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COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #1177

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LEININGER CABINET & WOODWORKING, INC.

RESPONDENT

DECISION AND ORDER

In accordance with Section 47(3) of the Rules of Procedure of this Commission, the Hearing Officer's Recommended Order in the above-styled case was called for review on July 25, 1985.

At issue in this case is whether the Respondent limited its contest to a penalty only issue, and, if not, whether the Hearing Officer erred in sustaining all serious violations as alleged.

After a careful review of Respondent's letter of contest, we find it capable of being understood as more than a penalty only contest. Therefore, pursuant to the rule of construction adopted in The Barbee Company, KOSHRC #847 (1982), we construe the letter to be a full contest of all violations alleged as serious.

We find the violations of standards 1910.212(a)(1), 1910.213(c)(1), 1910.213(c)(2), 1910.213(c)(3) and 1910.213(b)(3) were grouped and alleged as a single serious violation, for which a penalty of \$150 was proposed. We find that the Hearing Officer was correct in sustaining the violations and agree that the penalty should be reduced to \$100.


We find the violations of standards 1910.213(h)(1), 1910.213(h)(3) and 1910.213(h)(4) were grouped and alleged as a single serious violation, for which a penalty of \$150 was proposed. We find that the Hearing Officer was correct in sustaining the violations and agree that the penalty should be reduced to \$100.

We also find that the Hearing Officer was correct in sustaining the violation of standard 1910.219(e)(3)(i) and agree that the penalty for same should be reduced to \$60.

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Decision and Order
Page Two

We construe Complainant's withdrawal of the alleged violations of standards 1910.219(d)(1) and 1910.219(e)(1)(i) during the hearing to be a motion for withdrawal, and we do hereby GRANT such motion.

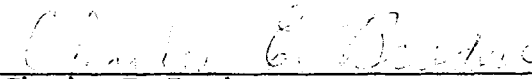
Accordingly, it is ORDERED that the Hearing Officer's Recommended Order is vacated insofar as it sustains the violations of standards 1910.219(d)(1) and 1910.219(e)(1)(i). All other findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.



Robert T. Cobb
Chairman



Carl J. Ruh
Commissioner



Charles E. Braden
Commissioner

DATE: July 29, 1985

DECISION NO. 1447


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

Hon. Kenneth J. Costelle (Messenger Mail)
Assistant Counsel
Labor Cabinet
Office of General Counsel
U. S. 127 South
Frankfort, KY 40601

Mr. Robert L. Leininger (Cert. Mail #P587 662 804)
Leininger Cabinet & Woodworking
116 South Forbes Road
Lexington, KY 40505

This 29th 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

7-15
7-30
Memo 7/15

FV

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC # 1177

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LEININGER CABINET & WOODWORKING, 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 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:

KOSHRC #1177

Hon. Kenneth J. Costello
Assistant Counsel
Labor Cabinet
Office of General Counsel
U. S. 127 South
Frankfort, KY 40601


(Messenger Mail)

Mr. Robert L. Leininger
Leininger Cabinet & Woodworking
116 South Forbes Road
Lexington, KY 40505

(Cert. Mail #P587 654 157)

This 20th day of June, 1985.

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



Sue Ramsey
Executive Assistant

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LEININGER CABINET AND
WOODWORKING, INC.

RESPONDENT

* * * * *

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

* * * * *

This case involves a safety inspection conducted on or about May 8, 1984, by an OSH Compliance Officer employed by the Secretary of Labor, (hereinafter Secretary), upon the worksite of Leininger Cabinet and Woodworking, Inc. (hereinafter Leininger) located in Lexington, Fayette County, Kentucky.

PROCEDURAL FACTS

The pertinent procedural information is as follows:

1. An inspection of the worksite of Leininger's took place on May 8, 1984, by Foy Hood, a Compliance Officer, acting as a representative for the Secretary.

2. As a result of said inspection on July 25, 1984, Leininger was issued two citations and notification of penalties. The citations issued were both serious and

other than serious. A total penalty proposed was \$390.00.

3. On August 13, 1984, Leininger filed a notice of contest, objecting to and contesting the proposed penalty.

4. Notification of the intent to contest was duly transmitted to the Review Commission on August 21, 1984.

5. The Complaint was filed by the Secretary on August 31, 1984.

6. The case was assigned to this Hearing Officer and a Notice of Hearing was served on the parties on November 28, 1984.

7. A hearing was held on January 10, 1985 in Lexington, Kentucky.¹

8. A Notice of Receipt of Transcript was mailed to the parties on January 23, 1985.

FINDINGS OF FACT

On May 8, 1984, the Secretary conducted a general inspection of the work premises of Leininger in Fayette County, Kentucky. The 2½ hour inspection was made pursuant to KRS 338.101 by Foy Hood, the Secretary's authorized representative. During the investigation, Hood observed and otherwise became aware of conditions, means, manners and practices of employment that he felt violated the Safety

¹The 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, citations, notifications and variances issued under the Act; and, to adopt and/or promulgate rules and regulations with respect to procedural aspects of this hearing. Under the provisions of KRS 338.081, this Hearing Officer was appointed and authorized by the Review Commission to conduct the hearing. This recommended order is subject to review by the Review Commission.

and Health Standards Board Regulations 803 KAR 2:020 and 803 KAR 2:030, pursuant to authority of Section 338.061 of the Kentucky Revised Statutes, which subjected Leininger's employees to illness, injury or death. The alleged violations for which citations were issued were both serious and other than serious. The violations for which Leininger was cited are as follows:

| <u>ITEM NUMBER</u> | <u>DESCRIPTION</u> | <u>DATE BY WHICH VIOLATION MUST BE ABATED</u> | <u>PENALTY</u> |
|--------------------|---|---|----------------|
| 1a | 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by: | 8/23/84 | \$ 150.00 |
| | (a) Dewalt "Unisaw" table saw did not have a guard to cover the saw blade. Located in the west end of the building. | | |
| 1b | 1910.218(c)(1): Circular hand-fed ripsaw(s) were not guarded by an automatically adjusting hood which completely enclosed that portion of the saw above the table and above the material being cut: | 8/23/84 | |
| | (a) A "powermatic" table saw was not equipped with a hood guard. West end of shop. | | |
| 1b | 1910.213(c)(2): Hand-fed circular ripsaw(s) were not furnished with a spreader to prevent material from squeezing the saw or being thrown back on the operator: | 8/23/84 | |
| | (a) Dewalt "Unisaw" table saw did not have a spreader. West end of the shop. | | |
| | (b) A "Powermatic" table saw was not equipped with a spreader. West end of shop. | | |
| 1d | 1910.213(c)(3): Hand-fed ripsaw(s) did not have kickback fingers or dogs so located as to oppose the thrust or tendency of the saw to pick up the material or to throw it back toward the operator: | 8/23/84 | |
| | (a) Dewalt "Unisaw" table saw was not equipped with an anti-kickback device. West end of shop. | | |

- (b) A "Powermatic" table saw was not equipped with an anti-kickback device. West end of shop.

1e

1910.213(b)(3): Provisions were not made to prevent woodworking machine(s) from automatically restarting upon restoration of power after power failure: 8/23/84

- (a) Dewalt "Unisaw" table saw did not have a magnetic relay. West end of shop.

2a

1910.213(h)(1): The sides of the lower exposed of the blade of radial saw(s) were not guarded to the full diameter of the blade by a device that automatically adjusted itself to the thickness of the stock and remained in contact with the material being cut: 7/30/84

- (a) A Dewalt radial ram saw, serial #2705-06, did not have a lower guard. Northwest end of shop.

2b

1910.213(h)(3): Radial saw(s) were not provided with an adjustable stop to prevent the forward travel of the blade beyond the position necessary to complete the cut in repetitive operations: 7/30/84

- (a) A Dewalt radial arm saw, serial #2705-06, blade ran off the work table. Northwest end of shop.

2c

1910.213(h)(4): Radial saw(s) were not installed in a manner so as to cause the cutting head to return gently to the starting position when released by the operator: 7/30/84

- (a) A Dewalt radial arm saw, serial #2705-06, would not return to the starting position. Northwest end of shop.

3a

1910.219(d)(1): Pulley(s) with part(s) seven feet or less from the floor or work platform were not guarded in accordance with the requirements specified at 1910.219(m) and (o): 8/6/84 \$ 90.00

- (a) Tension machine. North side of shop.
(b) "B OK Crane" bandsaw, model 2300, South side of shop.

3b

1910.219(e)(1)(i): Horizontal belts which had both 8/6/84
runs 42 inches or less from the floor level were not
fully enclosed by guards conforming to requirements
specified in 1910.219(m) and (o):

(a) Tension machine. North side of shop.

3c

1910.219(e)(3)(i): Vertical or inclined belt(s) 8/6/84
were not enclosed by guard(s) conforming to the
requirements specified at 1910.219(m) and (o):

(a) "B" OK Crane" bandsaw, model 2300, south
side of shop.

1

1910.106(e)(2)(iv)(d): Flammable or combustible 8/13/84 0
liquids were not drawn from or transferred into
vessel(s), container(s), or portable tank(s) within
a building through a closed piping system, from safety
sands, by means of a device drawing through the top,
or from a container or portable tank by gravity through
an approved self-closing valve:

(a) A dispensing valve leaked when shut off.
This valve is mounted on a 55 gallon drum
in the east end of the building.

2

1910.106(e)(6)(ii): Class I flammable liquid(s) 8/13/84 0
were dispensed into containers without electri-
cally interconnecting the nozzle and the container:

(a) The flammable liquid drum was not ground
or bound when dispensing flammable liquid.
East side of building.

3

1910.107(b)(9): A clear space of not less than 3 7/30/84 0
feet was not kept free from storage on all sides
of paint booth(s):

(a) A safe distance of 3 ft. was not kept clear
of the outside area of spray booth. East end
of building.

4

1910.303(g)(1)(i): Workspace was less than 30 8/03/48 0
inches wide in front of electric equipment operating
at 600 volts, nominal, or less:

(a) Material was stored in front of the
breaker box. East end of building.

5

1910.37(q)(2): Passageway(s), not a way of exit 8/3/84 0

access but so located as to be likely to be mistaken for an exit, were neither identified by a sign reading "NOT AN EXIT" or similar designation nor identified by a sign indicating their actual character:

- (a) A room was not marked as an exit, or not an exit. East side of building.

6

1910.37(k)(2): Means of egress were not continuously maintained free of obstructions or impediments to full instant use in the case of fire or other emergency: 8/3/84 0

- (a) An exit was blocked with materials on the floor. North side of building.

7

1910.305(g)(1)(i): Flexible cords and cables were not approved and suitable for conditions of use and location: 9/3/84 0

- (a) A portable sander, electric cord, pulled away from its mounting. South side of work area.
- (b) A Rockwell circular saw, flexible cord, pulled away from its mounting. North east side of shop.

8

1910.305(g)(1)(iii): Flexible cords and cables were used for purposes prohibited by subparagraphs (a) through (e) of this paragraph: 8/6/84 0

- (a) A fluorescent lamp, flexible wire used in place of fixed wiring. South side of building.

9

1910.305(b)(2): Pull boxes, junction boxes, and fitting were not provided with covers approved for the purposes: 8/3/84 0

- (a) Face plate removed from outlet. East end of shop.
- (b) Face plate removed from outlet. East end of shop.

10

1910.305(b)(1): Unused openings in cabinets, boxes and fittings were not effectively closed: 8/3/84 0

- (a) An electric junction box had a hole in its housing. East side of building.

11

1910.151(b): Persons adequately trained to render first aid were not available at the worksite: 8/28/84 0

- (a) No employees at worksite trained in first aid.

12

1910.106(d)(3)(ii): Storage cabinet(s) for flammable and combustible liquids were not designed or constructed to meet minimal fire resistance as required: 8/3/84

- (a) Flammable liquids stored in cabinet not approved for this purpose. West end of building.

12b

1910.107(e)(2): The quantity of flammable or combustible liquids kept in the vicinity of spraying operation(s) exceeded the minimum required for operation: 8/3/84 0

- (a) The quantity of flammable and combustible liquids exceeded one day supply. West end of building.

13a

1910.107(b)(5)(iv): Space within the spray booth(s) on the downstream and upstream sides of filters was not protected with approved automatic sprinklers: 8/8/84 0

- (a) Devilbiss spray booth had no sprinkler system. West end of building.

13b

1910.107(b)(5)(1): There were not visible guage(s), audible alarm(s) or pressure activated device(s) installed on paint spray booth(s) to indicate or insure that the required air velocity was maintained: 8/8/84 0

- (a) Devilbiss spray booth, filter clogged. West end of building.

14

1910.303(g)(2)(i): Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact by approved cabinets or other forms or approved enclosures, or other means listed under this provision: 8/3/84 0

- (a) The electrical panel box, with breaker, 1" x 5" opening. Appx. 2 inches to line box. West end of building.

Leininger contested the penalty only for the alleged violations in the Notice of Contest.

A penalty of \$150.00 was proposed for Citation 1, item 1(a) 1910.212(a)(1) which reads: Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by:

(a) Devalt "Unisaw" table saw did not have a guard to cover the saw blade located in the west end of the building.

A penalty of \$150.00 was proposed for Citation 1, Item 2(b) 1910.213(h)(1) which reads: The sides of the lower exposed portion of the blade of radial saw(s) were not guarded to the full diameter of the blade by a device that automatically adjusted itself to the thickness of the stock and remained in contact with the material being out;

(a) A Dewalt radial arm saw, serial #2705-06, did not have a lower guard. Northwest end of shop.

A third penalty of \$90.00 was proposed for Citation

² However, John Leininger testified during the hearing that "[they] were not really even contesting the amount of the fine." [T.R. 67]. John Leininger went on to testify that he felt that Hood obviously made an effort to keep the fine low. [T.R.67].

1, Item 3(a) 1910.219(a)(1): Pulley(s) with part(s) seven feet or less from the floor or work platform were not guarded in accordance with the requirements specified at 1910.219(m) and (o):

- (a) Tension machine. North side of shop.
- (b) "B OK Crane" bandsaw, model 2300, south side of shop.

To calculate the proposed penalties, forms OSH-1A and OSH-10 were used (See Exhibits 2,5,7 and 8) by the Secretary.

All of the violations for which Leininger was cited have been corrected, except for Citation 1, Item 3(a). (T.R. 65,66). Apparently, the exposed pulleys for which this citation was issued were backed to a wall and therefore exposure was limited. (T.R. 65). Also, Hood testified that this alleged violation could be abated by placing an expanded metal guard over the belt and pulleys. (T.R. 58).

Leininger contacted the Secretary's attorney prior to the hearing in an attempt to learn how to acquire a variance. (T.R. 67). During the hearing, the variance request procedure was explained to Leininger. With the exception of the good faith factors used, the evidence dictates that the Secretary gave Leininger the best possible considerations in calculating the penalties.

CONCLUSIONS OF LAW

A review of the evidence indicates that Leininger has received the maximum benefit of all the factors, except good faith on OSH-1A and OSH-10.

On Form OSH-10, Leininger received a 20% (out of a possible 30%) deduction for good faith. The OSHA Field Operations Manual, paragraph 288 gives the following guidelines regarding good faith.

(b) Good Faith. A maximum penalty reduction of 30 percent is permitted in recognition of an employer's "good faith". Good faith is measured in terms of the following criteria;

1. Evidence of genuine and effective safety and health efforts prior to the inspection. Such efforts need not involve a formalized program, especially for small businesses which frequently lack the resources to operate such a program. Factors which shall be considered in evaluating safety and health efforts, whether or not the business has a formal program, include:

a. The information describing the employer's safety and health program collected during the inspection and noted in the case file.

b. The overall condition of the workplace as reflected by the control or elimination of hazards, especially hazards of high gravity.

c. The extent to which control of or protection against cited hazards was attempted, even though inadequately; such attempts may include incomplete efforts to identify and implement feasible engineering and/or administrative controls for toxic substances and harmful physical agents.

d. The extent to which more serious injuries and illnesses have been investigated and steps taken to prevent their recurrence.

e. The presence of effective monitoring of health-hazard exposures.

f. The degree to which the employer, employees and their supervisors show knowledge and concern about safety and health in their actions--including effective training and supervision of employees regarding good work practices.

g. Up-to-date maintenance and review of injury/illness records.

h. Specific actions to prevent recurrence of recorded injuries and illnesses.

i. The extent to which violations observed and injuries and illnesses which have occurred relate to hazards involving difficult, expensive and not widely known controls.

2. Evidence of a desire to comply with the Act during and after an inspection. Primary factors demonstrating such a desire are the speed and willingness with which the employer initiates correction of hazards noted during an inspection.

Closely scrutinizing the facts in the instant case in light of the above set out factors reveals that number two (2) above is particularly relevant. Testimony reveals that all the cited violations had been abated, (with the exception of one), at the time of the hearing. Further, Leininger had inquired about the procedure for acquiring a variance in those instances where the recommended abatement would possibly slow or make production impossible. In fact, Leininger had been led to believe that a variance could be requested from the Hearing Officer.

According to the above cited Field Operations Manual, paragraph 289, Section 3(a), a 30% reduction shall, in general, be made as follows:

(a) 30 percent. For generally thorough and effective safety and health efforts and prompt and aggressive initiation of abatement of cited violations during the inspection or (by commitment) as soon as is practical reflected by:

- Absence of most violations, including all willful, repeated and serious or moderate or high gravity.
- Absence of most serious injuries and illnesses.

Here, there is no evidence of repeated nor willful violations. The gravity factors used on form OSH-1A are all relatively low. The quick abatement and inquiry concerning variances showed good faith by Leininger.

Cast-Crete Corp. of Kissimmee, Rev. Comm. Judge 1976, 1975-75
OSHD ¶ 20,418 (\$185 penalties vacated).

Abatement and the process of obtaining a variance are costly. Costs spent for abatement and obtaining a variance will certainly make the working conditions at Leininger safer. Hopefully, Leininger has learned how properly to pursue variances and to otherwise stay in compliance with the law. If so, this would indicate that a reduction in penalty is appropriate. Secretary of Labor vs. Electrical Circuits, KOSHRC #1103. (Decision Number 1392, Dated 4/1/85).

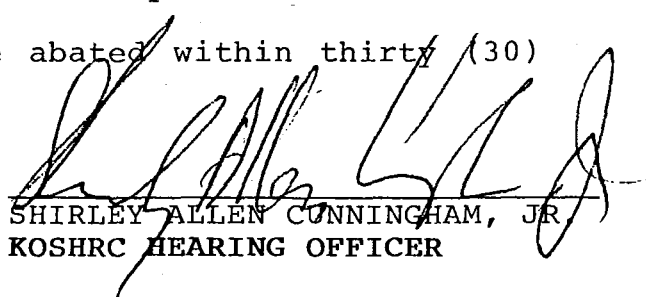
Considering all the circumstances, this Hearing Officer feels that an adjustment factor of thirty (30%) percent is appropriate for good faith. Though there is some evidence to the contrary, a strict reading of Leininger's Notice of Contest shows that all penalties were contested and are being considered in this decision.

Therefore, the following Order is recommended:

RECOMMENDED ORDER

IT IS HEREBY ORDERED that all VIOLATIONS cited herein are and the same shall be hereby SUSTAINED; and

IT IS FURTHER ORDERED that the proposed penalty of \$390.00 is and the same shall be hereby reduced to \$260.00 and that all violations shall be abated within thirty (30) days of this Order.


SHIRLEY ALLEN CUNNINGHAM, JR.
KOSHRC HEARING OFFICER

DATE: June 20, 1985
DECISION NO. 1432