



# 31

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

7-3-74

WENDELL H. FORD  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 12

JAMES R. YOCUM, Commissioner  
Department of Labor

COMPLAINANT

VS.

UNION UNDERWEAR COMPANY, INC.

RESPONDENT

REVIEW COMMISSION  
DECISION

Before STOWERS, Chairman, UPTON and STANTON,  
Commissioners.

FOR THE MAJORITY, COMMISSIONER STANTON:

Hearing in the above-styled case took place on February 14, 1974, and the only matter of contention was whether or not the offense for which respondent was cited should be categorized as serious or non-serious. We fully agree with the findings of fact of the Hearing Officer in this case except in the matter of the employer's responsibility to supervise such a situation.

In a situation where a man is to be lowered into a tank (J-box) with boiling water directly beneath him, we feel that it is incumbent upon the employer to take all reasonable precautions to see that the proper safeguards are taken to prevent injury. The employer certainly should have known that a great danger existed to anyone who might be working under such conditions.

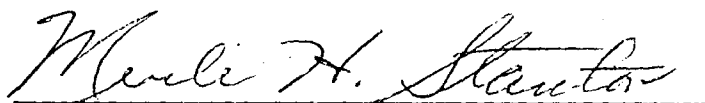
12

It was argued at hearing that the "procedure" was to release all water from the tank prior to lowering anyone inside for cleaning. But the respondent admitted that "as far as anybody knows this is the first time that water was left in the J-box during cleaning operations." In our view this statement makes it obvious that supervision was not sufficient to see that the "procedure" of the employer was followed. Since the employer did not safeguard to prevent such a situation, then the employee most definitely was working in a very dangerous atmosphere. The responsibility for removing the water hazard was vested with the very man who was himself inside, cleaning the tank, and ultimately killed. This is not simply a lack of proper supervision of the operation, but a lack of any supervision at all.

ORDER

For these reasons the violation charged shall be and the same is hereby reinstated as a serious violation and the proposed penalty shall remain \$600 as recommended by the Hearing Officer.

Commissioner Upton concurs.



Merle H. Stanton  
Commissioner

RECEIVED

JUL 1 1974

OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

S/ Charles B. Upton

Charles B. Upton  
Commissioner

DISSENT, COMMISSIONER STOWERS:

This matter concerns whether or not a serious or a non-serious violation occurred. The entire question pinpoints on whether or not the employer used due diligence in the operation described in the facts of this case as shown in the transcript and properly re-stated by the Hearing Officer. I fully agree with the Hearing Officer that the employer-respondent did not and could not, with the exercise of reasonable diligence, know that an employee would not empty the tank (J-box) before entry into the tank. I feel that the decision of my colleagues in this case imposes too great a burden on the employer and comes near making him strictly liable for actions where employees have assumed an unwarranted risk by their own misconduct.



---

Herbert L. Stowers  
Chairman



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 29, 1974

VENDELL H. FORD  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 12

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

VS

UNION UNDERWEAR COMPANY, INC.

RESPONDENT

NOTICE OF RECEIPT OF RECOMMENDED  
DECISION OF HEARING OFFICER  
AND ORDER

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a recommended decision of our hearing officer, the Honorable Lloyd Graper, has this day been received and is attached hereto as a part of this Notice and Order of this Commission.

You will take further 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.

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 as recommended by the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, the decision of the hearing officer is adopted and affirmed as the decision 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:

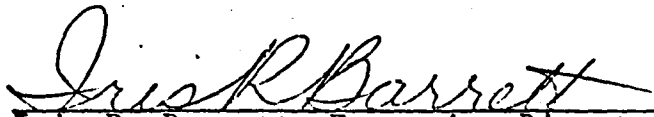
Commissioner of Labor of Kentucky  
Attention: Honorable Michael D. Ragland  
OSHA Coordinator

James I. Foley, General Counsel  
Department of Labor  
Frankfort, Kentucky 40601

Union Underwear Company, Inc.  
Post Office Box 148  
Campbellsville, Kentucky 42718

Attention: William E. Baxter  
Vice President

This the 29th day of March, 1974.

  
Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY  
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC DOCKET NO. 12

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

V.

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

UNION UNDERWEAR COMPANY, INC.

RESPONDENT

\* \* \* \* \*

This hearing was held 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 this 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.

On November 14, 1973, as a result of an inspection made on October 22, 1973, due to a fatality, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued a citation to the respondent charging a serious violation. On the basis of such inspection, it was alleged that respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in the following respects:

The standard, regulation, or section of KRS Chapter 338 allegedly violated was 29CFR 1910.28(j)(4) (as adopted by OSH-11) and the description of the alleged violation is as follows:

A workman on a boatswain's chair was not protected by a safety life belt attached to a lifeline ("J Box" range number one, bleach department).

On the same date, the same division of the same department issued to respondent a notification of proposed penalty, whereby respondent was notified, pursuant to the provisions of KRS Chapter 338, that the penalty for the proposed serious violation was \$600.00.

On December 6, 1973, the Occupational Safety and Health Review Commission received a letter dated December 5, 1973, from respondent addressed to the Commissioner, Kentucky Department of Labor, indicating that respondent wished to contest citation Ky. OSHA 1 #029, dated November 14, 1973, and the notification of proposed penalty dated the 14th of November, 1973. The citation and notification of proposed penalty was a result of an inspection made on October 22, 1973. Respondent also requested that they be notified when to appear before the Kentucky Occupational Safety and Health Review Commission.

On December 6, 1973, the Occupational Safety and Health Review Commission received from the Kentucky Department of Labor, Occupational Safety and Health Compliance Division, bearing the date December 6, 1973, a certification addressed to the Occupational Safety and Health Review Commission indicating that the following documents issued or received on the dates listed, and such listing includes November 14, 1973, a citation issued; November 14, 1973, notice of proposed penalties sent, total amount of \$600.00; and December 6, 1973, received notice of contest from employer.

Also included in the record is a receipt dated December 10, 1973, indicating that the notice of receipt of contest was received from the Occupational Safety and Health Review Commission by Honorable James Foley, Attorney for Complainant.

A certificate of service dated December 11, 1973, stating that on behalf of the employer it is certified that on December 11, 1973, the notice supplied by the Review Commission advising affected employees of this case and that a copy of the employer's notice of contest were posted at each place where a Kentucky Occupational Safety and Health Act citation is required to be posted, was received by the Occupational Safety and Health Review Commission on December 13, 1973. Such certificate indicated that no affected employee is represented by an authorized employee representative.

The complaint was received by the Occupational Safety and Health Review Commission on December 18, 1973.



An answer was filed and received by the Division of Compliance on January 3, 1974.

On January 8, 1974, by letter, the Review Commission advised the complainant and respondent that the case had been assigned to Hearing Officer, Lloyd Graper, and that all pleadings and papers shall be filed with Mr. Graper until a decision in the case is made by him.

On January 16, 1974, the Review Commission mailed a notice of hearing to both complainant and respondent, indicating that a hearing of this matter would be held before a hearing officer assigned under KRS 338.081 and under the Rules of Procedure of the Commission on Wednesday, February 13, 1974, at 10:00 a.m. at the office of Union Underwear, Campbellsville, Kentucky. On motion of respondent and by agreement of complainant by counsel, and good cause having been shown, a hearing of this matter was postponed and was held on Thursday, February 14, 1974, at 10:00 a.m. at the Capitol Plaza Tower building, Room G-2, Frankfort, Kentucky.

At the hearing, it was stipulated by and between the parties to limit the scope of the hearing to a determination solely of whether or not the violation complained of constituted a serious or a non-serious violation. In its answer, the respondent admits that there was no lifeline, but denies that its absence would constitute a serious violation as defined under the provisions of KRS 338.991.

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

1. It is, upon stipulation of the parties, found that respondent, at its place of business, permitted a workman on a boatswain's chair, which was not protected by a safety life belt attached to a lifeline ("J Box" range number one, bleach department).

2. It is found that if there was no water in the tank (J-Box) that it would be unlikely that serious physical harm would result to the worker who dropped the entire distance from the top of the tank to the bottom of the tank, and that the presence of hot water in the tank would be the only condition which could create a substantial probability that death or serious physical harm could result from the violation charged.

3. Respondent did not and could not, with the exercise of reasonable diligence, know that an employee would not empty the tank (J-Box) before entry into the tank.

Upon the basis of the foregoing, the hearing officer makes the following:

#### CONCLUSIONS OF LAW

1. Limiting the Review Commission's review to the determination of whether the violation was a serious or non-serious

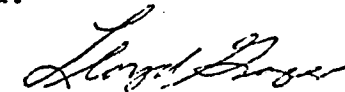
one, as agreed upon by the parties, appears appropriate under the circumstances, since it does not appear that error would result from not reviewing the unchallenged citation for the violation itself or the penalty imposed.

2. As used in KRS 338.991, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment, unless the employer did not, could not, with the exercise of reasonable diligence, know of the presence of the violation. Respondent is required to conduct itself in a manner so as not to cause harm to its employees at the risk of becoming subject to liability if it does not do so. This duty, however, imposes no obligation upon respondent which is not within its ability to perform, since it relates only to conduct over which the respondent has control. Subsection 12 of KRS 338.991 provides that if the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation, a serious violation shall not be deemed to exist. In this case, the severity of the injury most likely to result from the violation charged would be such as to require, at most, hospitalization for twenty-four (24) hours or more and would therefore, under the provisions of KRS 338.991(3) be classified as not to be of a serious nature. It would only be as a result of the causal factors beyond the respondent's control, such as

the employee's disregard of a safety rule with which he was familiar, i. e., failure to empty the J-Box before entry, that there could be a substantial probability that death or serious physical harm could result from the violation charged so as to place respondent's violation in the category of a serious violation under the provisions of KRS 338.990(12). Respondent did not and could not with the exercise of reasonable diligence know that an employee would not empty the J-Box before entry, although such was the company's normal procedure, the violation charged cannot be held to have been of a serious nature. It might be noted parenthetically that the particular employee in question was a range leader with prime responsibility for the operation of his particular range subject to supervision by a single supervisor who supervised a total of some 38 men. For these reasons, the violation should be classified as non-serious rather than serious, and the proposed penalty of \$600.00 which was uncontested should stand.

RECOMMENDED ORDER

IT IS ORDERED that the violation charged shall be and the same hereby is reduced from a serious violation to a non-serious violation, and the proposed penalty of \$600.00 shall be and the same hereby is sustained.



LLOYD GRAPER  
Hearing Officer, KOSHRC

DATED: March 26, 1974  
Frankfort, Kentucky

Decision No. 7