



# 22

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

WENDELL H. FORD  
GOVERNOR

REVIEW COMMISSION

H. L. STOWERS  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

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

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

6-5-74

KOSHRC # 2

PUBLIC SERVICE COMMISSION OF KENTUCKY  
(For and on behalf of Commissioner of Labor)

COMPLAINANT

vs.

BIG SANDY R.E.C.C.

RESPONDENT

REVIEW COMMISSION  
DECISION

Before STOWERS, Chairman, UPTON and STANTON,  
Commissioners.  
STANTON, COMMISSIONER:

On February 14, 1974, Honorable Lloyd Graper, Hearing Officer, issued his recommended decision and order in the instant case reducing the amount of the proposed penalty for a serious violation from \$550 to \$385; vacating the proposed penalty of \$27 for non-serious violation titled Item No. 3; and sustaining the proposed penalty of \$48 for the non-serious violation titled Item No. 6. On its own order this Commission directed that the recommendation of the Hearing Officer be reviewed by the Commission in accordance with KRS 338.071 and 338.081. Upon motion made by Complainant, Oral Arguments were allowed on April 16, 1974.

The Commission has reviewed the rulings of the Hearing Officer, the entire record in the case, and has considered the arguments and exceptions of the parties. The Commission adopts the Hearing Officer's recommended decision and order only to the extent that it is consistent with the following:

On August 21, 1973, the Public Service Commission issued a citation for a serious violation charging Respondent with violation of OSH-11 29 CFR 1910.109 (b)(1) and proposed

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a penalty of \$550.00. On August 21, 1973, the Public Service Commission also issued a citation for nine violations not of a serious nature charging Respondent with violations of, as to Item Number 1, OSH-11 29 CFR 1910.157 (d)(2)(i); as to Item Number 2, OSH-11 29 CFR 1910.141 (b)(v)(vi); as to Item Number 3, OSH-11 29 CFR 1910.176 (b); as to Item Number 4, OSH-11 29 CFR 1910.141 (c)(2)(i); as to Item Number 5, OSH-11 29 CFR 1910.22 (a)(1); as to Item Number 6, OSH-11 29 CFR 1910.106 (d)(2)(i); as to Item Number 7, OSH-11 29 CFR 1910.22 (a); as to Item Number 9, (Item Number 8 having been omitted) OSH-12 29 CFR 1926.1251 (c)(4)(iv); and as to Item Number 10, OSH-12 CFR 1926.959 (b)(3). A penalty of \$27.00 as to Item No. 3 and of \$48.00 as to Item No. 6 was proposed. Hearing of this matter was held on Wednesday, December 19, 1973.

A review of the record as to the serious violation indicates that a probability of serious injury or death existed at the time. In carefully considering all factors including the gravity of the situation, the citation was proper, and the penalty, due to the gravity, is raised from \$550 to \$600.

The Hearing Officer derived his adjusted penalty of \$385 by use of a fixed starting point of \$700 rather than the \$1000 starting point used by the Compliance Officer. The Hearing Officer stated that this methodology was used since he felt that gravity was not properly considered by the Compliance Officer's formula in evaluating a serious violation. We agree that gravity is a consideration in serious violations and that the Commission has here considered and will give due consideration to the gravity of the situation in assessing penalties for a serious violation. We do feel that while use of this formula technique by the Compliance officer in arriving at a penalty may be well designed to assist in arriving at a uniform penalty it does not properly explore the element of gravity, and the Review Commission will not be restricted thereby.

We do not approve of the "formula" method used by the Hearing Officer, since even though he properly considered the gravity of the situation by reducing the starting point of the penalty to that commensurate with his evaluation of the gravity, it is not a methodology to which a reviewing official should tie himself. If the Commission were to restrict itself to such mechanical formulas then discretionary review as to fairness and factual circumstances would be forfeited.

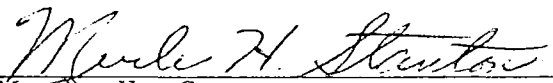
Considering KRS 338.991 (2), (3), and (12) it is obvious that the General Assembly has intended that there be discretionary range of \$1.00 to \$1,000 penalty assessed for a serious violation. There is no question that the word "shall" is a mandate to the Review Commission to assess a

penalty, thus it has no discretion to waive the penalty. But this Commission has the full discretion as to the amount of the penalty "up to \$1,000 for each violation." Proposed penalties by virtue of the citation and complaint are merely advisory in this Commission's review of the record as a whole. The factors of size, good faith, history, and gravity as used by the Compliance Officer cannot always be given equal weight by this Commission nor be computed according to a mechanical formula.

As to the non-serious violation titled Item No. 3, we feel that the Commissioner has met his burden of proof and that the penalty of \$27 should stand.

ORDER

IT IS ORDERED that the proposed penalty of \$550 for the serious violation shall be and the same is hereby INCREASED to \$600; the proposed penalty of \$27.00 for the non-serious violation titled Item No. 3 shall be and the same is hereby REINSTATED; and the proposed penalty of \$48.00 for the non-serious violation titled Item No. 6 shall be and the same hereby is SUSTAINED.

  
Merle H. Stanton  
Commissioner

Concurring:

/S/ Herbert L. Stowers  
H. L. Stowers, Chairman

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



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

CAPITAL PLAZA TOWER  
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PHONE (502) 564-6892

2-14-74

WENDELL H. FORD  
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MEMBER

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MEMBER

KOSHRC # 2

PUBLIC SERVICE COMMISSION for and on behalf of  
COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

V

BIG SANDY R.E.C.C.

RESPONDENT

NOTICE OF RECEIPT OF  
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 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 of 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:

FOR RESPONDENT:

Honorable James A. Knight  
Attorney for Respondent  
Paintsville, Kentucky 41240


Honorable Albert A. Burchett  
Attorney for Respondent  
Martin, Kentucky

FOR COMPLAINANT:

Honorable Morris E. Burton  
Attorney for Complainant  
Capital Plaza Tower  
P. O. Box 496  
Frankfort, Kentucky 40601

Honorable Robert T. Harrod  
Attorney for Complainant  
Capital Plaza Tower  
P. O. Box 496  
Frankfort, Kentucky 40601

This the 14<sup>th</sup> day of February, 1974.  
Frankfort, Kentucky

  
IRIS R. BARRETT, EXECUTIVE DIRECTOR  
KOSH REVIEW COMMISSION

RECEIVED

COMMONWEALTH OF KENTUCKY  
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

FEB 14 1974

OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION

KOSHRC DOCKET NO. 2

COMMISSIONER OF LABOR

COMPLAINANT

V.

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

BIG SANDY R.E.C.C.

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, hearings 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.

KRS 338.041, which creates in the Department of Labor a Division of Occupational Safety and Health to administer all matters pertaining to occupational safety and occupational health, requires

the Department of Labor to enter into an agreement with the Public Service Commission, which shall serve as the State agency in the administration of this Chapter for all matters relating to occupational safety and occupational health with respect to utilities as defined in KRS 278.010, and their employees. Such an agreement was entered into between the Department of Labor and the Public Service Commission on August 1, 1973, and a copy has been filed with the Review Commission in connection with this hearing.

On August 21, 1973, the Public Service Commission issued a citation for a serious violation charging Respondent with violation of OSH-11 29 CFR 1910.109(b)(1) and proposed a penalty of \$550.00.

On August 21, 1973, the Public Service Commission also issued a citation for nine violations not of a serious nature charging Respondent with violations of, as to Item Number 1, OSH-11 29 CFR 1910.157(d)(2)(i); as to Item Number 2, OSH-11 29 CFR 1910.141(b)(v)(vi); as to Item Number 3, OSH-11 29 CFR 1010.176(b); as to Item Number 4, OSH-11 29 CFR 1910.141(c)(2)(i); as to Item Number 5, OSH-11 29 CFR 1910.22(a)(1); as to Item Number 6, OSH-11 29 CFR 1910.106(d)(2)(i); as to Item Number 7, OSH-11 29 CFR 1910.22(a); as to Item Number 9, (Item Number 8 having been omitted) OSH-12 29 CFR 1926.251(c)(4)(iv); and as to Item Number 10, OSH-12 29 CFR 1926.959(b)(3). A penalty of \$27.00 as to Item No. 3 and of \$48.00 as to Item No. 6 was proposed.

The description of alleged violation in the citation for the serious violation reads:

No person shall store, handle or transport explosives or blasting agents when such storage, handling and

transportation of explosives or blasting agents constitutes an undue hazard to life and property. Approximately forty (40) dynamite caps (electric) were stored in paper container in southeast corner of aisle no. 3 in warehouse on 3rd shelf from floor. Warehouse was unlocked and accessible to all employees.

The description of alleged violation in the citation for violations not of a serious nature, as to Item No. 3, reads:

Storage of material shall not create a hazard. Shelf 10' by 2' running over top of doorway in small parts room without substantial support for amount of material stored on shelf.

and, as to Item No. 6, reads:

Only approved containers and portable tanks shall be used to store flammable and combustible liquids. One gallon of gasoline stored in metal can without spring closing lid and spout cover located on 4' counter between transformer repair shop and garage area in basement of warehouse.

By letter dated August 31, 1973, the Respondent notified the Commissioner that it intended to challenge the citations issued. Such letter bore a stamp reading: "FILED SEP 5 1973 PUBLIC SERVICE COMMISSION" and "RECEIVED SEP 7 1973 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION".

A Certificate of Service indicating that the Notice supplied by the Commission advising affected employees of this case and a copy of the employer's Notice of Contest were posted at each place where the Kentucky Occupational Safety and Health Act Citation is required to be posted and served upon each local union representing affected employees, dated September 14, 1973, was received by the Occupational Safety and Health Review Commission on September 17, 1973.

A Complaint designating the Complainant "PUBLIC SERVICE COMMISSION OF KENTUCKY (For and on Behalf of Commissioner of Labor)



bore a stamp reading "RECEIVED SEP 25 1973 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION".

An Answer bore a stamp reading: "RECEIVED OCT 8 1973 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION".

On December 6, 1973, all parties were given written notice that a hearing of this matter would be held before a hearing officer assigned under KRS 338.081 and the Rules of Procedure of the Review Commission on Wednesday, December 19, 1973, at 10:30 a.m. at the office of the Respondent at Paintsville, Kentucky 41240.

By admitting paragraphs 1 and 2 of the Complaint and by agreement with Complainant entered into the record, Respondent and Complainant have narrowed the issues in contest to the following questions:

1. Was the Complaint filed with the Review Commission no later than 20 days after receipt of the Notice of Contest as required by Section 18 of the Rules of Procedure of the Review Commission?

2. Was the case appropriately titled under Section 16 of the Rules of Procedure of the Review Commission?

3. Was the proposed penalty of \$550.00 for the serious violation reasonable?

4. Was the proposed penalty of \$27.00 for the non-serious violation titled Item No. 3 reasonable?

5. Was the proposed penalty of \$48.00 for the non-serious violation titled Item No. 6 reasonable?

After hearing the testimony of the witnesses and having considered the same together with the exhibits and the stipulations,

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. By failure to deny paragraph 1 of the Complaint, Respondent is deemed to have admitted that on the 13th day of August, 1973, the authorized Compliance Officer of the Public Service Commission of Kentucky made an inspection of the Respondent's facilities and equipment located at Paintsville, Kentucky, and environs. As a result of said inspection, the said Compliance Officer discovered the violations of the regulations of the Occupational Safety and Health Standards Board relating to occupational health and safety as hereinabove described.

2. By failure to deny paragraph 2 of the Complaint, Respondent is deemed to have admitted that the basis for the jurisdiction of the Complainant to make the inspection aforesaid and affix the penalties hereinabove set forth is KRS 338.041(3) and the contract dated August 1, 1973, between the Kentucky Department of Labor and the Public Service Commission which is filed as a part of the permanent records of the Kentucky Occupational Safety and Health Review Commission.

3. The Complaint was filed with the Review Commission on September 25, 1973, which was not later than 20 days after September 5, 1973, the date of receipt of the Notice of Contest by the Public Service Commission.

4. The Complaint bore the title "PUBLIC SERVICE COMMISSION OF KENTUCKY (For and on behalf of Commissioner of Labor), COMPLAINANT. No evidence was presented by Respondent showing prejudice by reason thereof.

5. The warehouse where the electric dynamite caps were stored was a restricted area with limited employee access. Its principal, and usually sole occupant, was the warehouse man.

6. In his testimony regarding the non-serious violation titled Item No. 3, the Compliance Officer could not recall whether or not there were any cardboard boxes on the shelf in question. He testified as to seeing the appearance of the shelf and the materials which he stated were stacked up to three feet. He could not testify as to what these materials were.

7. The Compliance Officer, as an agent of the Commissioner, as to the non-serious violation titled Item No. 6, gave effect to the four criteria hereinafter outlined, and gave them the proper weight under the circumstances.

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

CONCLUSIONS OF LAW

1. Limiting the Review Commission's review to the particular components of the citations agreed upon by the parties appears appropriate under the circumstances since it does not appear that error would result from not reviewing the whole of the citations in detail.

... of any public administrative agency, or copy duly certified by the custodian thereof, shall be prima facie evidence of its contents in all proceedings." On its face, the Complaint was timely filed. No evidence was presented by Respondent to refute such prima facie evidence.

3. In view of the provisions of KRS 338.041(3) relegating to the Public Service Commission the administration of KRS Chapter 338 for all matters relating to occupational safety and occupational health with respect to utilities as defined in KRS 278.010, and their employees, the title used by Complainant is in substantial compliance with Section 16 of the Rules of Procedure of the Review Commission. Such titling was not a jurisdictional defect and worked no prejudice to Respondent.

4. The assessment of civil penalties under the provisions of KRS 338.991 is a function of the Review Commission. Under the provisions of KRS 338.141, an authorized representative of the Commissioner of Labor, if he finds that an employer has violated a requirement of KRS Chapter 338 shall issue a citation to the employer which shall describe the alleged violation, establish the time period provided for correction by fixing a reasonable date by which the alleged violation shall be eliminated, and propose the civil penalty to be paid. If within fifteen (15) working days from the receipt of the citation, an employer, employee or representative of the employees fails to notify the Commissioner that he intends to contest the citation, then the citation shall be deemed a final order of the Review Commission and not be subject to review by any court or .

agency. Under the provisions of KRS 338.991(6), the Review Commission shall have the authority to modify all civil penalties and fines provided for in KRS Chapter 338.

The broad scope of the Occupational Safety and Health Act of 1970, encompassed in the statement of Congress' objectives, indicated that one of the ways Congress would achieve its purpose to assure, as far as possible, safe and healthful working conditions to every employee in America and to preserve this country's human resources would be by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith.

Congress, in such Act, required that due consideration be given to four factors in arriving at an appropriate penalty. The factors to be weighed are the size of the employer's business, the gravity of the violation, the employer's good faith, and the employer's history of previous violations. These factors would apply as well to the Secretary of Labor in proposing penalties to be assessed by the Commission. While KRS Chapter 338 does not specifically set out the factors to be weighed by the Review Commission in arriving at an appropriate penalty, Congress' objectives clearly require due consideration of such factors.

Notwithstanding this mandate, and notwithstanding the fact that KRS 338.991(2) provides that any employer who has received a citation for a serious violation shall be assessed a civil penalty of up to \$1,000.00 for each violation, under both the Federal and the Kentucky programs the Secretary and the Commissioner, respectively, do not recognize degrees of gravity where the violation is a serious one. All such violations are viewed as inherently grave to the highest degree and they have, accordingly, provided that the unadjusted penalty for every serious violation is to be fixed at a flat \$1,000.00. Also, no abatement credit is given in the instance of a serious violation. Only the adjustment factors of "good faith", "size" and "history" are used and allowed in the same percentage amounts as in the case of a non-serious violation.

While the Commissioner's desire for uniformity in penalty assessment is something to be favored, it should not be permitted when it is in direct conflict with the intent of Congress and the plain wording of KRS 338.991(2). In the instant case, inasmuch as the number of employees exposed to the electric dynamite caps appears to be no greater than one most of the time, the probability of injury is somewhat less than where a large number of employees are exposed to a substandard condition. In this case, it is concluded that the likelihood of injury in terms of probabilities would be low even though there was a substantial probability that death or serious physical harm could result from the condition. For this reason, the unadjusted penalty for the serious violation should have been \$700.00 instead of \$1,000.00, and

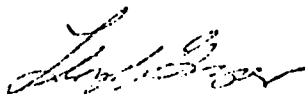
and the adjusted penalty should have been assessed at \$385.00 instead of at \$550.00.

5. In all proceedings initiated by a notice of contest, the burden of proving the case rests with the Commissioner of Labor. Proof that is speculative or conjectural in nature is not satisfactory. Because of a lack of probative evidence upon which to predicate the gravity of the non-serious violation titled Item No. 3, no penalty should be assessed.

6. As to the non-serious violation titled Item No. 6, the Commissioner has met his burden of proof and the penalty assessed should stand.

ORDER

IT IS ORDERED that the proposed penalty of \$550.00 for the serious violation shall be and the same hereby is REDUCED to \$385.00; the proposed penalty of \$27.00 for the non-serious violation titled Item No. 3 shall be and the same hereby is VACATED; and the proposed penalty of \$48.00 for the non-serious violation titled Item No. 6 shall be and the same hereby is SUSTAINED.



LLOYD GRAPER  
Hearing Officer, KOSHRC

DATED: February 14, 1974  
Frankfort, Kentucky

Decision No. 1