



JULIAN M. CARROLL

~~WENDELL FORD~~
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision +
Order No. 243*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge Street
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 5, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 197

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THOMAS AUTOMATIC CAR WASH

RESPONDENT

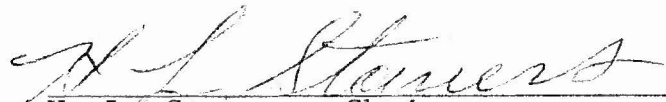
DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., dated December 19, 1975, is before the Commission for review.

Finding no error in the application of the law to the facts herein, and the evidence appearing to adequately support the findings and conclusions of the Hearing Officer, it is the unanimous order of the Review Commission that the Recommended Order of the Hearing Officer be and it hereby is AFFIRMED, and that the penalties and citations involved herein stand AFFIRMED as proposed.


H. L. Stowers, Chairman

Dated: March 5, 1976
Frankfort, Kentucky

DECISION NO. 243

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

/s/ Merle H. Stanton
Merle H. Stanton, Commissioner

197 (243)

This is to certify that copy of this Decision and Order has been served by mailing or personal delivery on the following:


Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

Mr. Thomas G. Thomas (Certified Mail #456138)
Thomas Automatic Car Wash
5364 Dixie Highway
Louisville, Kentucky 40216

Honorable Ronald Snyder (Certified Mail #456139)
Attorney at Law
3007 Sprowl Road
Jeffersontown, Kentucky 40299

This 5th day of March, 1976.


Iris R. Barrett
Executive Director



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order # 206*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

December 19, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 197

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THOMAS AUTOMATIC CAR WASH

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.

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.

197 (206)

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

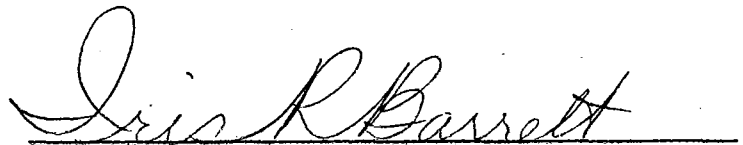
Commissioner of Labor
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. Thomas G. Thomas
Thomas Automatic Car Wash
5364 Dixie Highway
Louisville, Kentucky 40216

(Certified Mail # 456058)

This 19th day of December, 1975.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

KOSHRC NO. 197

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

THOMAS AUTOMATIC CAR WASH

RESPONDENT

* * * * *

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

Thomas G. Thomas, pro se, Personal Representative for the Respondent,
not represented by counsel, c/o Thomas Automatic Car Wash, 5364 Dixie
Highway, Louisville, Kentucky

FOWLER - Hearing Officer

* * * * *

On June 3, 1975, an inspection was made by the Department of Labor,
at a place of employment operated by the Respondent, Thomas Automatic Car
Wash, at 5364 Dixie Highway, Louisville, Kentucky. As a result of that invest-
igation, a Citation was issued on June 18, 1975, consisting of one (1) Citation
listing 21 non-serious violations and corresponding abatement dates. No Item
was contested and the matter became final without further action.

A follow-up investigation and inspection was made on August 11, 1975,
again by the Department of Labor, of the same location on Dixie Highway in
Louisville, Kentucky, operated by the Respondent Company.

As a result, the follow-up inspection of August 11, 1975, the following was alleged:

It was alleged that the Citation previously referred to issued under KRS Chapter 338, was not posted at or near each place of an alleged violation referred to in the Citation, in violation of 803 KAR 2:125 Section 1(1). A proposed penalty of \$500.00 was made as a result of this Citation, and the abatement date was set for August 23, 1975. It was further alleged that as a result of the follow-up inspection of August 11, 1975, the Respondent Company had failed to correct items number 18, 19, and 21 of the first violation as indicated in paragraph 12, a, b, and c of the Complaint as follows: (a) Violation of 29 CFR 1910.264 (c)(1)(iii)(b), "extractor not provided with interlock device which prevented cover from being opened while basket in use". The proposed penalty for failure to correct item 1 in the original Citation was computed to be five days of failure to correct at \$175.00 per day, with previously allowed abatement credit, totalling \$923.00.

The abatement date set for each of items 18, 19, and 21 under the original Citation, was August 5, 1975.

It was further alleged that as a result of the follow-up operation of August 11, 1975, that the Respondent had failed to correct item number 19, which is item 12 (b) in the Complaint and is alleged as follows: Violation of 29 CFR 1910.264 (c)(1)(iii)(c), "manufacturer's rated speed at which extractor could be operated was not stamped on inside basket in letters one-fourth inch in height".

The proposed penalty was for five days of failure to correct at \$100.00 per day or a total of \$500.00.

It was further alleged that as a result of the follow-up inspection of August 11, 1975, that the Respondent had failed to correct item 21, as shown in paragraph 12 (c) of the Complaint being as follows: "A violation of 29 CFR 1910.151(b) no individuals adequately trained to render first aid, and a list of first aid supplies was not signed by a physician." The penalty proposed for such violation was for five days of failure to correct at \$100.00 per day or a total of \$500.00.

The total proposed penalties were for item 1 of the new Citation, being a failure to post the previous violation of \$500.00. Failure to correct item number 18, \$923.00; failure to correct item number 19, \$500.00; failure to correct item number 21, \$500.00, total of \$2,423.00.

All of the aforesaid Citations and penalties are contested by the Respondent, both as to the original Citation of failure to post the previous violation and for the failure to correct items 18, 19, and 21 of the original Citation. The pertinent procedural dates and information are as follows:

1. Inspections were made of the aforesaid premises on June 3, 1975, and a follow-up examination on August 11, 1975. One Citation was issued alleging failure to post the previous violations and failure to correct items 18, 19, and 21 of the original Citation and said Citation was issued on August 20, 1975.
2. Notice of Contest was received on August 29, 1975.
3. Notice of Contest with copy of the Citations and proposed penalty was transmitted to the KOSH Review Commission on August 29, 1975.

4. Notice of Receipt of Contest was mailed on September 2, 1975, and Certification of Employer Form was received on September 5, 1975.

5. The Complaint was received on September 18, 1975. No formal answer was received but the original letter of protest of the Respondent received August 23, 1975, and was and is, considered as an Answer herein.

6. The case was assigned to a Hearing Officer on October 14, 1975.

7. Hearing was scheduled and held on November 5, 1975, at 11:00 A.M., at the Legal Arts Building, Louisville, Kentucky.

8. The Receipt of the Transcript of the Evidence of the Hearing was received on December 4, 1975, and no Briefs or Memorandum was requested by either party.

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 authorize 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 hearings. Under the provisions of KRS 338.081, hearing was authorized by 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 a Citation or penalty.

The testimony of the witnesses will be discussed in the order of the Citations commencing with the failure to post the previous violation.

The testimony of the Department was that the Citation had not been posted, either at the locale of the extractor, which had been the basis of the Citation, nor at the business office or cashier's desk at the car wash. The Respondent Company is engaged in the business of an automatic car wash wherein automobiles are driven to the car wash, the driver leaves the automobile and it automatically proceeds through a washing process and is picked up on the other side by employees of the Respondent, who then clean the inside of the automobile, wash the windows and wipe the excess water from the automobile. The testimony is uncontradicted that the Citation was not posted at the time of re-inspection. Respondent testified that the Citation had been put there, but that it had been either removed or had been kept in the automobile of the Respondent, or one of its employees, for a safe keeping. There is little evidence to dispute the fact that the Citation was not posted in accordance with the regulations.

The testimony concerning the failure to correct the condition which existed on the extractor in not providing an interlocking device and not stating the manufacturer's rated speed is contained in page 34 of the proof, in which the compliance officer testified that as he started toward the extractor the employee of the Respondent stated that nothing had been done on the extractor and that they, the Respondent, had called a man to work on it but that he had not come and that in any event no work had been done on the extractor. This contained the total amount of proof which was obtained at the hearing concerning whether or not the extractor had been corrected, insofar as the department of Labor was concerned.

★ The Respondent's testimony concerning the extractor was that they had called a man to work on it and had been unable to get anyone to fix it and that another extractor had been delivered on August 18th and was in use at the time of the hearing. [Respondent's proof further showed that the extractor was not used at any time during the period during which the violation was to be abated and that, in fact, the fuses had been removed from the extractor, making it inoperable.]

The same character of proof would apply to 12(b) in the Complaint in relation to the failure to state the manufacturer's rated speed on the extractor.

9 The proof on the violation as alleged in paragraph 12(c), that "no individuals were adequately trained to render first aid, and a list of first aid supplies was not signed by a physician," alleged violation of 29 CFR 1910.151(b), was erroneously described, or improperly reported, as referring to sub-section (b), which your hearing officer cannot find ^{why?} and which we assume was in error and intended to be sub-section (b), which provides that in order to be included in the regulation the employer must have 8 or more employees and the proof of the number of employees is very inconclusive at the original inspection and totally lacking in the re-inspection. ~~Subsection (b) says none of this~~

The proof was somewhat uncertain as to the exact number of employees that were employed by the Respondent and it seemed reasonable that the employees that were on the payroll were not engaged in the business of operating the extractor and that the cashier, at least, had nothing at all to do with

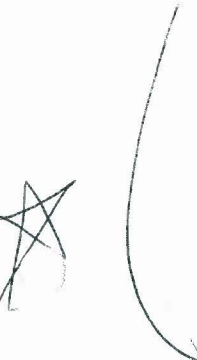
the operation of the machinery. There is little question that there was no person adequately trained to render first aid at the time of the re-inspection and that the nearest hospital facility was several miles away. It does appear that there was a kit of first aid supplies which was present and that this kit had been apparently signed by a doctor, who stated that it was apparently sufficient for minor injuries and there was a signed list of the items that were there.

There is no question raised about the sufficiency of the original Citation or the finality of same.

~~The testimony revealed that the operation was one which was to~~
a degree seasonal in nature, and one which undoubtedly had to require part-time help, presumably young boys, who would be available to work for certain hours during some days in the operation of the car wash. It could ~~be~~ properly be classified, I feel, as a business which had certain peak periods during which time a number of boys would need to be employed, and correspondingly during periods of time, possibly two or less, could operate the business.

The extractor was used to extract the water from the rags which were used in wiping the excess water from the automobiles after processing through the automatic car wash.

Respondent's testimony was, and uncontradicted, that prior to the abatement period a wringer was used for the purpose of drying out the rags and that the extractor was disconnected, defused, and not used at all during the period of abatement and that there was no extractor used until the new one arrived, approximately August 18, 1975.

A handwritten five-pointed star is located on the left margin. A curved arrow originates from the star and points towards the word "Respondent's" in the final paragraph.

After hearing the testimony of the witnesses and after having read and examined the evidence and considered same, together with the arguments of the parties, it is concluded that substantial evidence on the record considered as a whole supports the following Findings of Fact.

FINDINGS OF FACT

1. The original Citation was not contested, nor were the penalties, and that the fines totalling \$289.00 have not been paid as per the inspection of June 3, 1975.
2. That the follow-up inspection was made by another compliance officer on August 11, 1975.
3. That the re-inspection did not show whether the condition concerning the extractor had been abated or not, but merely showed that nothing had been done to the machine.
4. An attempt was made to fix the extractor and the new one was ordered.
5. That the Respondent started using the hand wringer instead of the extractor on August 4, 1975, and that the fuses were removed from the extractor and the equipment was not usable.
6. The history of the Company shows an accident occurred in May, 1975, resulting in a broken arm as a result of the use of the extractor.
7. There was no person present at the time of the re-inspection who was skilled in first aid.
8. Supplies were present for first aid use, but had not been certified as such by a doctor.

9. A new extractor was delivered on August 18, 1975, and is in use.

10. There is no certain proof that the Respondent had 8 or more employees working regularly, or at the time of re-inspection.

11. The procedural requirements of the inspection and the re-inspection were adequate and appropriate consideration of the proposed penalties and credits was given under the guide lines set forth by the Department for its compliance division.

CONCLUSIONS OF LAW

It is concluded by the Hearing Officer, as a matter of law: (1) that the violation of 803 KAR 2:125 Section 1(1), failure to post the Citation was proven and that the fine and abatement date should be sustained; (2) that the Department has not proven a failure to correct the violation of items 18, 19, concerning the extractor. ~~Since~~ ^T there is no proof that the extractor was, in fact, used on the re-inspection or had been used at any time prior to the re-inspection. The only testimony was that nothing had been done to the extractor. A correction may be accomplished by dis-continuing the use of the dangerous instrument and this appears to be such a situation. The fact that nothing was done to the extractor does not, of itself, prove that there had been no correction of the violation, since removal of the equipment from use effectively would remove the hazard which is sought to be controlled by the regulation. The Department has failed to carry the burden of proof insofar as items 18 and 19 are concerned in the use of the extractor and those violations and the penalties attached thereto, should be vacated.

Insofar as Item 21 is concerned, in that no individual was adequately trained to render first aid and a list of first aid supplies was not signed by a physician, it is important to note that there be 8 or more employees to be covered under such regulation.

29 CFR 1910.151(b) has been held to be vague and un-enforceable under many of the decisions of the Review Commission. In that regard, Love Box Co. Inc., CCH-ESHG Paragraph 18, 834, dated October 10, 1974, OSHRC 6286 and also Denesi Packing Co., CCH-ESHG 17, 603, and Mid-West By Products, Inc., Paragraph 17, 172. All of these authorities seem to indicate that the conditions set forth in the regulation are too vague to be complied with. However, the Hearing Commissioner is aware also of the decision of October 21, 1975, in KOSHRC NO. 141, Public Service Commission for and on the behalf of Commissioner of Labor, Commonwealth of Kentucky vs. Capital Oil and Gas in which this Review Commission sustained an Order vacating the penalty for a violation of 29 CFR 1910.151(b) for other reasons and did not touch on the vagueness of the regulation.

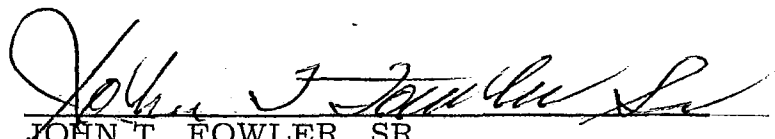
It is concluded that, in spite, of the vagueness of the regulation, and the lack of sufficient information concerning the number of employees present at the time of re-inspection, that a list of medical supplies was present and listed but not signed by a doctor, that there remains sufficient proof of the lack of a persons skilled in first aid to sustain the proposed violation, but also grounds sufficient to show such compliance as to indicate good faith and to require a reduction in proposed penalty.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the Citation issued against the Respondent as Item 1 (violation of 803 KAR 2:125 Section 1(1), failure to post violation and the fine of \$500.00 is hereby sustained and the abatement date is re-set for 30 days from the effective date of this Order.

~~IT IS FURTHER ORDERED AND ADJUDGED that the Citations~~
~~for failure to correct Items 18 and 19 and the proposed penalties are hereby~~
vacated.

~~IT IS FURTHER ORDERED AND ADJUDGED that the Citation~~
~~issued against the Respondent for failure to correct Item 21 in the original~~
~~Citation is sustained and a fine of \$100.00 is imposed upon the Respondent~~
~~for such failure to correct and the abatement date is re-set for 30 days from~~
the effective date of this Order.


JOHN T. FOWLER, SR.
Hearing Officer - KOSHRC

Dated: December 19, 1975
Frankfort, Kentucky

DECISION NO. 206