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JULIAN M. CARROLL

~~WENDELL H. FORD~~

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 5, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 114

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CERAMIC COATING CO.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

UPTON and STOWERS, COMMISSIONERS:

The Decision and Recommended Order of Hearing Officer Roger Riggs in this case, dated June 16, 1975, is before this Commission for review. Upon careful consideration of the record herein, it is the finding of the Commission that the standard allegedly violated in Item #4, 29 CFR 1910.141(a)(3)(ii) (as adopted by 803 KAR 2:020), provides two alternatives for compliance, as follows:

The floor of every workroom shall be maintained "in a dry condition where wet processes are used...dry standing places shall be provided, where practicable, or appropriate waterproof footwear shall be provided. (Emphasis added)

The employer herein showed that he had availed himself of the second alternative by presenting evidence that he had provided waterproof footwear, and the employee involved stated that his feet were in fact dry while working. The Department of Labor failed to rebut any of this evidence at hearing and consequently was unable to sustain its burden of proof as to Item #4.

It is therefore the order of this Commission that the decision of the Hearing Officer sustaining a violation of 1910.141(a)(3)(ii) be and it hereby is REVERSED, and that the citation and the \$41.00 penalty attaching are hereby DISMISSED and VACATED, respectively.

It is the further order of this Commission that the Hearing Officer's Recommended Decision as to Items #1 and #2 of the citation, and in all other respects not inconsistent with this opinion, be AFFIRMED.

/s/ Charles B. Upton
Charles B. Upton, Commissioner

/s/ H. L. Stowers
H. L. Stowers, Chairman

STANTON, CONCURRING in part and DISSENTING in part:

I cannot agree with and therefore respectfully DISSENT from the majority's decision to vacate the citation for a violation of 29 CFR 1910.141(a)(3)(ii). It is my finding that the employer failed to provide dry standing places or appropriate waterproof footwear for the employees who were conducting wet processes. The employer failed to furnish a safe and healthful place of work, and I would therefore sustain that citation. I do, however, CONCUR with the majority's decision with respect to the dismissal of the citations for Items #1 and #2.

Merle H. Stanton
Merle H. Stanton, Commissioner

Date: August 5, 1975
Frankfort, Kentucky

DECISION NO. 148

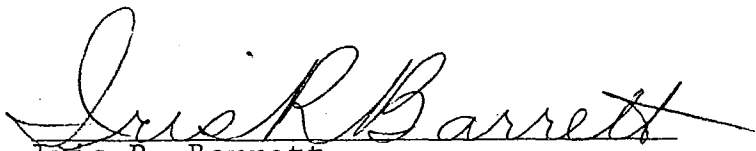
This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

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

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

Mr. Ralph Saunders, Personnel Director (Certified Mail #469055)
The Ceramic Coating Company
Post Office Box #370
Newport, Kentucky 41072

This 5th day of August, 1975.


Iris R. Barrett
Executive Director

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 16, 1975

JULIAN M. CARROLL
~~WENDELL H. FORD~~
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 114

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CERAMIC COATING 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.

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

Mr. Ralph Saunders, Personnel Director (Certified Mail # 469011)
The Ceramic Coating Company
Post Office Box #370
Newport, Kentucky 41072

This 16th day of June, 1975.



Iris R. Barrett
Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #114

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

CERAMIC COATING COMPANY

RESPONDENT

* * * * *

Hon. Peter J. Glauber, Attorney at Law, Frankfort, Kentucky,
For Complainant
Mr. Ralph Saunders, Personnel Manager, Ceramic Coating Co.,
For Respondent
RIGGS, HEARING OFFICER

On December 18, 1974 an inspection took place at Ceramic Coating Company's plant located at Newport, Kentucky. As a result of the inspection of Respondent's operations, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued a citation to Respondent charging four other than serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

As to Item Number 1, the standard allegedly violated was 29 CFR 1910.95 (h)(1) (as adopted by OSH 11-2) and a description of the alleged violation was as follows:

Three employees were exposed to sound levels between 100 and 105 DBA for 3 hours when measured on the A scale of a sound level meter. (Grinders in surface preparation department).

A penalty of \$57.00 was proposed and the date by which complete abatement was to be achieved was stated as July 16, 1975.

As to Item Number 2, Complainant charged a violation of 29 CFR 1910.95 (b) (3) (as adopted by OSH 11-2) explaining such charge as follows:

The sound levels exceeded the levels as prescribed in Table G-16, and the company does not have an effective hearing conservation program.

A penalty of \$41.00 was proposed and the date stated by which the alleged violation must be achieved was July 16, 1975.

As to Item Number 3, the standard allegedly violated was 29 CFR 1910.141 (a) (3) (as adopted by OSH 11-2) and the alleged violation was described as:

All places in the establishment where employees are working were not being kept clean to the extent that the nature of the work allows. (Lunch room and employee restroom).

No penalty was proposed for this alleged violation and January 27, 1975 was the date stated in the citation by which the alleged violation must be corrected.

As to Item Number 4, the section of KRS Chapter 338 allegedly violated was 29 CFR 1910.141 (a) (3) (ii) (as adopted by OSH 11-2) and was described as:

Where wet processes were being conducted, the floor of the workroom did not have a dry standing place provided where practicable nor was appropriate waterproof footwear provided. (No waterproof footwear being worn by employee in mill room).

The Department of Labor proposed a penalty of \$41.00 and the stated date by which the alleged violation must be corrected was March 4, 1975.

On January 24, 1975, the Department of Labor received a letter from respondent stating employer's intention to contest the alleged violations designated Item 1, 2, and 4 of the citation. Thereafter the Department of Labor issued a complaint, alleging the contested violations as previously noted and proposing said penalty amounts. On February 14, 1975 the Review Commission received the employer's answer denying the allegations and violations in paragraphs 6 through 8 of the Complaint.

The notice of hearing was promptly sent to the parties and a letter certifying that the notice had been duly posted was received by the Review Commission on February 4, 1975 along with a certification from Respondent that no affected employee is represented by an authorized employee representative.

Hearing was held on March 4, 1975 at the hour of 2:00 p.m. in the office of the Bureau of Highways in Covington, 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. At said hearing Complainant moved without objection to have reflected for the record that any place in the citation reading OSH 11-2 be changed to 803 KAR 2-020 to conform to the new Kentucky Administrative Register.

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

DISCUSSION AND
FINDINGS OF FACT

1. Respondent was permitted to amend his citation and complaint at hearing to reflect that wherever the words "as adopted by OSH 11-2" were used therein it should read "as adopted by 803 KAR 2-020".
2. Testimony and photographs were presented by Complainant in explanation to the Commission that where a wet process activity was taking place, an employee of Respondent was exposed to the necessity of working in the millroom area without a dry standing place provided where practicable. Complainant further proved that Respondent did not require the use of appropriate waterproof footgear and that there was no dry standing place provided where practicable.
3. During presentation of the Department of Labor's case, the evidence and testimony stated above was offered in support of the charge of a violation of a standard, read into the record which standard was 29 CFR 1910.141 (a) (1) (ii) (as adopted by 803 KAR 2-020). This standard does make it a violation of the Act to allow the conditions to exist as proven by the Department of Labor.

However, both the Citation and the Complaint, after reflecting the allowed amendment at hearing, allege a violation of 29 CFR 1910.141 (a) (3) (ii) (as adopted by 803 KAR 2-020).

4. Ear plugs were being utilized by the employees working in the metal grinding section.

5. The compliance officer sampled the metal grinding section continuously for two or three 30-minute periods which samples reflected a decibel level of 100-105 for a period of 14 minutes of the 30 minutes of sampling.

6. The compliance officer did not know specifically the overall time he did spend sampling for these alleged noise level violations.

7. The compliance officer did not remain in the area during the entire sampling for the sound level violations nor during the specific 30-minute continuous sampling.

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

CONCLUSIONS OF LAW

The defect in the Citation and in the Complaint alleging the wrong standard in connection with the floors of the wet processing area is not fatal in this instance since it appears from the record and brief of Respondent that he was on notice and fully aware of the condition for which he was cited and the standard which made it a violation. There appears to be no reason included in the record as to why the Respondent could not practicably provide a dry standing place in this area. The compliance officer considered the proper criteria in arriving at the proposed penalty.

Respondent pointed out further errors in the Complaint which may have easily caused some confusion on his part. These errors, however, do not evidence that he was prejudiced in any manner.

The compliance officer's sample taken over one, two or three continuous 30-minute samples is insufficient to conclude that the sound levels exceed the values shown on Table G-16. Mr. Hater testified that with the testing devices he was somewhat restricted to the area, thus did not work his "ordinary grinding day". This in itself would throw some cloud on whether or not a proper sample was taken. He stated that he ordinarily worked at other jobs during part of the day, as do the other men working with grinders.

The allegation was that the men were exposed for 3 hours to a decibel level of 100-105. The compliance officer admitted that the "operation varied". He went on to say: "To know exactly, I would need to have stayed there three hours."

The burden of proof is on the Complainant to show by a preponderance of evidence that the alleged violation existed on the day of the inspection. In this case it appears that sound levels were possibly in excess of the permissible noise exposure levels shown on Table G-16. But in order to prove the existence of the violation, the compliance officer would necessarily have had to stay and measure the sound levels for the length of time shown on the table. Further the complaint stated that the Compliance Officer did "personally observe conditions; means, manners and practices of employment . . . which violate" the Act. This he admittedly did not do since he did not stay and sample for 3 hours as alleged.

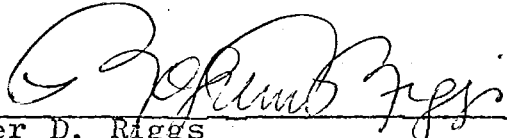
The compliance officer said that he could not know "exactly" whether or not the exposure was as he had alleged unless he had stayed the entire three hours. On this basis, the citation should not be sustained since an employer cannot be held for a violation that might have existed.

The other item of the citation was not contested and it does not appear that error would result from not reviewing this allegation.

IT IS

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation for items 1, and 2 shall be and the same hereby are DISMISSED with prejudice, and the penalties of \$57.00 and \$41.00 respectively shall be and the same hereby are VACATED. The citation for item 4 and the penalty of \$41.00 shall be and the same hereby are SUSTAINED. Abatement shall be completed by September 1, 1975.



Roger D. Riggs
Hearing Officer, KOSHRC

Dated: June 16, 1975

Decision No. 128