

FV

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #1167 _____

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THOMPSON ENGINEERING COMPANY

RESPONDENT

DECISION AND ORDER

The parties in the above-referenced action shall take notice that pursuant to Section 47(3) of the Rules of Procedure of the Kentucky Occupational Safety and Health Review Commission, the Recommended Order in this matter was called for review by the Review Commission on August 22, 1985. The issue on review was whether the Hearing Officer erred in vacating the proposed penalty.

KRS 338.991(2) requires that a serious violation be accompanied by some penalty assessment. American Saw & Tool Division of Vermont American Corporation, KOSHRC #854 (1982).

After a careful review of the evidence presented at the hearing held on December 5, 1984, the Commission VACATES the Recommended Order of the Hearing Officer insofar as it vacates the proposed penalty of \$210 for the serious violation sustained therein.

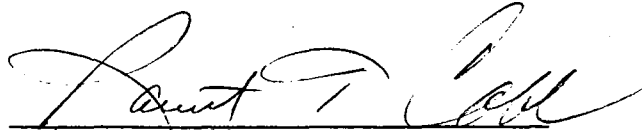
We find that a penalty assessment of one dollar (\$1.00) is reasonable under the circumstances of this case.

The Commission hereby ORDERS Respondent to pay a penalty of one dollar (\$1.00) for the serious violation of 29 CFR 1910.1001(c)(2)(iii).

1167

KOSHRC #1167
Decision and Order
Page Two

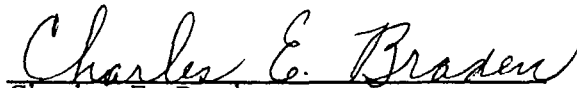
All other findings and conclusions of the Hearing Officer not inconsistent with this decision and order are hereby **AFFIRMED**.



Robert T. Cobb
Chairman



Carl J. Ruh
Commissioner



Charles E. Braden
Commissioner

DATE: August 26, 1985

DECISION NO. 1467

Copy of this Order has been served on the following parties
in the manner indicated:

Hon. Joni Page
Assistant Counsel
Labor Cabinet
Office of General Counsel
U. S. 127 South
Frankfort, KY 40601

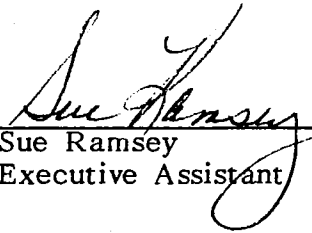
(Messenger Mail)

Mr. B. R. Thompson, Pres.
Thompson Engineering Co.
837 Floyd Drive
P. O. Box 5043
Lexington, KY 40555

(Cert. Mail #P587 662 851)

This 26th day of August, 1985.

Kenneth Lee Collova
Executive Director
KOSH REVIEW COMMISSION
Airport Bldg., Louisville Rd.
Frankfort, KY 40601
PH: (502) 564-6892


Sue Ramsey
Executive Assistant

8-19
9-3
8/5 - Order 8/19

FU

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #1167

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THOMPSON ENGINEERING CO.

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 submit a petition for discretionary review by this Commission. The petition must be received by the Commission in its offices in Frankfort on or before the 25th day following the date of this notice. 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 on the following parties in the manner indicated:

Hon. Joni Page
Assistant Counsel
Labor Cabinet
Office of General Counsel
U. S. 127 South
Frankfort, KY 40601


(Messenger Mail)

Mr. B. R. Thompson, Pres.
Thompson Engineering Co.
837 Floyd Drive
P. O. Box 5043
Lexington, KY 40555

(Cert. Mail #P587 662 799)

This 25th day of July, 1985.

Kenneth Lee Collova
Executive Director
KOSH REVIEW COMMISSION
Airport Bldg., Louisville Rd.
Frankfort, KY 40601
PH: (502) 564-6892


Sue Ramsey
Executive Assistant

KOSHRC NO. 1167

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THOMPSON ENGINEERING CO.

RESPONDENT

FINDINGS OF FACT
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

* * * * *

This case involves a safety inspection conducted on or about May 30, 1984, by an OSH Compliance Officer employed by the Secretary of Labor, (hereinafter Secretary), upon the worksite of THOMPSON ENGINEERING COMPANY, (hereinafter Respondent) located in Lexington, Kentucky. Respondent was engaged in removing asbestos from an elementary school. During the course of that inspection, the Compliance Officer issued to the Respondent one (1) citation for one (1) serious violation of the Kentucky Occupational Safety and Health Act (hereinafter Act). The Compliance Officer further recommended a penalty of Two Hundred and Ten Dollars (\$210.00).

The pertinent procedural information is as follows:

1. An inspection of the work premises of the Respondent was conducted on or about May 10, 1984.

2. The Respondent was issued one (1) citation for one (1) serious violation under the Act. The citation alleged:

(a) Violation of 29 CFR 1910.1001(c)(2)(iii) in that:

Two (2) employees were exposed to airborne asbestos while doing demolition work at Yates Elementary without the use of the type "C" continuous flow pressure-demand, supplied-air respirators.

3. The Compliance Officer recommended a proposed penalty of Two Hundred and Ten Dollars (\$210.00).

4. On July 26, 1984, notification fixing the abatement date of August 6, 1984 and the proposed penalty was issued Respondent.

5. On August 6, 1984, notification of the intent to contest was duly transmitted to the Kentucky Occupational Safety and Health Review Commission (hereinafter Review Commission).

6. The complaint was filed by the Secretary on August 23, 1984.

7. The case was assigned to a hearing officer on October 24, 1984.

8. The hearing was conducted on December 5, 1984 in Lexington, Kentucky.

9. The Notice of Receipt of Testimony was mailed on or about January 9, 1985.

The aforementioned hearing was held under the

provisions of KRS 338.071(4), one of the provisions for the safety and health of employees which authorizes the Review Commission to hear and rule on appeals and citations, notifications and variances issued under the Act, and to adopt and promulgate aspects of this hearing. This hearing officer was appointed by the Review Commission to serve in its place. After this hearing, the Review Commission may sustain, modify or dismiss a citation or penalty.

FINDINGS OF FACT

On May 30, 1984 Ms. Karen Early, Compliance Officer with the Kentucky Occupational Health and Safety Program conducted an inspection of the work premises of the Respondent who was engaged in removing asbestos from Yates Elementary School in Lexington, Kentucky (Transcript of Hearing hereinafter TH 10). The inspection was a referral from the Respondent. (Id.).

At that time, the Compliance Officer became aware of a serious violation of the Act. The Respondent was cited for violation of 29 CFR 1910.1001(c)(2)(iii) in that two (2) employees were exposed to airborne asbestos while doing demolition work without the use of Type "C" continuous flow pressure-demand, supply-air respirators. (TH 12).

The actual asbestos removal took place in a hallway of the school. (TH 14). The asbestos was to be removed by the "glove bag" containment method and disposed using the "drum disposal" method. (TH 36). There is no evidence in the record that the actual setting up for the removal

was improper.

It is admitted that employees of the Respondent were not equipped with Type "C" respirators. The employees were equipped with respirators that did not cover the whole face of the employee.

The citation was designated as serious since the exposure to the hazard caused diseases such as asbestosis, mesothelioma or lung cancer. Using the standard OHS-10 penalty worksheet the Secretary recommended a penalty of Two Hundred Ten Dollars (\$210.00).

The Respondent is a Kentucky company whose principal business is mechanical contracting. (TH 52). The Respondent does plumbing, heating and air conditioning, insulation and sheet metal insulation. (TH 52). The Respondent admits that it has few jobs such as asbestos installation and removal. (Id.).

The respondent points out that prior to beginning this job he contacted various agencies such as the local Health Department, the Kentucky Labor Cabinet and other federal agencies as well. In addition, the Respondent contracted services of McCoy and McCoy to advise the Respondent of the correct methods and applicable regulations into removal and take air sample before, during and after removal. (TH 50).

The Respondent states he informed said persons how he proposed to remove the asbestos and there were no negative replies. The Compliance Officer stated she

delivered to the Respondent or one of its employees the applicable regulation(s) during her conference with Respondent. However, there was no discussion as to the type of respirators that were to be used or required.

Therefore, after a review of the record herein this hearing officer concludes that the Respondent violated the Act by not providing his employees with Type "C" continuous flow pressure demand, air respirators while they were engaged in the demolition and removal of asbestos. This hearing officer agrees with the reasoning set out in Anaconda Aluminum, 1981 CCH OSHD ¶ 25, 300 and Johns Manfield, 1981 CCH OSHD ¶ 25,491 which holds that the standard set out in 1910.1001(c)(2)(iii) which states that all workers engaged in spraying, demolition on removal of asbestos must use Type "C" supplied air respirators. It is agreed by both the Secretary and the Respondent that these respirators were not provided.

The Respondent does not contest these facts, but rather argues that his consultants, governmental agencies and initially the Compliance Officer (who witnessed at the opening conference the respirators in use) lead him to believe he was in conformity with the Act.

Of concern to this hearing officer is the fact that the Compliance Officer on the morning of the inspection witnessed the use of the respirators herein described, but did nothing at that time to prevent the exposure or continued exposure of airborne asbestos to the employees

of the Respondent. It appears that Compliance Officer returned to the Frankfort office and conferred with her superiors before deciding to issue a citation. This alone is not improper, and for the record I would state it is many times correct and appropriate to confer with superiors in office before deciding to issue a citation. Here, however, the citation was issued late in the day in question when the job was nearly completed. Most importantly, the Respondent informed the Secretary prior to removal of methods it was going to use.

Based on these facts it would be inappropriate to assess any sanctions against the Respondent at this time.

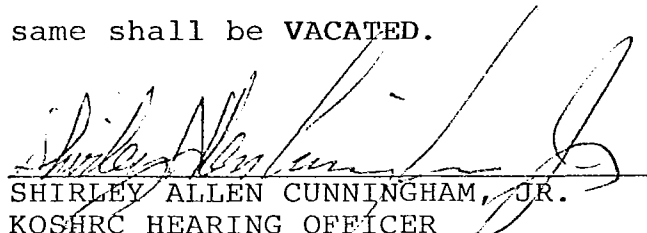
This decision should not be read or taken to detract from the Secretary's position that Type "C" continuous flow pressure demand, supplied air respirators are required whenever employers and employees are engaged in the demolition and removal of asbestos. Rather this case is limited on its facts because the Secretary was notified prior to the job of the methods of removal to be used; and, because of Respondent's notice the Secretary appeared at the worksite and observed the usages described without citation until the job was almost completed.

Because of the confusion in this area, the Secretary should consider some written response or notification to employers who notify it of asbestos removal. This notice

should include specific requirements of the clothing and equipment to be worn by employees during the removal of asbestos. Additionally the Secretary may wish to contact other governmental agencies to be sure that no other conflicting information is being disseminated.

RECOMMENDED ORDER

IT IS HEREBY ORDERED that the alleged violation of 29 CFR 1910.1001(c)(2)(iii) is and the same shall be hereby **SUSTAINED**; the proposed penalty of Two Hundred Ten Dollars (\$210.00) is and the same shall be **VACATED**.


SHIRLEY ALLEN CUNNINGHAM, JR.
KOSHRC HEARING OFFICER

DATE: July 25, 1985

DECISION NO. 1437