

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

H

2

**HOUSE BILL 874
Committee Substitute Favorable 5/11/05**

Short Title: Title Change/Safety and Health Review Board. (Public)

Sponsors:

Referred to:

March 24, 2005

A BILL TO BE ENTITLED

1 AN ACT TO CHANGE THE TITLE OF THE SAFETY AND HEALTH REVIEW
2 BOARD UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF
3 NORTH CAROLINA TO THE NORTH CAROLINA OCCUPATIONAL SAFETY
4 AND HEALTH REVIEW COMMISSION, TO CHANGE THE TITLE OF THE
5 OFFICE OF OCCUPATIONAL SAFETY AND HEALTH TO THE
6 OCCUPATIONAL SAFETY AND HEALTH DIVISION, AND TO RESTORE
7 THE AUTHORITY OF THE BOARD TO ASSESS PENALTIES IN THE CASE
8 OF AN APPEAL.
9

10 The General Assembly of North Carolina enacts:

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

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

17 "(b) Legislative findings and purpose:

18 ...

19 (2) The General Assembly of North Carolina declares it to be its purpose
20 and policy through the exercise of its powers to ensure so far as
21 possible every working man and woman in the State of North Carolina
22 safe and healthful working conditions and to preserve our human
23 resources:

24 a. By encouraging employers and employees in their effort to
25 reduce the number of occupational safety and health hazards at
26 the place of employment, and to stimulate employers and
27 employees to institute new and to perfect existing programs for
28 providing safe and healthful working conditions;

- 1 b. By providing that employers and employees have separate but
2 dependent responsibilities and rights with respect to achieving
3 safe and healthful working conditions;
- 4 c. By authorizing the Commissioner to develop occupational
5 safety and health standards applicable to business giving
6 consideration to the needs of employers and employees and to
7 adopt standards promulgated from time to time by the Secretary
8 of Labor under the Occupational Safety and Health Act of 1970,
9 and by creating a safety and health review ~~board~~ commission
10 for carrying out adjudicatory functions under this Article;
- 11 d. By building upon advances already made through employer and
12 employee initiative for providing safe and healthful working
13 conditions;
- 14 e. By providing occupational health criteria which will assure
15 insofar as practicable that no employee will suffer diminished
16 health, functional capacity, or life expectancy as a result of his
17 work experience;
- 18 f. By providing for training programs to increase the number and
19 competence of personnel engaged in the field of occupational
20 safety and health;
- 21 g. By providing an effective enforcement program which shall
22 include a prohibition against giving advance notice of an
23 inspection and sanctions for any individual violating this
24 prohibition;
- 25 h. By providing for appropriate reporting procedures with respect
26 to occupational safety and health which procedures will help
27 achieve the objectives of this Article and accurately describe the
28 nature of the occupational safety and health problem;
- 29 i. By encouraging joint employer-employee efforts to reduce
30 injuries and diseases arising out of employment;
- 31 j. By providing for research in the field of occupational safety and
32 health, by developing innovative methods, techniques, and
33 approaches for dealing with occupational safety and health
34 problems;
- 35 k. By exploring ways to discover latent diseases, establishing
36 causal connections between diseases and work in environmental
37 conditions, and conducting other research relating to health
38 problems, in recognition of the fact that occupational health
39 standards present problems often different from those involved
40 in occupational safety;
- 41 l. By authorizing the Commissioner to enter into contracts with
42 the Department of Health and Human Services, or any other
43 State or local units, to the end the Commissioner and the
44 Department of Health and Human Services and other State or

1 local units may fully cooperate and carry out the ends and
2 purposes of this Article.

- 3 m. The General Assembly of North Carolina appoints and elects
4 the North Carolina Department of Labor as the designated
5 agency to administer the Occupational Safety and Health Act of
6 North Carolina."

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

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

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

12 **"§ 95-133. Office of Director of Occupational Safety and Health; powers and**
13 **duties of the Director.**

14 (a) There is hereby created and established in the North Carolina Department of
15 Labor a division to be known as the ~~Office of Occupational Safety and Health.~~ Health
16 Division. The Commissioner shall appoint a Director to administer this division who
17 shall be subject to the direction and supervision of the Commissioner. The Director shall
18 carry out the responsibilities of the State of North Carolina as prescribed under the
19 Occupational Safety and Health Act of 1970, and any subsequent federal laws or
20 regulations relating to occupational safety and health, and this Article, as written,
21 revised or amended by legislative enactment and as delegated or authorized by the
22 Commissioner. The Commissioner shall make and promulgate such rules, amendments,
23 or revisions in rules, as he may deem advisable for the administration of the office, he
24 shall also accept and use the services, facilities, and personnel of any agency of the
25 State or of any subdivision of State government, either as a free service or by
26 reimbursement. The Director shall devote full time to his duties of office and shall not
27 hold any other office. The Director, subject to the approval of the Commissioner, shall
28 select a professional staff of qualified and competent employees to assist in the
29 statewide administration of the Article. All of the employees referred to herein shall be
30 under the classified service, as herein defined in G.S. 95-127, subdivision (3).

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

- 35 (1) Uniformly superintend, enforce and administer applicable occupational
36 safety and health laws of the State of North Carolina;
37 (2) Make or cause to be made all necessary inspections, analyses and
38 research for the purpose of seeing that all laws and rules and
39 regulations which the office has the duty, power and authority to
40 enforce are promptly and effectively carried out;
41 (3) Make all necessary investigations, develop information and reports
42 upon conditions of employee safety and health, and upon all matters
43 relating to the enforcement of this Article and all lawful regulations
44 issued thereunder;

- 1 (4) Report to the Federal Occupational Safety and Health Administration
2 any information which it may require;
- 3 (5) Recommend to the Commissioner such rules, regulations, standards, or
4 changes in rules, regulations and standards which the Director deems
5 advisable for the prevention of accidents, occupational hazards or the
6 prevention of industrial or occupational diseases;
- 7 (6) Recommend to the Commissioner that he institute proceedings to
8 remove from his or her position any employee of the Office who
9 accepts any favor, privilege, money, object of value, or property of any
10 kind whatsoever or who shall give prior notice of a compliance
11 inspection of a work place unless authorized under the provisions of
12 this Article;
- 13 (7) Employ experts, consultants or organizations for work related to the
14 occupational safety and health program of the ~~Office~~Division and
15 compensate same with the approval of the Commissioner;
- 16 (8) Institute hearings, investigations, request the issuance of citations and
17 propose such penalties as he may in his judgment consider necessary
18 to carry out the provisions of this Article;
- 19 (9) The Commissioner shall have the power and authority to issue all
20 types of notices, citations, cease and desist orders, or any other
21 pleading, form or notice necessary to enforce compliance with this
22 Article as hereinafter set forth. The Commissioner is also empowered
23 and authorized to apply to the courts of the State having jurisdiction
24 for orders or injunctions restraining unlawful acts and practices
25 prohibited by this Article or not in compliance with this Article and to
26 apply for mandatory injunctions to compel enforcement of the Article,
27 and the Commissioner is authorized, and further authorized by and
28 through his agents, to institute criminal actions or proceedings for such
29 violations of the Article as are subject to criminal penalties. The
30 Director shall recommend to the Commissioner the imposition and
31 amount of civil penalties provided by this Article, and the
32 Commissioner may institute such proceedings as necessary for the
33 enforcement and payment of such civil penalties subject to such
34 review of the ~~Board~~Commission as hereinafter set forth.
- 35 (10) The Director may recommend to the Commissioner that any person,
36 firm, corporation or witness be cited for contempt or for punishment as
37 of contempt, and the Commissioner is authorized to enter any order of
38 contempt or as of contempt as he may deem proper and necessary, and
39 any hearing examiner may recommend to the Commissioner that such
40 order or citation for contempt be made.
- 41 (11) The Commissioner or the Director, or their authorized agents, shall
42 have the power and authority to issue subpoenas for witnesses and for
43 the production of any and all papers and documents necessary for any
44 hearing or other proceeding and to require the same to be served by the

1 process officers of the State. The Commissioner and the Director may
2 administer any and all oaths that are necessary in the enforcement of
3 this Article and may certify as to the authenticity of all records, papers,
4 documents and transcripts under the seal of the Department of Labor.

- 5 (12) All orders, citations, cease and desist orders, stop orders, sanctions and
6 contempt orders, civil penalties and the proceedings thereon shall be
7 subject to review by the Board-Commission as hereinafter provided,
8 including all assessments for civil penalties."

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

10 "**§ 95-135. ~~Safety and Health Review Board.~~North Carolina Occupational Safety**
11 **and Health Review Commission.**

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

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

36 (c) The ~~Board-Commission~~ shall meet at least once each calendar quarter but it
37 may hold call meetings or hearings upon at least three days' notice to each member by
38 the chairman and at such time and place as the chairman may fix. The chairman shall be
39 responsible on behalf of the ~~Board-Commission~~ for the administrative operations of the
40 ~~Board-Commission~~ and shall appoint such hearing examiners and other employees as he
41 deems necessary to assist in the performance of the ~~Board's-Commission's~~ functions and
42 fix the compensation of such employees with the approval of the Governor. The
43 assignment and removal of hearing examiners shall be made by the ~~Board-Commission~~,
44 and any hearing examiner may be removed for misfeasance, malfeasance, misconduct,

1 immoral conduct, incompetency, the commission of any crime, or for any other good
2 and adequate reason as found by the ~~Board~~Commission. The ~~Board~~Commission shall
3 give notice to such hearing examiner, along with written allegations as to the charges
4 against him, and the same shall be heard by the ~~Board~~Commission, and its decision
5 shall be final. The compensation of the members of the ~~Board~~Commission shall be on a
6 per diem basis and shall be fixed by the Governor. The chairman of the ~~Board~~
7 Commission may be paid a higher rate of compensation than the other two members of
8 the ~~Board~~Commission. For the purpose of carrying out its duties and functions under
9 this Article, two members of the ~~Board~~Commission shall constitute a quorum and
10 official action can be taken only on the affirmative vote of at least two members of the
11 ~~Board~~Commission. On matters properly before the ~~Board~~Commission the chairman
12 may issue temporary orders, subpoenas, and other temporary types of orders subject to
13 the subsequent review of the ~~Board~~Commission. The issuance of subpoenas, orders to
14 take depositions, orders requiring interrogatories and other procedural matters of
15 evidence issued by the chairman shall not be subject to review. Prior to taking any
16 action under this subsection to set compensation, the Governor may consult with the
17 Advisory Budget Commission.

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

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

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

41 (g) In case of a contumacy, failure or refusal of any person to testify before the
42 ~~Board~~Commission, give any type of evidence, or to produce any books, records,
43 papers, correspondence, memoranda or other records, such person upon such failure to
44 obey the orders of the ~~Board~~Commission may be punished for contempt or any other

1 matter involving contempt as set forth and described by the general laws of the State.
2 The ~~Board-Commission~~ shall issue no order for contempt without first finding the facts
3 involved in the proceeding. Witnesses appearing before the ~~Board-Commission~~ shall be
4 entitled to the same fees as those paid for the services of said witnesses in the courts of
5 the State, and all such fees shall be taxed against the interested parties according to the
6 judgment and discretion of the ~~Board-Commission~~.

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

14 (i) A hearing examiner appointed by the chairman of the ~~Board-Commission~~
15 shall hear, and make a determination upon, any proceeding instituted before the ~~Board~~
16 ~~Commission~~ and may hear any motion in connection therewith, assigned to the hearing
17 examiner, and shall make a report of the determination which constitutes the hearing
18 examiner's final disposition of the proceedings. A copy of the report of the hearing
19 examiner shall be furnished to the Director and all interested parties involved in any
20 appeal or any proceeding before the hearing examiner for the hearing examiner's
21 determination. The report of the hearing examiner shall become the final order of the
22 ~~Board-Commission~~ 30 days from the date of the report as determined by the hearing
23 examiner, unless within the 30-day period any member of the ~~Board-Commission~~ had
24 directed that the report shall be reviewed by the entire ~~Board-Commission~~ as a whole.
25 Upon application for review of any report or determination of a hearing examiner,
26 before the 30-day period expires, the ~~Board-Commission~~ shall schedule the matter for
27 hearing, on the record, except the ~~Board-Commission~~ may allow the introduction of
28 newly discovered evidence, or in its discretion the taking of further evidence upon any
29 question or issue. All interested parties to the original hearing shall be notified of the
30 date, time and place of the hearing and shall be allowed to appear in person or by
31 attorney at the hearing. Upon review of the report and determination by the hearing
32 examiner the ~~Board-Commission~~ may adopt, modify or vacate the report of the hearing
33 examiner and notify the interested parties. The report of the hearing examiner, and the
34 report, decision, or determination of the ~~Board-Commission~~ upon review shall be in
35 writing and shall include findings of fact, conclusions of law, and the reasons or bases
36 for them, on all the material issues of fact, law, or discretion presented on the record.
37 The report, decision or determination of the ~~Board-Commission~~ upon review shall be
38 final unless further appeal is made to the courts under the provisions of Chapter 150B of
39 the General Statutes, as amended, entitled: "Judicial Review of Decisions of Certain
40 Administrative Agencies.

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

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

43 "(b) Procedure for Enforcement. –

44 ...

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

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

20 "(b) Procedure for Enforcement. –

21 ...
 22 (4) If an employer notifies the Director that the employer intends to
 23 contest a citation issued under the provisions of this Article or
 24 notification issued under the provisions of this Article, or if, within 15
 25 working days of the receipt of a citation under this Article, any
 26 employee or representative thereof files a notice with the Director
 27 alleging that the period of time fixed in the citation for the abatement
 28 of the violation is unreasonable, the Director shall immediately advise
 29 the ~~Board~~Commission of such notification, and the ~~Board~~
 30 Commission shall afford an opportunity for a hearing. The ~~Board~~
 31 Commission shall thereafter issue an order, based on findings of fact,
 32 affirming, modifying, or vacating the Director's citation or the
 33 proposed penalty fixed by the Commissioner, or directing other
 34 appropriate relief, and such order shall become final 30 days after its
 35 issuance. Upon showing by an employer of a good faith effort to
 36 comply with the abatement requirements of a citation, and that an
 37 abatement has not been completed because of factors beyond the
 38 employer's reasonable control, the Director, after an opportunity for a
 39 hearing as provided in this Article, shall issue an order affirming or
 40 modifying the abatement requirements in such citation. The rules of
 41 procedure prescribed by the chairman of the ~~Board~~Commission shall
 42 provide affected employees or representatives of affected employees
 43 an opportunity to participate as parties to hearings under this section."

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

1 **"§ 95-138. Civil penalties.**

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

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

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

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

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

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

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

39 **"§ 95-152. Confidentiality of trade secrets.**

40 All information reported to or otherwise obtained by the Commissioner or his agents
41 or representatives in connection with any inspection or proceeding under this Article
42 which contains or which might reveal a trade secret shall be considered confidential, as
43 provided by section 1905 of Title 18 of U.S.C., except as to carrying out this Article or
44 when it is relevant in any proceeding under this Article. In any such proceeding the

1 Commissioner, the ~~Board~~Commission, or the court shall issue such orders as may be
2 appropriate to protect the confidentiality of trade secrets."

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

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

8 ...
9 (9) ~~The Occupational Safety and Health Review Board.~~The North
10 Carolina Occupational Safety and Health Review Commission."

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