

*Done*



115  
121  
(271)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

104 Bridge Street  
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision +  
Order No. 271*

*May 6, 1976*

KOSHRC # 115 & 121  
(Consolidated)

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SMITH MACHINE & SUPPLY COMPANY, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

UPTON, Commissioner, for the Majority:

A Recommended Order of Hearing Officer John T. Fowler, Sr., dated February 13, 1976, is presently before this Commission for review.

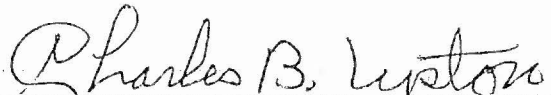
The Commission notes an error in the final paragraph, page 11, of the Hearing Officer's Recommended Decision. The first line of that paragraph is hereby corrected to read, "IT IS FURTHER ORDERED that Items 10 through 29...are hereby sustained," rather than "Items 9...."

There are numerous items presented for reconsideration in this case, including the issue of reasonable promptness of issuance of the citation, and reasonableness of proposed penalties. After thorough review of all pleadings and evidence in the record before it, it is the majority decision of the Commission that the Hearing Officer erred in sustaining Item 13 of the citation, pertaining to a portable fire extinguisher. The evidence fails to show sufficient employee exposure, among other elements, to sustain a citation under 29 CFR 1910.157(a). The Hearing Officer's findings relating to timeliness of issuance of the citation, however,

are found to be proper and well-supported, and they are hereby  
AFFIRMED without other comment.

It is further held that the Complainant appears to have carried the fundamental burden of proof on Items 1 through 7 and 10 through 29 sufficient to warrant that these items and pertinent penalties be AFFIRMED, and it is so ordered. It is likewise found that the Hearing Officer properly applied the law to the facts in vacating Items 8, 9, 30 and 31, and his holdings regarding these items are AFFIRMED. In the matter of Item 30, the vacation of both citation and penalty resulted directly from a failure of the compliance officer to gather proper and complete evidence on inspection to aid in carrying the burden of proof for Complainant at hearing.

Finally, the penalties as applied to certain items herein are found to be sufficient and proper as applied, and no evidence has been found by this Commission so compelling as to justify the disturbance of that result.



Charles B. Upton, Commissioner

/s/ Merle H. Stanton

Merle H. Stanton, Commissioner

STOWERS, Chairman, CONCURRING in part and DISSENTING in part:

I concur in all elements of this decision with the respectful exception of the majority opinion pertaining to Item 17. This involved the anchoring of a pedestal grinder, where the cited standard, 29 CFR 1910.212(b), indicates, "Machines designed for a fixed location must be anchored."

In my opinion, testimony by Respondent at hearing clearly indicates that the machine is portable and need not be bolted down. Even in the face of testimony by Complainant's Compliance Officer that the machine stand had holes in its base

KOSHRC # 115 & 121 (Consolidated)  
(Decision and Order of Review Commission)

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

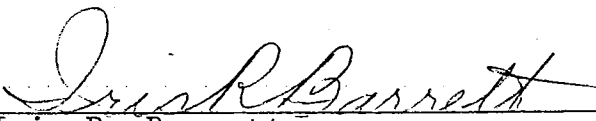
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Peter J. Glauber  
Assistant Counsel

The Honorable John H. Helmers (Certified Mail # 467298)  
Attorney at Law  
100 St. Ann Building  
Post Office Box 727  
Owensboro, Kentucky 42301

Mr. Frank T. Faith, Jr., Pres. (Certified Mail # 467297)  
Smith Machine & Supply Company, Inc.  
817 Lewis Street  
Post Office Box 508  
Owensboro, Kentucky 42301

This 6th day of May, 1976.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

*Time*



115  
121  
(221)

JULIAN M. CARROLL  
**GOVERNOR**

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
**REVIEW COMMISSION**

H. L. STOWERS  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601  
PHONE (502) 564-6892

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

*KOSHRC*  
*Decision of*  
*Order No. 221*

February 13, 1976

KOSHRC # 115 & 121  
(Consolidated)

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SMITH MACHINE & SUPPLY COMPANY, INC.

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. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

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 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, 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 directed 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 (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Peter J. Glauber  
Assistant Counsel

Honorable John H. Helmers (Certified Mail # 456115)  
Attorney at Law  
100 St. Ann Building  
Post Office Box 727  
Owensboro, Kentucky 42301

Mr. Frank T. Faith, Jr., Pres. (Certified Mail #456115)  
Smith Machine & Supply Company, INC.  
817 Lewis Street  
Post Office Box 508  
Owensboro, Kentucky 42301

This 13th day of February, 1976.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director



KOSHRC NO. 115 and  
KOSHRC NO. 121 (consolidated)

COMPLAINANT

SMITH MACHINE & SUPPLY COMPANY, INC.

RESPONDENT

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

Hon. John H. Helmers, Sandidge, Holbrook & Craig, P.S.C., 100 St. Ann Building, Owensboro, Kentucky 42301, Attorneys for Respondent.

FOWLER, Hearing Officer

This action was reassigned to the present Hearing Officer due to the death of the previously assigned Hearing Officer, and no part of the oral testimony was heard by the present Hearing Officer. The case is, thus, recommended on the basis of the file, the Transcript of the Evidence, and the Briefs and authorities cited by the parties. The actions appeared to arise as a result of the same inspection and the actions were consolidated by order of the Commission on March 7, 1975. From the record it appears that one action is a duplication of the other and they both contain the same citations for the same alleged offenses and the same penalties and are, thus, probably duplications, but in any event, decided as a consolidated matter.

The record discloses that as a result of an inspection of January 2, 1975, by the Commissioner of Labor of premises located at 817 Lewis Street in Owensboro, Kentucky, a place of business of the Respondent herein, a citation was issued on January 21, 1975, listing 31 violations of KRS Chapter 338, (Kentucky Occupational Safety and Health Act of 1972).

The original answer appears to contest 16 of the 31 stated alleged violations. However, at the hearing the statement was made that all 31 of the alleged violations were in contest and the case has been, thus, approached, with the understanding on the part of the Hearing Officer that all items have been and are in contest by the Respondent. The following items were charged as alleged violations, all considered to be other than serious and the following proposed penalties were made.

1. OSH 103 Sec. 2(a) "The notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted."
2. 29 CFR 1910.22 (d)(1)  
(as adopted by OSH 11-2) "The floor loads approved by the building official were not marked on plates and affixed to the building in a conspicuous place to which they relate (second floor)."
3. 29 CFR 1910.22 (a)(1)  
(as adopted by OSH 11-2) "All places of employment and passageways in the fabrication shop were not kept clean and orderly and in a sanitary condition."
4. 29 CFR 1910.23(c)(1)(i)  
(as adopted by OSH 11-2) "The open-sided platform above the front of the machine shop was more than four (4) feet above the adjacent floor and was not guarded by a standard railing and toeboard on all open sides where persons pass beneath."

5. 29 CFR 1910.25(d)

(1)(x)(as adopted by

OSH 11-2) "Ladders which had developed defects were not withdrawn from service for repair or destruction and tagged or marked as "Dangerous, Do Not Use" (straight ladder and step ladder, machine shop step ladder, fabrication shop). "

6. 29 CFR 1910.37(j)

(as adopted by OSH

11-2) "A means of egress not substantially level was not provided with a stair or ramp (rear exit door, machine room).

7. 29 CFR 1910.37(q)(1)

(as adopted by OSH 11-2) "Exits from the fabrication shop were not marked by readily visible signs. "

8. 29 CFR 1910.107

(c)(5)(as adopted by

OSH 11-2) "Electrical equipment in the paint spraying area was not specifically approved for locations containing both deposits of readily ignitable residue and explosive vapors (fabrication shop)."

9. 29 CFR 1910.107(d)(2)

(as adopted by OSH 11-2) "The spraying area was not provided with mechanical ventilation adequate to remove flammable vapors, mists, or powders to a safe location and to confine and control combustible residues (fabrication shop). "

10. 29 CFR 1910.132 (a)

(as adopted by OSH 11-2) "Personal protective equipment (safety-toe footwear) was not provided for employees who regularly work with metal parts thereby exposing them to foot injury (machine and fabrication shop).

11. 29 CFR 1910.133(a)(1)

(as adopted by OSH 11-2) "Suitable eye protectors were not provided where machines and operations presented the hazard of flying objects ("Wellsaw", "Marvel" hydraulic saw, and radial drill operators weld chipping, fabrication shop). "

12. 29 CFR 1910.141(c)(1)

(vi) (as adopted by OSH

11-2) "A covered receptacle was not provided in a toilet room used by women (office). "



13. 29 CFR 1910.157 (a)

(1)(as adopted by OSH 11-2) "A portable fire extinguisher was not maintained in a fully charged and operable condition (soda-acid extinguisher, machine shop)."

14. 29 CFR 1910.179(j)

(2)(iv)(as adopted by OSH 11-2).

"Signed monthly inspection reports were not available for the hoist chain on the overhead crane in machine shop."

15. 29 CFR 1910.179

(m)(1)(as adopted by OSH 11-2)

"Full written, dated, and signed monthly inspection reports were not available for running ropes on the overhead crane in fabrication shop."

16. 29 CFR 1910.212(a)

(1)(as adopted by OSH 11-2)

"Machine guarding was not provided to protect the operator and other employees in the machine area from hazards created by rotating parts (portion of bandsaw blade above guide, machine shop)."

✓ 17. 29 CFR 1910.212(b)

(as adopted by OSH 11-2)

"The "Lima" pedestal grinder was not securely anchored to prevent walking or moving (machine shop)."

18. 29 CFR 1910.215(a)

(4)(as adopted by OSH 11-2)

"Work rests were not provided or were not kept adjusted to within one-eighth inch of the wheels on the "Carboloy", "Lima", and "Landis" grinders in the machine shop and side room."

19. 29 CFR 1910.215(b)

(9)(as adopted by OSH 11-2)

"The distance between the wheel periphery and the adjustable tongue or the peripheral member at the top exceeded one-fourth inch on the "Lima" and "Landis" grinders (machine shop, side room)."

20. 29 CFR 1910.219

(e)(3)(i) (as adopted by  
OSH 11-2)

"Inclined belts seven (7) feet or less from the floor were not enclosed ("Ames" lathe, small keyseater, machine shop: "Wellsaw", radial drill, small air compressor, vertical boring mill, fabrication shop)."

21. 29 CFR 1910.219(c)

(2)(as adopted by OSH  
11-2)

"Exposed parts of horizontal shafting seven (7) feet or less from the floor were not protected by stationary casings or trough enclosures (planer, machine shop radial drill, fab shop)."

22. 29 CFR 1910.219(c)

(3)(as adopted by OSH  
11-2)

"Vertical shafting seven (7) feet or less from the floor was not enclosed with a stationary casing (radial drill, fab shop)."

23. 29 CFR 1910.219(f)

(1)(as adopted by OSH  
11-2)

"Gears on the "Ames and "American" lathes were not enclosed."

24. 29 CFR 1910.252

(e)(2) (iii) (as adopted  
by OSH 11-2)

"Workers or other persons adjacent to a welding area were not protected from the rays by noncombustible or flameproof screens or shields or were not required to wear appropriate goggles (fab shop)."

25. 29 CFR 1910.252 (a)

(2)(ii)(d)(as adopted by  
OSH 11-2)

"Valve protection caps were not in place, handtight on some oxygen cylinders in storage (fab shop)."

26. 29 CFR 1910.252(a)

(2)(iv)(c)(as adopted by  
OSH 11-2)

"Oxygen cylinders in storage were not separated from fuel-gas cylinders, a minimum distance of twenty (20) feet or by a noncombustible barrier at least five (5) feet high having a fire-resistance rating of at least one-half hour (fab shop)."

27. "National Electrical Code" Article 400-4(as adopted by 29CFR 1910.309 (a) and OSH 11-2) "Flexible cord was used where run through a hole in the wall (connecting water heater, front of machine shop). "

28. "National Electrical Code" Article 110-22(as adopted by 29CFR 1910.309 (a) and OSH 11-2) "Each disconnecting means, and each service, feeder, or branch circuit at the point where it originates was not legibly marked to indicate its purpose (electrical service area, front of machine shop). "

29. "National Electrical Code" Article 400-5 (as adopted by 29CFR 1910.309 (a) and OSH 11-2) "Flexible cord was not used in continuous lengths without splices (cord to light on "Bridgeport" milling machine, machine shop yellow extension cord, fab shop). "

30. "National Electrical Code" Article 250-45 (d)(3)(as adopted by 29CFR 1910.309 (a) and OSH 11-2) "Exposed noncurrent-carrying metal parts of cord and plug-connected equipment were not guarded (drill, utility grinder, machine shop). "

31. "National Electrical Code" Article 110-17(a)(as adopted by 29 CFR 1910.309(a) and OSH 11-2) "Live parts of electrical equipment operating at 50 volts or more were not guarded against accidental contact by approved enclosures (220 volt receptacle in side room has no face plate). "

In Item No. 4 a proposed penalty of \$37.00 was made; Item No. 8 a penalty of \$37.00 was proposed; Item No. 10 a penalty of \$31.00 was proposed; Item No. 11 a penalty of \$44.00 was proposed; Item No. 20 a penalty of \$44.00 was proposed; Item No. 21 a penalty of \$31.00 was proposed; Item No. 24 a penalty of \$31.00 was proposed; Item No. 30 a penalty of \$44.00 was proposed.

No penalty was proposed for the other alleged violations. Abatement dates were set at various periods for each of the alleged violations.

The pertinent procedural information is as follows:

1. Inspection of premises mentioned, January 2, 1975.
2. Citation issued January 21, 1975, listing 31 non serious violations.
3. The proposed penalties are as set forth above, totalling \$299.00.
4. Notice of Contest was received January 30, 1975.
5. Notice of Contest was transmitted to the KOSH Review Commission February 3, 1975.
6. The Notice of Receipt of Contest was mailed February 4, 1975, and the Certification of Employer form was received February 10, 1975.
7. The Complaint was received February 11, 1975. Answer was filed February 27, 1975, and amended March 14, 1975.
8. The case was originally assigned to a Hearing Officer on March 10, 1975.
9. A hearing was scheduled originally on April 10, 1975, and was continued on several occasions eventually being heard on May 14, 1975, in the Law Offices of Sandidge, Holbrook & Craig, P.S.C., 100 St. Ann Building, Owensboro, Kentucky. The matter was reassigned to the present Hearing Officer January 15, 1976, and the record does not indicate when the transcript of the evidence was received.

The aforesaid hearing was held under the provisions of KRS 338.071 one of the provisions dealing with the safety and health of employees which author 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 procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty.

The major portion of the rather lengthy testimony was concerned with the examination of Mr. Steven Coomes, who was the Compliance Officer for the Kentucky Occupational Safety and Health Commission in this case. The primary question raised by the Respondent was by cross-examination as to the method used in arriving at the computation of penalties and in questioning the Compliance Officer concerning the investigation and the subsequent citations.

Respondent raises the question of whether the Commission acted, with reasonable promptness under the meaning of Section ((a) of the Act. Respondent contends that the citation did not meet the standard, 72 hours as set forth in the Federal Regulations and that the Commissioner of Labor did not act with reasonable promptness; a delay of some 19 days from January 2nd inspection until January 21st citation and cites several decisions from various Courts which have determined reasonable promptness in the issuance of citations. The Respondent offered little testimony concerning the alleged violations and the principal questions appear to be whether or not the Department of Labor has made a sufficient case

to sustain the alleged violations and whether or not the citation was issued with reasonable promptness.

After hearing the testimony of the witnesses and having read the Transcript of the Evidence together with the Briefs of the parties and the authorities cited therein and such additional research as your Hearing Officer has conducted, it is concluded that substantial evidence on the record considered as a whole supports the following Findings of Fact.

FINDINGS OF FACT

1. Proper procedures were used in making the inspection and investigation and proper procedures and consideration were given in determining the penalties and credits to which the Respondent was entitled.
2. Jurisdiction of the parties and subject matter and due and timely notice of the hearings is found as a matter of fact.
3. The Department of Labor failed to show by sufficient evidence the violations alleged in Items No. 8 and No. 9 in reference to the paint shop and there is insufficient evidence to sustain a violation of these items.
4. There is no proof in the transcript in regard to Item No. 30 and Item No. 31 was dismissed by the Hearing Officer at the hearing, so it is found that there is insufficient evidence as to Items No. 30 and 31.
5. The Department of Labor has introduced sufficient evidence to sustain the violations and the proposed penalties in all of the other items cited.



CONCLUSIONS OF LAW

It is concluded as a matter of law that the citation was issued with reasonable promptness under the meaning of the Act. The Court of Appeals for the Seventh Circuit in *Peter J. Brennan, Secretary of Labor vs. Chicago Bridge & Iron Co., and the Occupational Safety and Health Review Commission* on April 22, 1975, stated that the rule which required the Secretary, or in this case the Commissioner, or his representative to issue a citation within 72 hours of the time the decision to do so is reached is unacceptable, and such requirement is not supported by the Legislative history of the requirements of Section 9(a). The above-cited case had a delay of 30 days between the inspection and the issuance of the citation. It appears to the Hearing Officer that some time is necessary in order to review the inspection and to decide whether or not a citation should, in fact, be issued under the circumstances and that the time element in this case, January 2, 1975 to January 21, 1975, is not an unreasonable delay and is within the meaning of reasonable promptness in the facts in this case. It is concluded that to require such a time factor to be interpreted would necessitate some showing of prejudice on the part of the party or Respondent cited. In other words, unless there is a great length of time which elapses, which would make proof difficult to come by, there must be or should be some showing of prejudice on the part of the Respondent in order to raise the question validly of reasonable promptness, where the time involved is some 19 days as in the present case. There are many decisions, including *S. A. Healy Co., and Kenny Construction Co. vs. Secretary of Labor*, OSHRC Docket No. 2214, October 5, 1973; *Ray Lien Masonry*, OSHRC

Docket Nos. 1626 and 1627, June 20, 1973, in addition to the 7th Circuit case which was previously referred to in this decision.

Respondent has cited no case in which the time element was as short from the time of the inspection to the time of the issuance of the citation as in the case at hand, and it is, thus, concluded that reasonable promptness did exist in issuance of the present citation.

It is further concluded that the penalties which were proposed be assessed against the Respondent, for the violations alleged are reasonable and the cases in which sufficient proof was introduced, they should be sustained.

RECOMMENDED ORDER

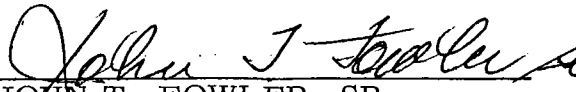
IT IS ORDERED AND ADJUDGED that citation No. 8 and 9 and the penalty proposed for the violation of said Items are hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that Items 30 and 31 and the penalties proposed for the alleged violation of said items are hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that Items 1 through 7 and the attendant proposed penalty for Item 4 of \$37.00 are hereby sustained.

IT IS FURTHER ORDERED that Items <sup>10</sup>~~8~~ through 29, proposed penalty attached to Item No. 10 of \$31.00, and the proposed penalty for Item No. 11 of \$44.00; the proposed penalty for Item 20 of \$44.00; the proposed penalty for Item 21 of \$31.00 and the proposed penalty for Item No. 24 of \$31.00 are hereby sustained.

Abatement for the Items above sustained, is set for 30 days from the effective date of this Order.

  
JOHN T. FOWLER, SR.  
Hearing Officer

Dated: February 13, 1976  
Frankfort, Kentucky

DECISION NO. 221