioner that such order or citation for contempt be made.

- (11) The Commissioner or the Director, or their authorized agents, shall have the power and authority to issue subpoenas for witnesses and for the production of any and all papers and documents necessary for any hearing or other proceeding and to require the same to be served by the process officers of the State. The Commissioner and the Director may administer any and all oaths that are necessary in the enforcement of this Article and may certify as to the authenticity of all records, papers, documents and transcripts under the seal of the Department of Labor.
- (12) All orders, citations, cease and desist orders, stop orders, sanctions and contempt orders, civil penalties and the proceedings thereon shall be subject to review by the Board-Commission as hereinafter provided, including all assessments for civil penalties."

SECTION 5. G.S. 95-135 reads as rewritten:

"§ 95-135. Safety and Health Review Board-North Carolina Occupational Safety and Health Review Commission.

(a) The Safety and Health Review Board-North Carolina Occupational Safety and Health Review Commission is hereby established. The Board-Commission shall be composed of three members from among persons who, by reason of training, education or experience, are qualified to carry out the functions of the Board-Commission under this Article. The Governor shall appoint the members of the Board-Commission and name one of the members as chairman of the Board-Commission. The terms of the members of the Board-Commission shall be six years except that the members of the Board-Commission first taking office shall serve, as designated by the Governor at the time of appointment, one for a term of two years, one for a term of four years, and the member of the Board-Commission designated as chairman shall serve for a term of six years. Any vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled by the Governor for the remainder of the unexpired term. The Governor shall fill all vacancies occurring by reason of the expiration of the term of any members of the Board-Commission.

(b) The Board-Commission shall hear and issue decisions on appeals entered from citations and abatement periods and from all types of penalties. Appeals from orders of the Director dealing with conditions or practices that constitute imminent danger shall not be stayed by the Board-Commission until after full and adequate hearing. The Board-Commission in the discharge of its duties under this Article is authorized and empowered to administer oaths and affirmations and institute motions, cause the taking of depositions, interrogatories, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with any appeal or proceeding for review before the Board-Commission.

(c) The Board-Commission shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Board-Commission for the administrative operations of the Board-Commission and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Board's-Commission's functions and fix the compensation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Board-Commission, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Board-Commission. The Board-Commission shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Board-Commission, and its decision shall be final. The compensation of the members of the Board-Commission shall be on a

per diem basis and shall be fixed by the Governor. The chairman of the ~~Board Commission~~ may be paid a higher rate of compensation than the other two members of the ~~Board Commission~~. For the purpose of carrying out its duties and functions under this Article, two members of the ~~Board Commission~~ shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the ~~Board Commission~~. On matters properly before the ~~Board Commission~~ the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the ~~Board Commission~~. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review. Prior to taking any action under this subsection to set compensation, the Governor may consult with the Advisory Budget Commission.

(d) Every official act of the ~~Board Commission~~ shall be entered of record and its hearings and records shall be open to the public. The ~~Board Commission~~ is authorized and empowered to make such procedural rules as are necessary for the orderly transaction of its proceedings. Unless the ~~Board Commission~~ adopts a different rule, the proceedings, as nearly as possible, shall be in accordance with the Rules of Civil Procedure, G.S. 1A-1. The ~~Board Commission~~ may order testimony to be taken by deposition in any proceeding pending before it at any stage of such proceeding. Any person, firm or corporation, and its agents or officials, may be compelled to appear and testify and produce like documentary evidence before the ~~Board Commission~~. Witnesses whose depositions are taken under this section, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the State.

(e) The rules of procedure prescribed or adopted by the ~~Board Commission~~ shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

(f) Any member of the ~~Board Commission~~ may be removed by the Governor for inefficiency, neglect of duty, or any misfeasance or malfeasance in office. Before such removal the Governor shall give notice of hearing and state the allegations against the member of the ~~Board Commission~~, and the same shall be heard by the Governor, and his decision shall be final. The principal office of the ~~Board Commission~~ shall be in Raleigh, North Carolina, but whenever it deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, the ~~Board Commission~~ may hold hearings or conduct other proceedings at any place in the State.

(g) In case of a contumacy, failure or refusal of any person to testify before the ~~Board Commission~~, give any type of evidence, or to produce any books, records, papers, correspondence, memoranda or other records, such person upon such failure to obey the orders of the ~~Board Commission~~ may be punished for contempt or any other matter involving contempt as set forth and described by the general laws of the State. The ~~Board Commission~~ shall issue no order for contempt without first finding the facts involved in the proceeding. Witnesses appearing before the ~~Board Commission~~ shall be entitled to the same fees as those paid for the services of said witnesses in the courts of the State, and all such fees shall be taxed against the interested parties according to the judgment and discretion of the ~~Board Commission~~.

(h) The Director shall consult with the chairman of the Board with respect to the preparation and presentation to the ~~Board Commission~~ for adoption of all necessary forms or citations, notices of all kinds, forms of stop orders, all forms and orders imposing penalties and all forms of notices or applications for review by the ~~Board Commission~~, and any and all other procedural papers and documents necessary for the administration of the Article as applied to employers and employees and for all procedures and proceedings brought before the ~~Board Commission~~ for review.

(i) A hearing examiner appointed by the chairman of the ~~Board Commission~~ shall hear, and make a determination upon, any proceeding instituted before the ~~Board Commission~~ and may hear any motion in connection therewith, assigned to the hearing

examiner, and shall make a report of the determination which constitutes the hearing examiner's final disposition of the proceedings. A copy of the report of the hearing examiner shall be furnished to the Director and all interested parties involved in any appeal or any proceeding before the hearing examiner for the hearing examiner's determination. The report of the hearing examiner shall become the final order of the ~~Board-Commission~~ 30 days from the date of the report as determined by the hearing examiner, unless within the 30-day period any member of the ~~Board-Commission~~ had directed that the report shall be reviewed by the entire ~~Board-Commission~~ as a whole. Upon application for review of any report or determination of a hearing examiner, before the 30-day period expires, the ~~Board-Commission~~ shall schedule the matter for hearing, on the record, except the ~~Board-Commission~~ may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue. All interested parties to the original hearing shall be notified of the date, time and place of the hearing and shall be allowed to appear in person or by attorney at the hearing. Upon review of the report and determination by the hearing examiner the ~~Board-Commission~~ may adopt, modify or vacate the report of the hearing examiner and notify the interested parties. The report of the hearing examiner, and the report, decision, or determination of the ~~Board-Commission~~ upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record. The report, decision or determination of the ~~Board-Commission~~ upon review shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes, as amended, entitled: "Judicial Review of Decisions of Certain Administrative Agencies.

(j) Repealed by Session Laws 1993, c. 300, s. 1."

SECTION 6. G.S. 95-137(b)(2) reads as rewritten:

"(b) Procedure for Enforcement. –

⋮
(2) If the Director has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the ~~Board-Commission~~ in case of any review proceedings under this Article initiated by the employer in good faith and not solely for a delay or avoidance of penalties), the Director shall notify the employer by certified mail, by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery of such failure and of the penalty proposed to be assessed under this Article by reason of such failure and that the employer has 15 working days within which to notify the Director that the employer wishes to contest the Director's notification of the proposed assessment of penalty. If, within 15 working days from the receipt of notification issued by the Director, an employer fails to notify the Director that the employer intends to contest the notification or proposed recommendation of penalty, the notification and the proposed assessment made by the Director shall be final and not subject to review by any court."

SECTION 7. G.S. 95-137(b)(4) reads as rewritten:

"(b) Procedure for Enforcement. –

⋮
(4) If an employer notifies the Director that the employer intends to contest a citation issued under the provisions of this Article or notification issued under the provisions of this Article, or if, within 15 working days of the receipt of a citation under this Article, any employee or representative thereof files a notice with the Director alleging that the period of time fixed in the citation for the abatement

of the violation is unreasonable, the Director shall immediately advise the ~~Board~~ Commission of such notification, and the ~~Board~~ Commission shall afford an opportunity for a hearing. The ~~Board~~ Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Director's citation or the proposed penalty fixed by the Commissioner, or directing other appropriate relief, and such order shall become final 30 days after its issuance. Upon showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that an abatement has not been completed because of factors beyond the employer's reasonable control, the Director, after an opportunity for a hearing as provided in this Article, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the chairman of the ~~Board~~ Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section."

SECTION 8. G.S. 95-138 reads as rewritten:

"§ 95-138. Civil penalties.

(a) The ~~Commissioner~~, Commissioner, upon recommendation of the Director, or the North Carolina Occupational Safety and Health Review Commission in the case of an appeal, may assess penalties against any employer who violates the requirements of this Article, or any standard, rule, or order promulgated pursuant to this Article, as follows:

- (1) A minimum penalty of five thousand dollars (\$5,000) to a maximum penalty of seventy thousand dollars (\$70,000) for each willful or repeat violation.
- (2) A maximum penalty of seven thousand dollars (\$7,000) for each nonserious or serious violation.
- (3) A maximum penalty of seven thousand dollars (\$7,000) for each day that an employer fails to correct and abate a violation, within the period allowed for its correction and abatement, which period shall not begin to run until the date of the final Order of the ~~Board~~ Commission in the case of any appeal proceedings in this Article initiated by the employer in good faith and not solely for the delay of avoidance of penalties.
- (4) A maximum penalty of seven thousand dollars (\$7,000) for violating the posting requirements, as required under the provisions of this Article.

(b) The Commissioner shall adopt uniform standards that the Commissioner, the ~~Board~~, Commission, and the hearing examiner shall apply when determining appropriateness of the penalty. The following factors shall be used in determining whether a penalty is appropriate:

- (1) Size of the business of the employer being charged.
- (2) The gravity of the violation.
- (3) The good faith of the employer.
- (4) The record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.

The report of the hearing examiner and the report, decision, or determination of the ~~Board~~ Commission on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

(c) The clear proceeds of all civil penalties and interest recovered by the Commissioner, together with the costs thereof, shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2."

SECTION 9. G.S. 95-152 reads as rewritten:

"§ 95-152. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article which contains or which might reveal a trade secret shall be considered confidential, as provided by section 1905 of Title 18 of U.S.C., except as to carrying out this Article or when it is relevant in any proceeding under this Article. In any such proceeding the Commissioner, the ~~Board-Commission~~, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets."

SECTION 10. G.S. 150B-1(e)(9) reads as rewritten:

"(e) Exemptions From Contested Case Provisions. – The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

...
(9) ~~The Occupational Safety and Health Review Board.~~ The North Carolina Occupational Safety and Health Review Commission."

SECTION 11. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 22nd day of June, 2005.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 1:22 p.m. this 29th day of June, 2005