

Done



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order # 178*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

October 22, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

VS.

MARKS MANUFACTURING COMPANY

KOSHRC #140

COMPLAINANT

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Lloyd Graper,
dated August 27, 1975, is before this Commission for review.

The Review Commission has thoroughly reviewed the
contentions of both parties and all elements of the record
before it. No error being found therein and for other good
cause shown, it is the unanimous order of this Commission
that the findings of the Hearing Officer in this case be and
they hereby are AFFIRMED in all respects not inconsistent with
this opinion.

H. L. Stowers
H. L. Stowers, Chairman

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

DATED: October 22, 1975
Frankfort, Ky.

/s/ M. H. Stanton
M. H. Stanton, Commissioner

DECISION NO. 178

140(178)


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

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

Mr. Houston Marks, President (Certified Mail #467104)
Marks Manufacturing Company
P. O. Box 927
Owensboro, Kentucky 42301

This 22nd day of October, 1975.


Iris R. Barrett, Executive Director

Heone
JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 27, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 140

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MARKS MANUFACTURING COMPANY

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION # 154

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.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:


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. Houston Marks, President
Marks Manufacturing Company
P. O. Box 927
Owensboro, Kentucky 42301

(Certified Mail #456468)

This 27th day of August, 1975.


Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 140

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

MARKS MANUFACTURING COMPANY

RESPONDENT

* * * * *

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

Mr. Houston J. Marks, President, Marks Manufacturing Company, Owensboro,
Kentucky, for Respondent.

GRAPER, Hearing Officer.

Inspections were made on November 13, 1974, and March 17, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health, of a place of employment located at Industrial Drive, Owensboro, Kentucky, whereat the respondent was described as a manufacturer of tanks and truck bodies. On the basis of the November 13, 1974, inspection, it was alleged in a Citation issued January 17, 1975, that respondent violated provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in 38 separate respects. Respondent failed to file its Notice of Contest within 15 working days from receipt of the Citation and by Order of the Review Commission,

dated May 5, 1975, upon complainant's Motion to Dismiss, the Citation was sustained.

On the basis of the March 17, 1975, inspection, it was alleged in Citations issued April 2, 1975, that respondent violated the provisions of KRS Chapter 338 in the following respects:

Citation No. 1, Item Number 1. The Standard, regulation or section of KRS Chapter 338 allegedly violated was 803 KAR 2:060 Section 2(1). A description of the alleged violation is: The notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted. This is a repeat of item number one (1) from citation number one (1) issued January 17, 1975. An abatement date of one week was proposed. A penalty of \$190.00 was proposed.

Citation No. 2, Item Number 1. The standard, regulation or section of KRS Chapter 338 allegedly violated was 803 KAR 2:125 Section 1(1). A description of the alleged violation is: Upon receipt of a citation under KRS Chapter 338, the citation, or a copy thereof, unedited, was not posted at or near each place an alleged violation referred to in the citation occurred, or in a prominent place where it would be readily observable by all affected employees (citation issued January 17, 1975). An immediate abatement date was proposed. A penalty of \$500.00 was proposed.

Citation No. 2, Item Number 2. The standard, regulation or section of KRS Chapter 338 allegedly violated was 1910.157 (a)(6). A description of the alleged violation is: A portable fire extinguisher was so installed that the top of the extinguisher was more than five (5) feet above the floor (north wall, tank department). An abatement date of one week was proposed. No penalty was proposed.

In a Notification of Failure to Correct Alleged Violation and of Proposed Additional Penalty dated April 2, 1975, it was alleged that on January 17, 1975, a Citation was issued to respondent and that based upon a reinspection conducted on March 17, 1975, respondent failed to correct the following violations within the times prescribed.

Citation 1, Item 12. Respondent violated standard 29 CFR 1910.107(c)(5) (as adopted by OSH 11-2). Electrical

equipment located in paint spraying area was not specifically approved for locations containing both deposits of readily ignitable residue and explosive vapors. (lighting fixtures, exhaust fan motors, Paint Department). To have been abated by March 5, 1975, and for which a penalty of \$48.00 was paid. A penalty of \$1,303.00 was proposed.

Citation 1, Item 17. Respondent violated standard 29 CFR 1910.178(p)(1) (as adopted by OSH 11-2). A defective powered industrial truck (large "Yale" lift truck) was not taken out of service until it had been restored to safe operating condition. (defective horn, Truck Department). To have been abated by February 11, 1975, and for which no penalty was imposed. A penalty of \$500.00 was proposed.

Citation 1, Item 18. Respondent violated standard 29 CFR 1910.212(a)(5) (as adopted by OSH 11-2). Blades of fans less than seven (7) feet above the floor were not provided with guards having openings no larger than one-half (1/2) inch (exhaust fans, Paint Department). To have been abated by March 5, 1975, and for which a penalty of \$34.00 was paid. A penalty of \$931.00 was proposed.

Citation 1, Item 22. Respondent violated standard 29 CFR 1910.219(e)(3)(i) (as adopted by OSH 11-2) Vertical and inclined belts seven (7) feet or less from the floor were not enclosed by a guard. (power metal saw, large drill press, Hardware Area; air compressor, exhaust fans, Paint Department; air compressor, generator, compressor room). To have been abated by March 5, 1975, and for which a penalty of \$34.00 was paid. A penalty of \$931.00 was proposed.

Citation 1, Item 25. Respondent violated standard 29 CFR 1910.252(e)(2)(iii) (as adopted by OSH 11-2). Workers or other persons adjacent to the welding areas were not protected from the rays by non-combustible or flame-proof screens or shields or were not required to wear appropriate goggles (Hardware Area, Receiving and Shipping Area, Tank and Truck Departments). To have been abated by February 11, 1975, and for which a penalty of \$41.00 was paid. A penalty of \$1,117.00 was proposed.

Citation 1, Item 32. Respondent violated National Electrical Code Article 250-45(d)(1) (as adopted by 29 CFR 1910.309(a) and SOS 11-2). Exposed noncurrent-carrying metal parts of cord and plug-connected equipment were not grounded. ("Coke" machine, Lunch room). To have been abated by February 11, 1975, and for which no penalty was imposed. A penalty of \$500.00 was proposed.

The Notice of Contest was received from the employer (respondent) on April 17, 1975, which, together with a copy of each Citation, the Notification of Proposed Penalty, and the Notification of Failure to Correct Alleged Violation and of Proposed Additional Penalty was transmitted to the Kentucky Occupational Safety and Health Review Commission on April 18, 1975, and received by it on April 21, 1975. A Notice of Receipt of Contest was mailed on April 21, 1975, and a Certification of Employer form indicating that no affected employee is represented by an authorized employee representative was received on April 25, 1975. A Complaint was filed on April 28, 1975. On May 8, 1975, the case was assigned to the Hearing Officer and, on the same date, a Notice of Hearing was mailed. Pursuant to such Notice, a hearing was held on Thursday, May 29, 1975, at the Daviess County State Vocational-Technical School, 1901 Southeastern Parkway, Owensboro, Kentucky, 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 such 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. After the hearing, the Respondent filed financial statements and copies of its income tax forms.

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

As to Citation No. 1, Item Number 1, it is found that the notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted.

As to Citation No. 2, Item Number 1, it is found that upon receipt of a citation under KRS Chapter 338, the citation, or a copy thereof, unedited, was not posted at or near each place an alleged violation referred to in the citation occurred or in a prominent place where it would be readily observable by all affected employees (citation issued January 17, 1975).

As to Citation No. 2, Item Number 2, it is found that a portable fire extinguisher was so installed that the top of the extinguisher was more than five (5) feet above the floor (north wall, tank department).

As to Citation 1, Item 12, it is found that respondent failed to correct or abate the violation within the time prescribed.

As to Citation 1, Item 17, it is found that respondent failed to correct or abate the violation within the time prescribed.

As to Citation 1, Item 18, it is found that respondent failed to correct or abate the violation within the time prescribed.

As to Citation 1, Item 22, it is found that respondent failed to correct or abate the violation within the time prescribed.

As to Citation 1, Item 25, it is found that respondent failed to correct or abate the violation within the time prescribed. While the Commissioner of Labor has failed to show that the work would permit the welders to be enclosed in individual booths, goggles were not required until after the second inspection.

As to Citation 1, Item 32, it is found that respondent failed to correct or abate the violation within the time prescribed.

It is found that respondent during the year ending May 31, 1974, sustained a net loss of \$65,912.70 and that its Total Capital on that date was a negative balance of \$8,675.22.

It is also found that although respondent indicated that it had parts on order, no request was made for an extension of time to abate.

It is also found that respondent, because of its precarious financial condition required its only executive officer to work long hours and to be responsible for all facets of the business.

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

CONCLUSIONS OF LAW

The defense that the notice informing employees of the protections and obligations provided for in KRS Chapter 338 was not posted because it blew down is insufficient in law. The employer has an affirmative duty to see that the notice is posted at all times and

is not altered, defaced or covered by other material. It is obliged by the law to see that its employees know they are covered by KRS Chapter 338.

The defense that parts were ordered is insufficient in law because if the employer required additional time to abate, he was required to seek an extension of time to abate. Only if it was granted, could it be afforded such relief.

The defense that the "coke" machine was installed by someone else is insufficient in law because the employer's duty to furnish his employees a safe place in which to work is a duty which cannot be delegated to others.

As indicated in an earlier case before the Review Commission, Commissioner of Labor of Kentucky vs. Quality Home Repair Service, KOSHRC Docket No. 39, in assessing civil penalties, due consideration must be given the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. In applying the penalty criteria, the Review Commission has a much freer hand than does the Commissioner of Labor. Seeking uniformity, the Commissioner of Labor has established formulas with little room within them for facts which, in equity and good conscience, would justify different treatment.

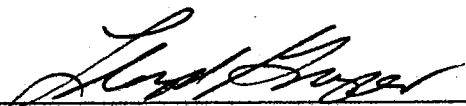
The Review Commission which functions to do justice on a case by case basis is not so bound, and, providing it considers the penalty criteria in arriving at the amount of penalty to be assessed, it may, in a particular contest give different weight to them than they are given by a formula of the Commissioner of Labor.

As to each of the violations charged and as to each of the failures to correct charged, the Commissioner of Labor has met his burden of proof and they each should stand. As to the proposed penalties, however, special circumstances warrant giving different weight to the penalty assessment criteria than were used in proposing such penalties.

In this case, because of the financial condition of respondent and the resulting burdens placed upon its sole executive, it would appear that the ends of both the Act and justice would be served by reducing the aggregate penalties proposed from \$5,972.00 to \$500.00.

RECOMMENDED ORDER

IT IS ORDERED that the citations, the abatement dates, and the failures to correct charged, set out above, shall be and the same hereby are sustained and IT IS FURTHER ORDERED that the aggregate penalties shall be and the same hereby are reduced from \$5,972.00 to \$500.00.



LLOYD GRAPER
HEARING OFFICER, KOSHRC

Dated: August 27, 1975
Frankfort, Kentucky

Decision No. 154