

Stowers



102 (145)

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H. L. STOWERS
CHAIRMAN
MERLE H. STANTON
MEMBER
CHARLES B. UPTON
MEMBER

August 4, 1975

KOSHRC # 102

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CARROLLTON CABINET CO., INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

PER CURIAM:

The recommended order of Hearing Officer Roger Riggs, dated April 18, 1975, is before this Commission for review. Hearing Officer Riggs sustained the citations and proposed penalties for items #1, #6, and #13; sustained the citations for items #18 and #19; sustained the citation but reduced the penalty for item #17, and dismissed the citations and vacated the proposed penalties for items #11 and #20. Mr. Riggs found that the Commissioner of Labor did not sustain his burden of proof on items #11 and #20.

This Commission agrees with Mr. Riggs that the Commissioner of Labor did not sustain his burden of proof on items #11 and #20. All other citations and penalties as recommended by the Hearing Officer are deemed appropriate. This Commission therefore concurs in the Recommended Order of Mr. Riggs and orders that his decision is hereby AFFIRMED.

In all other respects the decision of the Hearing Officer is affirmed.



H. L. Stowers, Chairman

/s/ Charles B. Upton

Charles B. Upton, Commissioner

/s/ Merle H. Stanton

Merle H. Stanton, Commissioner

DATED: August 4, 1975
Frankfort, Kentucky

DECISION NO. 145

This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Earl Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

Honorable H. Douglas Rouse (Certified Mail #469049)
Shepherd and Rouse
Attorneys at Law
Kentucky State Bank Building
455 Main Street
Carrollton, Kentucky 41008

Mr. J. G. Hamling, President (Certified Mail 469050)
Carrollton Cabinet Co., Inc.
P. O. Box 59
Carrollton, Kentucky 41008

This 4th day of August, 1975.



Iris R. Barrett
Executive Director

Kidney



102 (102)

JULIAN M. CARROLL
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MEMBER

April 18, 1975

KOSHRC # 102

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CARROLLTON CABINET COMPANY, INC.

RESPONDENT

NOTICE OF RECEIPT OF DECISION,
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED ORDER,
AND ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure, a Decision, Findings of Fact, Conclusions of Law, and Recommended Order of our hearing officer, the Honorable Roger D. R... has been received and is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this notice submit a petition for discretionary review by this Commission.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission, and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order by the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law, and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been filed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:


Commissioner of Labor
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Earl M. Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

Honorable H. Douglas Rouse (Certified Mail #775311)
Shepherd and Rouse
Attorneys at Law
Kentucky State Bank Building
455 Main Street
Carrollton, Kentucky 41008

Mr. J. G. Hamling, President (Certified Mail 775312)
Carrollton Cabinet Co., Inc.
P. O. Box 59
Carrollton, Kentucky 41008

This 18th day of April, 1975.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #102

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

CARROLLTON CABINET COMPANY, INC.

RESPONDENT

* * * * *

Hon. Peter J. Glauber, Frankfort, Kentucky for Complainant

Hon. H. Douglas Rowe, Carrollton, Kentucky for Respondent

RIGGS, Hearing Officer.

On October 3, 1974 an inspection was made at a place of employment of Carrollton Cabinet Company located six miles south of Carrollton, Kentucky where the manufacture of TV and radio cabinets takes place. As a result of the inspection, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued a citation to Respondent charging twenty-three other than serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

Item Number 1: The standard allegedly violated was 29 CFR 1910.23 (c)(1) (as adopted by OSH 11-2) and the description of the alleged violation was:

An open-sided floor 45 inches wide and approximately 8 feet high in the new building was not provided with standard railings and toeboard.

Item Number 2: The standard allegedly violated was 29 CFR 1910.23 (d)(1) (ii) as adopted by OSH 11-2) and the description of the alleged violation was:

A stairway with 14 steps, 35 3/4 inches wide, in the new building was not provided with a handrail on the open side.

Item Number 3: The standard allegedly violated was Article 110 of the National Electric Code (as adopted by 29 CFR 1910.309 (a) and OSH 11-2) and the description of the alleged violation was:

The disconnecting boxes in the basement and several in the main plant were not marked to indicate their purpose.

Item Number 4: The standard allegedly violated was 29 CFR 1910.219 (e)(1) (as adopted by OSH 11-2) and the description of the alleged violation was:

One (1) Wayne and two (2) Curtis air compressors in the basement, a multiple drill press and a sprenger #63644 drill press in the woodworking area, all were not provided with guards over the horizontal belts.

Item 5: The standard allegedly violated was 29 CFR 1910.219 (d)(1) (as adopted by OSH 11-2) and the description of the alleged violation was:

The pulleys on one (1) Wayne and two (2) Curtis air compressors in the basement, a multiple drill press and a sprenger #63644 drill press, both in the woodworking area, were not guarded.

Item Number 6: The standard allegedly violated was Article 110-17(a) of the National Electric Code (as adopted by 29 CFR 1910.309 (a) and OSH 11-2) and the description of the alleged violation was:

A fuse box to the air compressors in the basement had a live 220 volt bare wire exposed and was not guarded or is isolated so as to prevent accidental contact by employees.

Item Number 7: The standard allegedly violated was Article 370-18(c) (as adopted by 29 CFR 1910.309(a) and OSH 11-2) and the description of the alleged violation was:

A junction box in the basement and a junction box in the woodworking area were not provided with covers.

Item Number 8: The standard allegedly violated was 29 CFR 1910.107 (b) (7) (as adopted by OSH 11-2) and the description of the alleged violation was:

The openings of 4 spray booths where conveyors carry work in and out, located in the finish department, were not built with the openings as small as practical.

Item Number 9: The standard allegedly violated was 29 CFR 1910.107(c) (6) (as adopted by OSH 11-2) and the description of the alleged violation was:

Electrical equipment located in all spray booths throughout the Finish department were not of the type required for Class I Group D locations.

Item Number 10: The standard allegedly violated was 29 CFR 1910.106 (e) (2) (ii) (b) (1) (as adopted by OSH 11-2) and the description of the alleged violation was:

Four (4) 55-gallon drums of lacquer were stored about 5 feet from the propane gas furnace in the finish area. Twelve (12) 5-gallon cans of stain binder, four 5-gallon drums of black toner, and five 55-gallon drums of lacquer thinner, some full, some not, were also stored in the area.

Item Number 11: The standard allegedly violated was 29 CFR 1910.106(e)(2)(iii) (as adopted by OSH 11-2) and a description of the alleged violation was:

The area in the finish department where the lacquer is transferred from 1 tank to another container was not separated from other operations in the building by adequate distance or by construction having adequate fire resistance.

Item Number 12: The standard allegedly violated was 29 CFR 1910.22(d)(1) (as adopted by OSH 11-2) and a description of the alleged violation was:

The floor of the main plant was not provided with a load capacity approved by the building official and marked on plates of approved design and securely affixed to the building in a conspicuous place.

Item Number 13: The standard allegedly violated was Article 250-42(a) of the National Electric Code (as adopted by 29 CFR 1910.309(a) and OSH 11-2) and a description of the alleged violation was:

A bench grinder in the finish department; 3 table saws and 2 drill presses, 1 a Sprenger #63644 in the woodworking department, all were not grounded.

Item Number 14: The standard allegedly violated was 29 CFR 1910.215(a)(2) (as adopted by OSH 11-2) and a description of the alleged violation was:

A bench grinding wheel in the finish department was not provided with a hood guard to cover the wheel, spindle end, and nut projections.

Item Number 15: The standard allegedly violated was 29 CFR 1910.215(a)(4) (as adopted by OSH 11-2) and a description of the alleged violation was:

A bench grinding machine in the finish department was not provided with a tool rest to support the work.

Item Number 16: The standard allegedly violated was 29 CFR 1910.212(a)(5) (as adopted by OSH 11-2) and the description of the alleged violation was:

Two (2) small fans in the finish area were not provided with guards with openings no larger than $\frac{1}{2}$ inch.

Item Number 17: The standard allegedly violated was 29 CFR 1910.213(c)(1) (as adopted by OSH 11-2) and the description of the alleged violation was:

The 5 hand-fed circular table saws in the wood-working area were not provided with a hood guard to completely cover that portion of the saw above the table and that portion of the saw above the material being cut.

Item Number 18: The standard allegedly violated was 29CFR 1910.213(c)(2) (as adopted by OSH 11-2) and the description of the alleged violation was:

The 5 hand-fed circular table saws in the woodworking area were not provided with spreaders to prevent material from squeezing the saws.

Item Number 19: The standard allegedly violated was 29 CFR 1910.213(c)(3) (as adopted by OSH 11-2) and the description of the alleged violation was:

The 5 hand-fed circular table saws in the woodworking area were not provided with non-kickback fingers or dogs.

Item Number 20: The standard allegedly violated was 29 CFR 1910.213(b)(1) (as adopted by OSH 11-2) and the description of the alleged violation was:

Dewalt Radial Arm Saw #53N50018 in the wood-working area was not provided with a lower guard to cover the sides of the lower exposed portion of the blade.

Item Number 21: The standard allegedly violated was 29 CFR 1910.213 (h)(4) (as adopted by OSH 11-2) and the description of the alleged violation was:

Dewalt Radial Arm Saw #53N50018 in the wood-working area was not installed in such a manner that the cutting head would return gently to the starting position when released by the operator.

Item Number 22: The standard allegedly violated was 29 CFR 1910.213 (h)(3) (as adopted by OSH 11-2) and the description of the alleged violation was:

Dewalt Radial Arm Saw #53N50018 in the wood-working area was not provided with an adjustable stop to prevent the blade from extending beyond the position necessary to complete the cut.

Item Number 23: The standard allegedly violated was 29 CFR 1910.151(b) (as adopted by OSH 11-2) and the description of the alleged violation was:

In the absence of an infirmary, clinic, or hospital in near proximity, a person or persons adequately trained to render first aid were not available in this plant.

Penalties were proposed for certain of the alleged violations as follows: Item #1, \$34.00; Item #6, \$34.00; Item #11, \$34.00; Item #13, \$34.00; Item #17, \$34.00; Item #20, \$34.00; and Item #23, \$34.00. There were no proposed penalties for any

of the other items. The date by which all of the described alleged violations must be corrected was stated as December 17, 1974.

On November 15, 1974, the Department of Labor received a letter from respondent stating employer's intention to contest the alleged violations except for Items 7, and 13. Thereafter the Department of Labor issued an amended citation deleting Items 2, 8, and 10 and deleting the penalty for Item #23. Respondent then notified Complainant that his contest would be limited to alleged violations numbered 1, 6, 11, 13, 17, 18, 19, and 20; and that he contested all penalties proposed. The Review Commission received the complaint alleging the contested items. Respondent's answer was received by the Review Commission on December 18, 1974 denying the allegations of the Complaint. On December 4, 1974 the Review Commission received a certification from respondent that no affected employee is represented by an authorized employee representative. The file further contains the proper notice of hearing and notice of assignment to hearing officer.

Hearing was held on January 21, 1975 at the hour of 2:00 p.m. in the office of Shepherd & Rouse, Attorneys in Carrollton, Kentucky under the provisions of KRS 338.071 (4), a section of Chapter 338 of the Kentucky Revised Statutes dealing with the safety and health of employees. This statute authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of said Chapter and to adopt and promulgate rules and regulations concerning the procedural aspects of its hearings. By virtue of the

provisions of KRS 338.081, hearings authorized by the provisions of this Chapter may be conducted by a Hearing Officer appointed by the Review Commission to represent the Commission in this manner. Following the hearing of an appeal, or on review of the decision of the Hearing Officer by its own motion, the Review Commission may sustain, modify, or dismiss a citation or penalty.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits, briefs, and representations of the parties, it is concluded that the substantial evidence on the record considered as a whole, supports the following:

FINDINGS OF FACT

1. An open-sided floor 45 inches wide and approximately 8 feet high was not provided with standard railings and toeboard.
2. A fuse box to certain air compressors in the basement of employer's plant, at the time of inspection, had a line 220 volt live wire exposed and was not guarded or isolated so as to prevent accidental contact by employees.
3. The area in the finish department where lacquer is transferred from one tank to another container was separated from an oven and/or spray booth in the building by a distance of somewhere between 10 and 25 feet.
4. Certain machinery, including certain table saws and drill presses, were not grounded at the time of inspection.
5. The five hand-fed circular table saws in the woodworking area were not provided with an approved hood guard to completely cover that portion of the saw above the table and

that portion of the saw above the material being cut.

6. The five hand-fed circular table saws in the wood-working area were not provided with spreaders to prevent material from squeezing the saws.

7. The five hand-fed circular table saws in the woodworking area were not provided with approved nonkickback fingers or dogs.

8. Many of the items of the citation were promptly abated by respondent shortly after his becoming aware that such situations were considered violations of the Act by the Commissioner of Labor.

Upon the basis of the foregoing, the Hearing Officer makes the following:

CONCLUSIONS OF LAW

A. Alleged Violations

Testimony and evidence in the form of a photograph were presented by Complainant to the effect that Respondent had not properly guarded a stairway of 45 inches wide which constituted an open sided floor eight (8) feet above the next lower floor level. The photograph portrays a possible hazard to employees who either place the items on the open side of the stairway for purposes of storage or remove these items for use. Such exposure would however be somewhat limited.

There is evidence that wiring which carried 220 volts was left unguarded and posed an extreme danger to employees who might happen into the area where the open cabinet was situated.

Though Complainant did not offer evidence that the wiring was live, Respondent's witness, Mr. Hamburg, testified that the cross-wiring was done to "keep this compressor in operation". The employer testified (1) that repair of the situation was in process and (2) that the area was "prohibited" to employees. Though repair was undoubtedly underway, the Respondent did not show why it was necessary for the existence of the situation at all. Upon points of the fuse box going bad, the employer should not have "wired across the junction" but should have immediately obtained and installed a new fuse box. Though it was stated that the area was prohibited to employees, it was admitted that there was no notice posted nor any barriers present to prevent employees from going into the area. Respondent, on cross examination, stated that there are three persons who go into the basement area where the fuse box is located; thus, there is not only a lack of any specific preventative measure to prevent employees from going into the area, but "three people" do go into the area. It is only because Complainant offered no stronger evidence concerning the danger involved that the Hearing Officer does not alter this item to a serious violation.

Complainant alleged that lacquer is transferred from one tank to another container in an area which exposed this procedure to the danger of fire. The photograph presented by the Department of Labor does not give any perspective to the distance between the transfer procedure and the propane gas furnace or the spray booth. Conflicting testimony was presented which put the proximity of the oven and spray booth to the transfer procedures

somewhere between 10 and 25 feet. Whatever distance may have been involved, however, could not prove the existence of a violation of the cited standard where no proof was presented as to the flammability or combustibility of the liquids in the tanks. There was some testimony, on cross-examination of Mr. Hamburg, that the "laquer thinner" may have a flash point near that of gasoline. He even stated that some of the chemicals were "much more flammable" than gasoline; nevertheless, the allegation of the Complaint referred only to laquer, and no proof was presented as to whether the flash point of the laquer was at a level considered either "combustible" in accordance with 29 CFR 1910.106(a)(18) (as adopted by OSH 11-2) or "flammable" in accordance with 29 CFR 1910.106(a)(19) (as adopted by OSH 11-2).

The Department of Labor alleged that Respondent violated the National Electrical Code by lack of grounding of a bench grinder, three table saws, and two drill presses. Respondent argues that the grinder had not been in use for some 8 or 9 months, that it was disconnected, and that there was no intent to ever use it again. However, Respondent does not deny that some of the other machines were not grounded. Mr. Hamburg stated that the employer replaced the plugs and wires on three saws and one drill press after the inspection.

Respondent protests the citation regarding the lack of hood guards, spreaders, and nonkickback fingers or dogs on the five hand-fed circular table saws. It is pointed out that the type of work being done and the alterations which this employer has made to the motors of the hand-fed circular saws render the use of approved guards impossible. Respondent then explained that he

and his people had developed and provided wooden guards for these saws and had been making use of such devices for several years. Concerning the spreaders, Mr. Hamburg feels that they are meaningless and perform no function in the type of work they perform. Like the guards, Mr. Hamburg says that they have developed their own type of apparatus to perform this function.

It is well that employers utilize ingenuity, and at the same time devise safety devices and techniques, otherwise unavailable, to protect their employees. Situations of this type have been anticipated, however, by the Act in KRS 338.151 wherein it provides that variances may be granted to any employer by the commissioner if there is practical difficulty or unnecessary hardship in meeting the provisions of the chapter so long as equivalent protection is secured and the safety and health of the employees will remain protected. The variance provisions of the Chapter are also available if the proponent of the variance has demonstrated that the conditions, practices, means, methods, operations, or processes used or proposed to be used will provide employment and a place of employment which are as safe and helpful as those which would prevail if the standard were complied with. The situation presented is clearly one in which a request for variance should be made by the employer. Without such a variance having been approved, and it having been clearly demonstrated that the provisions of this chapter were not being met on the date of inspection, these three items of the citation must be sustained.

The allegation which was designated Item #20 had to do with a radial arm saw in the woodworking area. Complainant alleged

that this saw was not provided with a lower guard to cover the sides of the lower exposed portion of the blades. To support the allegation Complainant must show that the saw in question was a radial arm saw, that there was no lower guard to cover the sides of the lower exposed portion of the blade, that the saw poses some danger to the safety employees, and that there is employee exposure. No photographs were available to portray the alleged violation. Testimony of Complainant was that the saw was not in operation on the day of inspection. The compliance officer could testify only that he "feels" that the saw was energized, that he "feels" that it was plugged in, and that sawdust was around the saw.

Respondent presented testimony that the saw in question was not used for over a year, that there was no blade on the saw, and that the saw required a special blade which was kept in the office and not available to the employees.

The burden of proof being on the Complainant, the evidence is insufficient to support the allegation.

B. Proposed Penalties

Due consideration must be given to the good faith of the employer, the size of the business of the employer being charged, the gravity of the violation, and the history of previous violations.

As to citation Item #1 concerning the open-sided floor, one must consider (1) that the existing railings would provide some protection although they do not comply with OSHA standards, (2) that there would be limited exposure to the danger involving the open side, and (3) that the earlier federal OSHA inspection may have

caused Respondent to feel that the railing that he erected would be adequate. Considering all of these things, a penalty of \$34 appears appropriate.

Item #6 of the citation which involves the fuse box with exposed wiring involves many considerations in deciding upon the appropriateness of the proposed penalty. On the one hand, it is important to consider that the employer had already begun repair procedures to remedy the problem when he was inspected, and that the fuse box is in an area where employee exposure is minimal. On the other hand, it may not be overlooked that were the evidence sufficient, the danger involved here might easily be considered a serious violation, and that there was no reason stated as to why it was necessary to wire across the junction rather than to immediately replace the fuse box. Considering the violation from both viewpoints it appears that the compliance officer proposed an appropriate penalty of \$34.

The proposed penalty of \$34 for the violation in connection with the grounding of machines appears to be appropriate under the circumstances as presented by the parties at the hearing.

The proposed penalty of \$34 for the violation alleged in Item #17 appears to be inappropriate in light of the evidence presented by Respondent. Although Respondent was not using OSHA approved hood-guards the employer did provide guards designed over the years by the employer and its employees to protect the employees on the particular jobs for which the saws were being used. The violation did exist in that the protective devices used were not "approved" and no variance had been either sought or received,

but it is significant that this is a case of improper protection rather than a lack thereof. For this reason, the violation should be sustained, but the penalty reduced to \$1.

Since the Commissioner did not sustain his burden of proof concerning what are designated as Items #11 and 20 of the citation then the penalties cannot stand.

Respondent's arguments concerning lack of due process since the employer was not notified of the inspection is not persuasive. It was felt by the General Assembly that if employers were notified prior to inspection then there would be a lack of individual initiative to bring his operation into compliance until such a notice was received. Truly the spontaneity of the inspection is an integral part of the Act, and there are few instances where advance notice would be permitted. There is no lack of due process since the Act provides that an employer representative accompany the compliance officer during the entire inspection, and then the opportunity to proceed through the administrative hearing process in contesting any alleged violations or penalties which he feels are unwarranted.

Limiting the review to items numbered one (1), six (6), eleven (11), thirteen (13), seventeen (17), eighteen (18), nineteen (19), and twenty (20) seems appropriate since it does not appear that error would result from not reviewing the other items.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation and proposed penalty of \$34 for Item #1 shall be and the same are hereby SUSTAINED;

that the citation and proposed penalty of \$34 for Item #6 shall be and the same are hereby SUSTAINED; that the citation for Item #11 shall be and the same is hereby DISMISSED and the proposed penalty therefore is hereby VACATED; that the citation and proposed penalty of \$34 for Item # 13 shall be and the same are hereby SUSTAINED; that the citation for Item #17 shall be and the same is hereby SUSTAINED and the penalty therefore is hereby REDUCED to \$1; that the citation for Item #18 shall be and the same is hereby SUSTAINED; that the citation for Item # 19 shall be and the same is hereby SUSTAINED; and that the citation for Item #20 shall be and the same is hereby DISMISSED and the proposed penalty therefore is hereby VACATED.

Respondent shall have abated Items numbered one (1), six (6), and thirteen (13) by June 13, 1975. Respondent shall have abated Items numbered seventeen (17), eighteen (18), and nineteen (19) by July 1, 1975.



ROGER D. RIGGS
HEARING OFFICER

Decision No. 108

DATED: April 18, 1975