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JULIAN M. CARROLL

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

H. L. STOWERS
CHAIRMAN

GOVERNOR

CAPITAL PLAZA TOWER

MERLE H. STANTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

CHARLES B. UPTON
MEMBER

*KOSHRC
Decision
Order No. 182*

October 27, 1975

KOSHRC # 111

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FIRESTONE TEXTILES COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

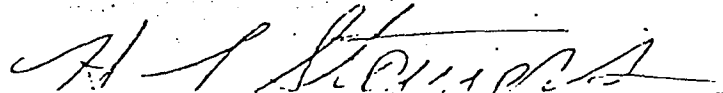
PER CURIAM:

A Recommended Order of Hearing Officer Lloyd Graper,
dated August 20, 1975, is before the Commission for review.

The Hearing Officer is correct in stating that safety
standard 29 CFR 1910.219(e)(1)(i) is not applicable in this
case, but he then incorrectly cites 29 CFR 1910.219(3) as the
applicable standard. The proper standard is hereby denoted as
29 CFR 1910.219(a)(3).

Further, upon specific consideration of the Hearing
Officer's Conclusion of Law No. 3, the Review Commission dis-
claims the reasoning contained therein, for the reason that
each instance of alleged occupational hazard must be considered
in the entirety of its individual elements and circumstances,
and no such conclusions about possibility of employee harm may
thus be drawn.

After a thorough review of the entire record before it, however, this Commission is in unanimous agreement with the ultimate Recommended Order of the Hearing Officer, and hereby orders it ~~AFFIRMED~~ in all respects not inconsistent with this opinion.



H. L. Stowers, Chairman

/s/ Charles B. Upton

C. B. Upton, Commissioner

/s/ M. H. Stanton

M. H. Stanton, Commissioner

DATED: October 27, 1975
Frankfort, Kentucky

DECISION NO. 182

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 & Health

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

The Honorable Thorley C. Mills, Jr., (Certified Mail #456474)
Assistant Counsel
Firestone
1200 Firestone Parkway
Akron, Ohio 44317

Mr. T. L. Yelton, Plant Manager (Certified Mail #456475)
Firestone Textiles Company
Div. of Firestone Tire & Rubber Co.
Post Office Box 8
Bowling Green, Kentucky 42101

This 27th day of October, 1975.


Iris R. Barrett, Executive Director



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 864-8892

August 20, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 111

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FIRESTONE TEXTILES COMPANY

RESPONDENT

NOTICE OF RECEIPT OF
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 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 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
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

The Honorable Thorley C. Mills, Jr., (Certified Mail #467012)
Assistant Counsel
Firestone
1200 Firestone Parkway
Akron, Ohio 44317

Mr. T. L. Yelton, Plant Manager (Certified Mail #467013)
Firestone Textiles Company
Div. of Firestone Tire & Rubber Co.
Post Office Box 8
Bowling Green, Kentucky 42101

This 20th day of August, 1975.


Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 111

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

FIRESTONE TEXTILES COMPANY

RESPONDENT

* * * * *

Hon. Peter J. Glauber, Assistant Counsel, Department of Labor,
Frankfort, Kentucky, for Complainant.

Hon. Thorley C. Mills, Jr., Assistant Counsel, Firestone Textiles
Company, Akron, Ohio, for Respondent.

GRAPER, Hearing Officer.

An inspection was made on December 2, 1974, by the Kentucky Department of Labor, Division of Occupational Safety and Health, of a place of employment located at Louisville Road, Bowling Green, Kentucky, whereat the respondent was described as a convertor of synthetic tire cord fabric. On the basis of such inspection, it was alleged in a Citation issued December 18, 1974, that respondent violated three separate provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972). Of these, only Item number 1, for which a penalty of \$37.00 was proposed in a Notification of Proposed Penalty accompanying the Citation, was contested.

The alleged nonserious violation of Standard 29 CFR 1910.219 (e)(1)(i) (as adopted by OSH 112) was described in the Citation as follows:

Horizontal belts less than 42 inches from the floor were not fully enclosed (at back idler pulley of ply frame No. 56 at corner belt idler pulleys on ply frames and cable frames, Twisting Department).

The date by which the alleged violation must be corrected was within one month.

The Notice of Contest was received from the Employer (respondent) on January 16, 1975, which, together with a copy of the Citation and the Notice of Proposed Penalty, was transmitted to the Kentucky Occupational Safety and Health Review Commission on January 21, 1975, and was received on January 22, 1975. On the same date, a Notice of Receipt of Contest was mailed to the parties and on January 27, 1975, a Certification of Employer form indicating that no affected employee is represented by an authorized employee representative was received. A Complaint was filed on January 22, 1975. An Answer was filed on February 7, 1975. On February 12, 1975, the case was assigned to the Hearing Officer and, on the same date, a Notice of Hearing was mailed to the parties. Pursuant to the request of the respondent made on February 14, 1975, an Amended Notice of Hearing was mailed to the parties on February 25, 1975, rescheduling the hearing. Pursuant to such Amended Notice of Hearing, a hearing was held on Thursday, March 6, 1975, at 9:00 a.m., CDT, at the Bureau of Highways Office, District #3, Conference Room, Bowling Green, Kentucky, under the provisions of KRS 338.071(4), one of the provisions of Chapter 338 of the Kentucky Revised Statutes dealing with the safety and health of employees, which authorizes the Review Commission to hear and rule on

appeals from citations, notifications and variances issued under the provisions of this Chapter and to adopt and promulgate rules and regulations with respect to the procedural aspect of its hearings. Under the provisions of KRS 338.081, hearing authorized by the provisions of such Chapter may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal, the Review Commission may sustain, modify, or dismiss a citation or penalty. Informal briefs were filed on behalf of both parties.

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

FINDINGS OF FACT

The following facts were not disputed by the parties:

1. Respondent has five hundred one twisting machines which twist yarn like material a given number of turns per inch which in turn may be twisted in two or three multiples which are later woven to make tire fabric.

2. At each of the four corners of each twisting machine there is a corner idler over which a corner idler belt runs. The corner idler is three and one-quarter inches in diameter and four inches in length. The corner idler belt is one-eighth inch thick and two and three-quarter inches wide.

3. A guardrail made of pipe one and one-half to two inches thick completely encircles each twisting machine. The bottom of the guardrail is eight inches from the floor. The inside of the guardrail

is eleven inches from the corner idler belt at each of that belt's four locations on each machine. At the top of its path, the corner idler belt is fourteen and one-half inches off the floor. The bottom of the corner idler is ten and one-half inches from the floor. In addition to the front guard railing, the belt is guarded on both sides.

4. Both parties agree that the corner idler and the corner idler belt do not pose any danger to the operators of the twisting machines while the machines are actually being operated.

5. There is an approximate six foot aisle completely around each twisting machine.

6. The compliance officer feels that the primary hazard is that employees may stick their hands in or trip and fall and get their hands in the approximately ten and one-half inch opening in the area of the corner idler and corner idler belt while cleaning up or reaching into the machine to remove lint or dust. He is not worried about the foot exposure.

7. The respondent contends, and this is undisputed by the complainant, that in the ordinary procedures and use relating to the operation of the twisting machines by the operators, there is no hazard to the operators. The respondent further contends, that the belts in question are located in such positions that inadvertent exposure to it is practically impossible. The machines are fully stopped for maintenance. Employees would not ordinarily have any reason to be near the machines while they are operating except for visual inspection. Employees would not touch any part of the machine during visual inspection. In support of this, respondent has shown that the Bowling Green plant has accumulated over 3 million operator man hours without a serious

injury from the belt in question, and that respondent's other textile plants and other textile plants of other companies have similar accident-free records with respect to the operation of the twisting units.

8. In addition to the corner idlers and belts, one back idler pulley of ply frame no. 56 was not covered. Respondent admits that the back idler pulleys are supposed to be covered but that this one happened not to be covered. Apparently it had fallen off.

9. Respondent is in the textile industry.

10. The amount of the penalty proposed is not in controversy should a violation be found to exist.

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

CONCLUSIONS OF LAW

1. Since respondent is in the textile industry, 1910.219(3) rather than 1910.219(e)(1)(i) is applicable. 1910.219(3) provides:

(3) For the Textile Industry, because of the presence of excessive deposits of lint, which constitute a serious fire hazard, the sides and face sections only of nip-point belt and pulley guards are required, provided the guard shall extend at least six (6) inches beyond the rim of the pulley on the in-running and off-running sides of the belt and at least two (2) inches away from the rim and face of the pulley in all other directions.

2. Full enclosure, therefore, is not required and respondent is not in violation of 29 CFR 1910.219(e)(1)(i).

3. While not necessary to this decision, both the complainant and respondent sought to have determined whether or not a mere possibility that injury could come to an employee could sustain a citation. There must be actual exposure to the hazard--even if the hazard exists in the workplace--before there is a probability that harm will befall a

worker. By its terms, the general duty clause prescribes the presence of a hazard which is causing or is likely to cause death or serious physical harm. The term "likely" denotes a higher degree of probability than the term "possibility". Following this reasoning, the Review Commission should not sustain a citation unless harm to an employee is likely or probable. While the probability may be low, moderate or high, a mere possibility is not enough. Anything is possible. An employer should not be held to any possibility. An employer should only be required to guard against that which is likely or probable. In the case at bar, only a possibility of employee harm was shown. To sustain his burden of proof, the Commissioner of Labor must prove by substantial evidence each element comprising the charged violation. Showing only a possibility of employee harm does not meet this burden.

4. For the foregoing reasons, the citation should be dismissed.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation charging an other than serious violation of Standard 29 CFR 1910.219(e)(1)(i) shall be and it hereby is dismissed with prejudice, and IT IS FURTHER ORDERED AND ADJUDGED that the proposed penalty and the proposed abatement date shall be and they hereby are vacated.


LLOYD GRAPER
HEARING OFFICER, KOSHRC

DATED: August 20, 1975
Frankfort, Kentucky

Decision No. 151