



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC
Decision
Order No. 337

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 7, 1976

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC #180

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

HEAVY VEHICLE SYSTEMS GROUP
OF THE BENDIX CORPORATION

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Herbert B. Sparks, issued under date of May 20, 1976, is presently before this Commission for review.

This case was called for review by the Commission to further consider the vacation of citation 2, alleging a repeat violation of 29 CFR 1910.107(c)(5) (as adopted by 803 KAR 2:020), and its proposed penalty of \$225.00.

Specifically at issue here is the approval of paint booth light fixtures. The Hearing Officer vacated the citation because the Complainant failed to establish that the light fixture in question was not approved as required by 29 CFR 1910.107(c)(5) (as adopted by 803 KAR 2:020). It is the holding of this Commission that the Hearing Officer was correct in vacating the citation and its proposed penalty.

The Complainant contended that the approval referred to in the standard comes from the Department of Labor, either by a CSHO at the jobsite inspection or from the Division of Education,

180

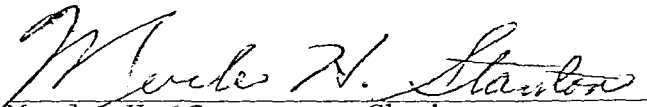
Training, and Consultation. With this we must disagree. 29 CFR 1910.107(a)(8) states that approved

"shall mean approved and listed by the following nationally recognized testing laboratories: Underwriters' Laboratories, Inc.; Factory Engineering Mutual Corp."

This definition applies to all of 1910.107 and, therefore, the CSHO should have determined whether or not the light fixture was approved by one of the two testing laboratories. Because he did not, the citation was correctly vacated.

It is, therefore, ORDERED that the decision of the Hearing Officer vacating the citation alleging a repeat violation of 1910.107(c)(5) and the proposed penalty of \$225.00 be hereby sustained and such citation and penalty are hereby dismissed.

It is further ORDERED that all conclusions and findings of the Hearing Officer not inconsistent with this decision are likewise hereby AFFIRMED.


Merle H. Stanton, Chairman

/s/ H. L. Stowers
H. L. Stowers, Commissioner

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

Dated: October 7, 1976
Frankfort, Kentucky

DECISION NO. 337



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 20, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order no. 276*

KOSHRC # 180

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

HEAVY VEHICLE SYSTEMS GROUP
OF THE BENDIX CORPORATION

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: Thomas M. Rhoads
Assistant Counsel

The Honorable Robert W. Daley (Certified Mail #976011)
Northern Regional Counsel
The Bendix Corporation
Executive Offices, Bendix Center
Southfield, Michigan 48075

Mr. Robert E. Schreiner, Mgr. Safety (Certified Mail #976012)
Heavy Vehicle Systems Group of Bendix Corp
901 Cleveland Street
Elyria, Ohio 40035

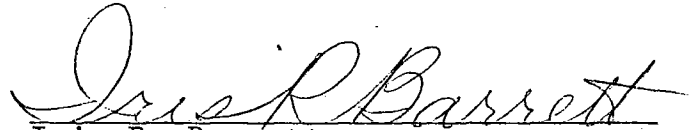
Mr. J. J. Toedter, Acting Plant Mgr. (Certified Mail #976013)
Heavy Vehicle Systems of Bendix Corp
U. S. 421 East
Frankfort, Kentucky 40601

Mr. Charles Kincaid, President of Local 532 (Certified Mail #976014)
241 Hickory Drive
Frankfort, Kentucky 40601

Mr. Anthony Manns (First Class Mail)
Committeeman, Local 532
Tracey Court
Frankfort, Kentucky 40601

Mr. Rara Justice (First Class Mail)
200 Jackson Drive
Frankfort, Kentucky 40601

This 20th day of May, 1976.

A handwritten signature in cursive script, reading "Iris R. Barrett". The signature is written in dark ink and is positioned above the printed name and title.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

KOSHRC # 180

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

HEAVY VEHICLE SYSTEMS GROUP
OF THE BENDIX CORPORATION

RESPONDENT

* * * * *

Hon. Thomas M. Rhoads, Attorney at Law, 902 Tierra Linda Drive,
Frankfort, Kentucky, Attorney for Complainant

Hon. Robert W. Daley, Northern Regional Counsel, The Bendix
Corporation, Executive Offices, Bendix Center, Southfield,
Michigan, for Respondent

* * * * *

An inspection was made on June 18, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health at a place of employment located in Franklin County, at or near U.S. 421 East, Frankfort, Kentucky, and on the basis of the inspection it was alleged in a citation dated June 30, 1975 that the Respondent violated ten (10) other than serious violations of the Acts and Standards, none of which are herein contested and two citations containing alleged repeated other than serious violations of the Acts and Standards from a previous citation which had been issued March 7, 1975.

The two alleged other than serious violations which were alleged to be repeated violations were:

The lacquer paint booth in the compressor booth area had electrical lighting equipment being used inside the booth whereon deposits of combustible residues readily accumulate and was not approved for locations containing both deposits of readily ignitable residues and explosive vapors.

This was alleged to be a repeated violation of an inspection made on February 25, 1975 of Citation No. 1, Item No. 3, and was alleged to be a violation of 1910.107(c)(5).

Areas around the cylinder head areas, compressor assembly area and main aisleways were covered with oil and were not kept in a clean and dry as possible condition.

This was alleged to be a repeated violation of an inspection made on February 25, 1975 of Citation No. 1, Item No. 1, and was alleged to be a violation of 1910.22(a)(2).

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above - June 18, 1975.
2. Citation issued June 30, 1975 wherein Respondent was issued three citations, one citation listing ten other than serious violations of the Acts and Standards, none of which are being contested, and two citations containing alleged repeated other than serious violations of the Acts and Standards from a previous citation issued March 7, 1975.
3. The proposed penalty for the alleged repeated violation of 29 CFR 1910.107(c)(5) was \$225.00 and the abatement date was July 24, 1975. The proposed penalty for the alleged repeated violation of 29 CFR 1910.22(a)(2) was \$270.00 and the abatement date was August 14, 1975.
4. Notice of Contest was received July 21, 1975.
5. Notice of Receipt of Contest was mailed July 25, 1975.
6. Certification of Employer Form was received July 30, 1975.

7. Complaint was received July 25, 1975.
8. Answer was received August 13, 1975.
9. Case was assigned to Hearing Officer on August 19, 1975.
10. Hearing was held on September 19, 1975 at 10:00 a.m. (EDT) at Capitol Plaza Tower, Room G-2, Frankfort, Kentucky.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorized 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 hearing. Under the provisions of KRS 338.081, the hearing was authorized by the 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 the citation or penalty.

After hearing the testimony of the witnesses, having considered same, together with exhibits filed and the stipulations and representations of the parties, it is concluded that the substantial evidence of the record considered as a whole supports the following Findings of Fact.

FINDINGS OF FACT

Preliminarily, counsel for the Respondent, requested that that portion of the Complaint dealing with oil spills be dismissed on the pleadings. That motion is expressly overruled.

The Respondent-Employer moved alternatively that that portion of the Complaint dealing with oil spills be stricken on the basis

they were vague and ambiguous and to a certain extent they were not only vague and ambiguous, but to some degree, misleading. That motion is expressly overruled.

Respondent's next motion was in reference to the paint booth portions of the Complaint, a motion being made to the effect that the description under 1910.107(c)(5) in that "electrical lighting equipment being used in the paint booth of Department 501 whereon deposits of combustible residue readily accumulate, was not approved for locations containing both deposits of readily ignitable residues and explosive vapors". This was vague and ambiguous and does not state what the specific violation was. It merely parroted or recited the basic provision of the code. This motion is overruled.

Respondent stated that he was served notice on the Wednesday before the hearing that there would be some eleven witnesses in the case. He requested the right to depose those witnesses. That motion was overruled at the hearing and the hearing was proceeded with.

Addressing the alleged violation of Standard 1910.107(c)(5), the Compliance Officer testified that while he was making his inspection, he noted that the spray booth where lacquer paint was used had improper lighting inside the spray booth which did not conform to the standard. (Transcript, Page 32). Upon cross-examination, the Compliance Officer elaborated that the specific violation he had in mind was the fact the lights, which are in the picture introduced, (See Exhibit), up in the top right hand and left hand corner inside the spray booth were not the type approved for this type of spraying operation. It was his belief that the

approval was by and on behalf of the Kentucky Department of Labor.

It was the Compliance Officer's understanding that the lights in question would have to be recessed in the ceiling to be approved lighting. These types of lights cannot be in the booth with a reflector, with just a shield over them (Transcript, Page 82). The lighting fixture itself has to be mounted on the outside of the side and it has to be airtight, there has to be an airtight seal around it reflecting through glass (Transcript, Page 82).

Standard 1910.107(c)(5) prohibits the use of nonapproved electrical equipment within lacquer paint booths. A review of the record herein indicated that there was no evidence that the light fixtures in the lacquer paint booth were not approved within the meaning of 1910.107(a)(8), which indicates that "approved means approved by certain designated nationally recognized testing laboratories". Specifically named are Underwriters Laboratory, Inc., and Factory Mutual Engineering Corporation.

In light of the failure of the Complainant to prove that the light fixture located within the lacquer paint booth was not properly approved equipment, it would seem that the Complainant, Commonwealth of Kentucky, has failed to meet the burden of proving each and every essential claim of its Complaint.

As to the allegation that Respondent was in violation of 29 CFR 1910.22(a)(2) which provides: "The floor of every workroom shall be maintained in a clean, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats or other dry standing places shall be provided where practicable".

The conditions which existed in Respondent's plant on June 18, 1975, which prompted the Compliance Officer to write a violation, and the Complainant to issue a citation against Respondent were described in the citation as follows: "Areas around the cylinder head area, compressor assembly area and main aisleways were covered with oil and were not kept in a clean and dry as possible condition".

The testimony of the inspecting Compliance Officer clearly established that on June 18, 1975 the floors around the specific areas named in the citation and subsequently in the Complaint, were covered with oil, which caused a hazardous condition to exist which compliance with Standard 1910.22(a)(2) was designed to prevent. Pictures were taken by the Compliance Officer during the course of his inspection and were introduced into evidence and said pictures illustrate the hazardous oil spillage on the floor around the compressor assembly area and the cylinder head area (see Complainant's Exhibits No. 1, 2 and 3).

Testimony of the Compliance Officer indicates that the main aisleways were covered with oil.

"Well, during the course of my inspection, the main aisleways that I walked on there were spots where they were slippery. I noticed from walking on them that you could slip on them". (Transcript, Page 68).

Evidence also established the conditions of Respondent's floors were hazardous and that the Respondent's employees were exposed to this condition. The Compliance Officer testified that the cylinder head area was used and there was a walkway through the area (Transcript, Page 67). The main aisleways were in constant use and the Compliance Officer himself was exposed to the hazard of slipping while

walking through the main aisleways (Transcript, Page 68).

The hazardous nature of the oil on the floors and the fact that Respondent's employees were exposed to hazards in the area cited is further evidenced by the testimony of employees (Transcript, Pages 99; 159; 162-163; 175-178; 182-184; 199).

CONCLUSIONS OF LAW

The Respondent argued that the production processes herein in question were inherently oily, and under the circumstances the floors were kept in as dry a condition, so far as possible, hence there was no violation of the standard. Evaluation of the Transcript and the evidence as a whole indicates that such was not the case. The Compliance Officer testified that the areas which had been in violation at the time of the first inspection were in compliance with the standard during the inspection on June 18, 1975. The Respondent had evidently remedied this violation in that area in the time between the two inspections. But, most telling on this point of the case is the fact that drainage was not maintained in the cylinder head area (Transcript, Page 207); dry standing platforms were not provided (Transcript, Page 180); and no employees were assigned to any areas to clean up oil spillage on a permanent basis (Transcript, Pages 99; 100; 160; 176; 184 and 201). All of this evidences the failure of Respondent to make an effort to keep the floors dry as possible, and in fact, indicated clearly that the floors were not kept dry as possible.

Of some help here is the Federal precedent on this issue, Preform Sealants, Inc., OSHRC Docket No. 2358, decided August 27, 1973, CCH Employment Safety and Health Guide (16,485). There, an

employer was held to have violated 1910.22(a)(2) for failing to remove oil spillage from the floor of a workroom in which a leaking oil pipe was situated. The Judge determined it was possible to wipe up the oil with sufficient frequency to keep it from becoming a hazard. In our case here, the Respondent-Employer has five janitors and only one is assigned to spend a majority of his time cleaning up the oil in the slack department (Transcript, Pages 201-204). The fact that the Respondent had a policy whereby the machine operators were responsible for cleaning their own areas, and "oil dry" was provided to remedy the problems, does not mean the floors were kept as dry as possible and that the Respondent is insulated from being found in violation of the standard. In Sperry Rand Corporation, Vickers Mobile Division, OSHRC Docket Nos. 187 and 414, decided May 31, 1972, CCH Employment Safety and Health Guide, paragraph 15,105, a violation of 1910.22(a)(2) was sustained even though the employer had similar policies. The Commission there found that no adequate corrective measures were instituted following several employee injuries and the filing of several grievances.

It is also noted that the violation herein in question are not isolated instances which might excuse the Respondent or at least negate the seriousness of the violation. The Respondent's employees testified that this was a continuing "everyday" problem that had been in existence for an extended period of time (Transcript, Pages 103; 159; 175; 178).

Further, it is found specifically that the oil spillage problem was a repeat violation and of some help here is General Electric Co., OSHRC Docket No. 2739, decided April 21, 1975, CCH Employment Safety

and Health Guide, paragraph 19,567. General Electric had been cited for several repeated violations and had contested the basis for issuing these citations, since the violations had occurred in different sections of their industrial complex than the prior violations of the same standards. Witness the similarity of the facts in this case.

In the General Electric case the Review Commission states:

"The term 'repeated' is therefore read to mean happening more than once in a manner which flaunts the requirements of the Act. With a test of whether the requirements of the Act are being flaunted it cannot be said abstractly just how many places of employment or conditions of employment should be considered. Each case must be decided upon its own merits and turn upon the nature and extent of the violations involved."

It would seem that the question of whether there is a repeat violation is a subjective one and the decision to issue a repeated citation cannot be made on the basis of whether a predetermined set of facts and circumstances exist.

As to what criteria is properly considered in making the determination whether a violation should be cited as repeated, Cedar Construction Co., OSHRC Docket No. 8407, decided May 30, 1975, CCH Employment Safety and Health Guide, paragraph 19,692, a repeated violation was found to be proper even though the prior violation occurred at a different worksite. The Commission stated:

"A determination of whether a violation is close enough in time, place and nature, to be considered repetitive must be decided on the particular facts. Here the circumstances surrounding the two violations warrant affirming the second citation as one for a repeated violation. The nature of the previous violation was the same. The geographic separation of the jobsites was not great and the foreman of the project admitted being aware of the previous citation."

There is no requirement that the second violation occur with respect to the same equipment or in the same area. Repeat citations have been found to be proper when the violations have occurred on two different ships, in two different parts of the ships and involving different equipment. Repeated citations have also been proper when different construction worksites were involved. Cedar Construction Company, Supra; Vappi & Company, Inc., OSHRC Docket No. 8282, decided January 7, 1975, CCH Employment Safety and Health Guide, paragraph 19,200. The occurrence of the second violation at a different workplace or involving different equipment is simply another factor to be considered within the entire set of facts and circumstances surrounding the violations, when determining whether a repeat citation should be issued.

Of some assistance in determining the issue concerning repeated violations one should also examine in addition to the above cited cases, Secretary v. Metropolitan Stevedor Co., 19 OSAHRC 841 (1975); Secretary v. Triple A South, Inc., 20 OSHARC 433 (1975); and, Secretary v. Bethlehem Steel Corp., 20 OSHARC 227 (1975).

The citation issued against the Respondent February, 1975 for violation of 1910.22(a)(2) cited the same hazardous condition, in the same facility, albeit, at different locations within that facility (Transcript, Pages 164-168). The Respondent was notified by the Compliance Officer, at that time, of the nature of the violation (Transcript, Pages 168; 170). While the employer abated the violation found during the course of the first inspection (Transcript, Page 63) the same violation was allowed to occur and exist in different areas of the plant after the employer was put on

notice that the same hazard continued to exist by the grievances filed by his employees and the injuries that occurred which were directly attributable to the oily condition of the plant floor. Of note here is that employee Kincaid's testimony in that several grievances specifically regarding the oily condition of the floor had been filed with the employer (Transcript, Page 184). Other employees testified that they had suffered injuries in falls directly attributable to the oily condition of the workroom floors (Transcript, Page 159; 163; 192; 199).

In conclusion, the record as a whole, all exhibits considered, briefs and all evidence of whatsoever nature before the Hearing Officer clearly indicates that a repeated violation of the citation is warranted concerning the oil spillage.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation alleging a nonserious repeated violation of 29 CFR 1910.107(c)(5) and the proposed penalty of \$225.00 shall be and the same is hereby vacated.

IT IS ORDERED AND ADJUDGED that the violation alleging a repeated violation of 29 CFR 1910.22(a)(2) as adopted by 803 KAR 2-020 shall be and the same is hereby sustained, and the proposed penalty of \$270.00 shall be and the same is hereby sustained.

IT IS ORDERED AND ADJUDGED that the citation herein in question must be corrected without delay, but no later than 30 days from the date of this Recommended Order.

Dated: May 20, 1976
Frankfort, Kentucky

DECISION NO. 276


HERBERT B. SPARKS
HEARING OFFICER