COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC DOCKET NO. 2214-92

SECRETARY OF LABOR COMPLAINANT

VS. **DECISION AND ORDER OF THE REVIEW COMMISSION**

RUDD DRYWALL COMPANY, INC. RESPONDENT

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Before Wagoner, Shumate and Yates, Commissioners:

This case was called for review by the commission consider hearing officer Patricia H. Rabits' recommended order sustaining the citations but deleting the penalty. **In** her petition for discretionary review, the secretary of labor argues both the citations and penalties should be affirmed because respondent was in default due to its failure to file "responsive pleadings" or appear at the hearing. Respondent, in its motion to deny discretionary review and brief, asks that the petition for discretionary review be denied.

Respondent, while it did not answer the complaint or attend the scheduled hearing, did contest the citations and penalty. KRS -338. 171 (4) authorizes the review commission to hear appeals from "...citations, notifications, and variances..." While our rules of procedure require the litigating parties to file a complaint and an answer, an answer (due to the constraints of KRS 338.171 (4)) is not a jurisdictional hurdle a respondent must cross to litigate a case before the hearing officer or this commission. Of course, in a well-litigated case, we expect that

an answer will be filed to focus the issues which will be tried while eliminating those that need not be tried. An answer will generally contribute to the orderly progress of the litigation.

Complainant also urges the commission to find that respondent, by its failure to attend the hearing, loses its ability to litigate further. But we have already addressed the first half of that issue. This review commission hears appeals from citations and penalties and respondent filed a notice of contest. Complainant's position, although riot articulated, is to the effect that at the hearing the secretary need put on no proof to prevail once (we would add) the issue has been joined by the notice of contest but respondent then fails to attend the hearing to offer proof.

What the secretary of labor misses is that thiS is not a constitutional court but an administrative agency. KRS 338.071 (1) requires that the commissioners appointed by the governor have certain experience in occupational safety and health matters. Further, as an administrative agency with the responsibility to hear appeals from citations, penalties and variances, we cannot exercise that institutional expertise acquired by an agency in the course of its statutory duties without access to the facts of the case. We do not possess the power of the secretary of labor to enforce the act. See KRS 338.101. For example, we have no powers to inspect but must rely, instead, on what is brought to us in the record of the case. What the commission and its hearing officers need to perform their

assigned tasks are the facts of each case as brought out in the hearing. KRS 338.071 (4) and KRS 338.081.

As an administrative agency charged with the duty to hear appeals resulting from the notice of contest, we are constrained to render decisions based on the law and facts. Once a notice of contest is filed, whether the respondent offers proof at the hearing or not, the secretary, in order to prevail, must prove the citation and penalty by a preponderance of the evidence and we so hold. When the secretary fails in her burden to prove the citation and penalty by a preponderance of the evidence, she will not prevail.

We cite with approval hearing officer Charles Goodman's language in Frozen Food Distributors, Inc., KOSHRC D-6-89, to the effect that:

> once a Notice of Contest has been filed by an employee, Constitutional considerations of Due Process require, even in the absence of any evidence introduced at the Hearing on behalf of employer, that the Secretary nonetheless be required to provide evidence at the Hearing sufficient to establish a prima facia case.

A review of the transcript of the hearing in this case reveals that the secretary proved that the two citations were serious citations. But the secretary failed to prove that citation one was a repeat violation. Oberle Jorde Co., KOSHRC 613, states the secretary, in order to sustain a repeat citation, must prove a prior citation which became a final order of this review commission.

At the hearing the compliance officer testified the company had been cited before for the "...same or similar violation."

Transcript of the Hearing 8 (TH 8). But no documentation was introduced proving the citation had become a final order of this commission. Neither was the question asked of the compliance officer whether the prior citation had been contested: When asked the date of the prior inspection, the compliance officer replied "It was the 9th and 10th and 12th of the year '90." TH 8. We reviewed the pictures of the prior inspection which are also dated "9th and 10th and 12th of the year '90." Complainant's Exhibit 2.

Had the secretary introduced an order of this commission establishing the prior citation was a final order or had the secretary elicited testimony at the hearing that the prior citation (already introduced into evidence) had not been contested, then a repeat serious violation would be sustained by this commission, at least in this case with the respondent absent at the hearing.

KRS 338.990 (6) says "The review commission shall have the authority to modifyl all civil penalties..." KRS 338.081 (3) reiterates that the review commission may "...sustain, modify or dismiss a citation or penalty." KRS 338.141(1) says

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[1] We examined Kentucky Digest 2d, Words and Phrases, for the word modify. We found the word modification and a cite to the case of Board v. Board, Ky. 690 S.W.2d 380, 381 (1985).. That case cited KRS 403.250 "Modification or termination of provisions for maintenance and property disposition." The interpreting cases under KRS 403.250 (which was enacted in 1972 as was KRS 338.990 (6)) use the word modification to mean either increasing or decreasing maintenance and property disposition awards. "Modify" means either "increase" or "decrease" according to Black's Law Dictionary, 4th edition. See also Words and Phrases to the same effect.

th'e commissioner [now secretary] only "proposes" penalties. While the above statutes make it clear the review commission is able, in contested cases, to modify the penalty proposed by the secretary, 803 KAR 2:115 sets the guidelines the secretary must follow when she proposes penalties. The secretary must take into consideration the size of the respondent, the gravity of the violation charged, the good faith of the respondent and the respondent's history of prior violations.

While KRS 338.990 (6) says the review commission may modify penalties proposed by the secretary, the secretary is required to follow the guidelines set down by 803 KAR 2:115 when proposing 'penalties. Although the review commission is not bound by the requirements of 803 KAR 2:115, we consider the information normally brOught out during a contested hearing through the examination and cross examination (if any) of the compliance officer on the appropriateness of the penalty to be essential in the discharge of our duties under KRS 338.990 (6). A reading of our prior decisions reveals the review commission has not set down a definition of a prima facia case for proving the proposed penalty at a hearing. We therefore hold today that the secretary, in a contested case, must prove by a preponderance of the evidence that she followed 803 KAR 2:115 for establishing the appropriateness of the penalty assessed against the respondent.

The issue, then, is whether to apply the rule announced in this case that the Secretary of Labor must prove the penalty was proposed according to the guidelines of 803 KAR 2:115 to the

case at hand. While in most cases judicial decisions are applied retroactively, Williams v. Gordon, Ky. 231 S.W.2d 89 (1950), there are situations where it would be unfair to do so. There is a line of cases arising out of the U.S. Supreme Court permitting prospective application of decisions of judicial and administrative bodies. In Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the supreme court discussed three factors to consider when applying judicial decisions prospectively. Those factors were used in a federal OSHA case, Dole v. East Penn Manufacturing Co., Inc, 894 F.2d 640 (3d Cir. 1990):

> First, the decision to be applied nonretroactively must establish a new principle of law... Second it has been stressed that 'we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question...' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.

This review commission has never enunciated a rule about the quantum of proof required to prove that a proposed penalty was correctly set. Certainly proof has always been required on a penalty calculation at a contested hearing but not, as we have held today, that each requirement of 803 KAR 2:115 must be specifically addressed and proved. To hold the secretary to that standard of proof today would work a hardship by permitting respondent to escape the imposition of penalties which flow directly from its failure to observe the requirements of scaffolding protection for its employees. Rudd is in the drywall

business which will occasion the use of scaffolds on a regular basis. To let Rudd evade the penalties arising in this case simply because this commission has not before set down the reqUirements for proving a prima facia case for a proposed penalty would unfairly interfere with the secretary's enforcement responsibilities under KRS Chapter 338.

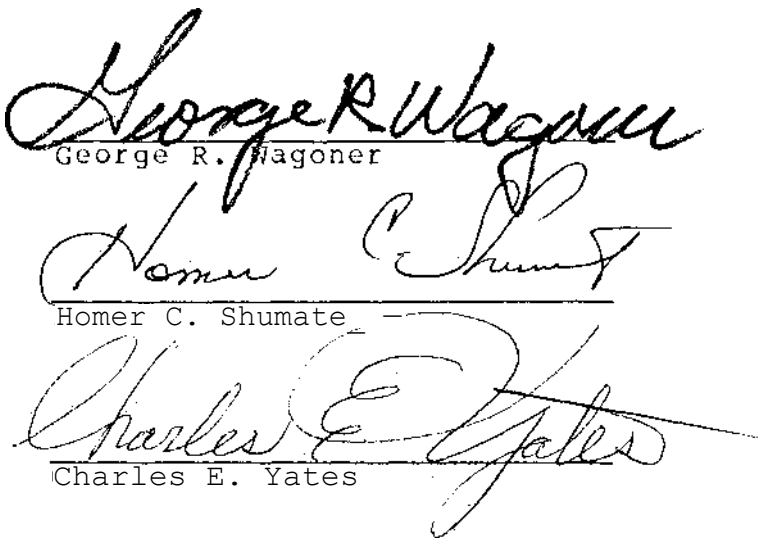
At the hearing in the instant case, the respondent did not make an appearance. The compliance officer testified the total penalties were consistent with the field operation manual guidelines for setting the penalties in this case. TH 11.

Due to the paucity of the proof on penalty calculation in this case, we are unable to recalculate the penalty for citation one (the repeat serious citation reduced by this decision to a serious violation) as a serious violation. We are left with no alternative but to group citation one, for the purpose of setting the penalty, with citation number two.

We find that the secretary proved that citations one and two are serious violations and, further, that the penalty for citation two was properly calculated to be $1,500. We hold that citation one is grouped with citation two (with a proposed penalty of $1,500) for the purpose of setting a total penalty in this case.

We are thus modifying the total penalty in this case, under our statutory authority, to $1,500 for serious citations one and two and affirming citations one and two as serious citations.

This /3 day of November, 1993.



George R. Wagoner

Homer C. Shumate

Charles E. Yates

DATE: November 18, 1993
DECISION NO. 2559-93

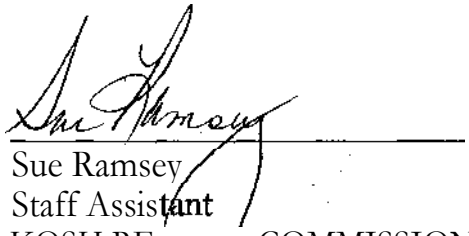
Copy of the foregoing Order has been served upon the following parties in the manner indicated:

Hon. Terry R. Anderson (Messenger Mail)
Counsel
Kentucky Labor Cabinet
Office of General Counsel
1047 U. S. 127 South, Suite #4
Frankfort, KY 40601

Hon . Donald D. Waggner (First Class Mail)
Suite 1004
167 West Main St.
Lexington, KY 40507

Mr. Billy Joe Rudd, Pres. (First Class Mail)
Rudd Drywall Co., Inc.
3007 Park Central Ave., Ste. A-1
Nicholasville, KY 40356

This 18th day of November, 1993.



Sue Ramsey
Staff Assistant
KOSH RE COMMISSION
#4 Millcree ark
Rt. #3, Millville Road
Frankfort, KY 40601
PH: (502) 564-6892
FAX: (502) 564-4619