

COMMONWEALTH OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2241-92

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

NEWPORT STEEL CORPORATION
and
UNITED STEEL WORKERS OF AMERICA
AFL-CIO, LOCAL 1870

RESPONDENT

AUTHORIZED EMPLOYEE
REPRESENTATIVE

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

After our hearing officer issued his recommended order in this case, both parties felt aggrieved, filing petitions for discretionary review under section 48 (1) of our rules of procedure (ROP).¹ Local 1870 objected to respondent's petition. This commission then called the case for review according to ROP 47 (3) and asked for briefs. Complainant and respondent filed briefs with the commission in addition to those written for the hearing officer.

INTRODUCTION

Newport Steel (NS) uses electric furnaces to melt scrap steel to make pipe. When the scrap is melted, it gives off hot gasses. These hot gasses are drawn away from the furnace and routed through ducts 15 feet in diameter to a building near the electric furnace known as the Brandt baghouse. As the gasses cool, dust particles

Enacted as section 48 (1), 803 KAR 50:010.

from the molten scrap accumulate in large bags (approximately 3,000 in number) in great quantities. Transcript of the evidence (TE) 13. On any given day, this dust is very toxic (containing lead, hexavalent chromium and barium, TE 13) and must be handled carefully as it is put into railroad cars for transport out of the steel mill for disposal away from Newport's premises.

Since anything and everything apparently finds its way into scrap steel, the company has a radiation monitor which tests the rail cars before they leave Newport's premises. On April 29, 1992 the radiation alarm sounded. The company, according to its emergency plan, called 911 and several other emergency numbers; the fire department and others arrived at the plant, their sirens and emergency lights on. Transcript of the evidence, volume II (TE II) 66. After some investigation, the emergency responders could find no source of radiation other than some painted numbers on a railroad car. Because Newport Steel wanted to be sure, it enlisted the aid of a steel scrap dealer located next door who came over with a radiation monitor. Investigation ultimately revealed that cesium 137, a radioactive substance, had found its way into the baghouse dust, the baghouse itself, some earth below the baghouse and rail cars used to transport the baghouse dust away from Le plant.

The radiation control branch (RCB) of the Kentucky department for human services, contacted when the radiation was discovered, by letter ordered Newport to hire an outside consultant as an advisor. Secretary's exhibit 2. Newport then elected to use its own

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employees for the cleanup. Because of concern about the health of these employees assigned to the cleanup, the union, local 1870, made a written request for employee medical records under 29 Code of Federal Regulations (CFR) 1910.20.² When these records were not produced, the union through its safety committee chairman Don Faulkner filed an occupational safety and health complaint (KRS 338.121 (1)) with the secretary of labor, the enforcer of the Kentucky occupational safety and health act. KRS chapter 338.

As a result of the compliance officer's (CO) inspection, the secretary issued three sets of citations. Citation 1 alleged respondent Newport Steel willfully violated the 1910.20 standard³ which required it to turn over requested employee medical records within 15 days. Citation 2 with 20 items alleged NS failed to follow standard 1910.120,⁴ sections (a) through (p), which set out requirements for employee information and monitoring, site control and analysis, emergency response and a written safety plan. These regulations are designed to protect employees from the hazards associated with working in an unregulated hazardous waste site which the secretary of labor alleged was the cesium 137 contaminated baghouse, dust, earth and railroad cars. Finally, the secretary issued citation 3 with four items alleging nonserious⁵

² Adopted in Kentucky by 803 KAR 2:020, 1989.

³ In this decision we use standard and regulation interchangeably.

Adopted in Kentucky by 803 KAR 2:307.

⁵ KRS 338.991 (3).

violations of the medical records standard. 1910.20.

Newport Steel contested the citations which led to discovery and then a two day hearing held under the authority of KRS 338.071 and our rules of procedure. Both parties filed briefs with the hearing officer.

DISCUSSION OF THE CASE

In his recommended order our hearing officer sustained the willful citation (which carried a penalty of \$5,000) for failing to comply with the 1910.20 requirements to turn over requested employee medical records in a reasonable time, dismissed the serious citations because, he said, they were based on the wrong standard and sustained the nonserious citations.

Citation 1

When willful citation 1 was written, 1910.20 (e) (1) (i), as amended,⁶ read as follows:

Whenever an employee or designated representative requests access to an exposure or medical record, the employer shall assure that access is provided in a reasonable time, place, and manner but no longer than fifteen (15) days after the request...
(emphasis added)

Kentucky has a state occupational safety and health plan authorized by 29 USC 667. While the Kentucky occupational safety and health standards' are largely borrowed intact from the federal,

⁶ In 1989 29 CFR 1910.20 (e) (1) (i) was adopted and amended by 803 KAR 2:020. Today Kentucky's adoption of 1910.20 (e) (1) (i) is found in 803 KAR 2:302.

Pertinent parts of the 1989 version of 803 KAR 2:020 are attached to this decision as appendix A.

⁷ Federal OSHA standards are adopted in Kentucky by 803 KAR 2:300 through 600.

the Kentucky standards board (KRS 338.051) has seen fit from time to time to adopt Kentucky standards and modify existing federal standards for use in Kentucky.

Kentucky's 1910.20 regulation (see above) says employers have a reasonable time but no longer than 15 days to turn over requested medical information; the federal version of 1910.20 says 15 working days. Labor maintains the standard has said 15 days from day one until now. Newport, on the other hand, says that when the federal standard (which says working days) was readopted in 1989, Kentucky inadvertently adopted the federal-working days version of 1910.20 (e) (1) (1). Newport comes to this conclusion by looking at 803 KAR 2:020, section 1. First, according to Newport Steel, the standards board reaffirmed the "15 days" language" and, second, several paragraphs down adopted the new federal standards (which contains the "15 working days" language). Page 3 of appendix A.

Newport would have us believe that since the standards board re-adopted the Kentucky "15 days" language higher up in the document than the re-adoption of the new federal standard which included the 15 working days requirement, we in Kentucky are left (or at least when the citation was issued) with the federal "working days" language. To get to this point, Newport cited KRS 446.250 which says if the Kentucky legislature adopts two bills which are in conflict, the bill last passed by the legislature controls. KRS 446.250 is a very specific statute which, to us, appears to shed no light on the subject at hand. Instead of two conflicting bills passed by the Kentucky legislature in the same

session, the case at bar asks us to construe one particular 1989 regulation.

The Kentucky standards board made clear its continuing commitment to the "15 days" concept while adopting in general the new federal standard, all within the same regulation. "Proper statutory construction requires that general words of a statute be construed in accordance with the specific terms." Kentucky Power Company v. Revenue Cabinet, Ky. 705 S.W.2d 904 (1986). We see the interpretation of the 1989 regulation in the same light. Kentucky, in 1989, reaffirmed its commitment to a 15 day requirement, a specific term, while adopting the federal standard (containing the 15 working day language) generally. The specific controls the general.

We conclude Kentucky has a 15 days requirement for an employer to comply with an employee (or employee representative) request for medical records.

Our hearing officer concluded Newport violated 1910.20 because it failed to turn over medical records to the requesting union within a "reasonable time." Recommended order pp. 19-20. While this assertion has some merit, given the company's decision to use its own employees (supervised by the outside contractor) to perform

* While both the Kentucky and federal versions of 1910.20 say an employer must comply "within a reasonable time" or 15 days (days or work days), both parties to this case say they did not try the "reasonable time" issue at the hearing but instead are relying on their view of the 15 days. Fair enough. The problem for us, however, is Mason Trenaman decided on his own in his recommended order a reasonable time under the circumstances was less than 15 days.

the clean up of the radiation contaminated baghouse and its surroundings, the secretary of labor did not cite Newport Steel for failing to turn over the records within a "reasonable time." The issue was not tried. In fact, during the hearing Newport Steel carefully objected when it appeared the secretary was eliciting information which might later permit an amended citation under CR 15.02. TE 247-249. We therefore reverse our hearing officer's recommendation to sustain citation 1 on the basis the company failed to turn over the requested medical information within a reasonable time.

The union filed a written request for the medical records on May 12, 1992 and Mason Trenaman found the company gave the union representative access to the records on June 2, 1992. We agree. That means, the company did not comply with the 15 day time limit to turn over the records. But 15 days from May 12 is May 27. From May 27 to June 2 means Newport was six days late in complying with the request.

The inspecting compliance officer came to Newport, following a complaint, on June 2, 1992 to begin his inspection. On June 2 NS gave the compliance officer all the employee records generated to that time. He was accompanied by the union official who had requested the records to begin with. That union official, Donald Faulkner, admitted he did not ask the company for copies of the medical records he examined on June 2.

Q. You did not ask for any copies of records following that meeting, is that correct?

A. After OSHA came in? No, I didn't. I sat back,

and I knew I would get OSHA records through access, the freedom of information act, and things of that nature because I knew OSHA would be able to get the records that I hadn't gotten to that date.

TE II 23

Labor maintains access means copies. In the definitions section of 1910.20 (c), it says "'Access' means the right and opportunity to examine and copy." But Mr. Faulkner, the labor representative, testified he didn't ask for copies of the medical records on June 2 because he thought he could get them when he wanted. Actually, when Mr. Faulkner asked labor for the medical records, labor notified him it could not comply fully because the case was still under investigation. TE II 31-32.

We agree with our hearing officer's finding the union got access to the records on June 2, 1992 just 6 days after the requirement but elected not to ask for copies as it could have. Because the company was 6 days late in providing access to the medical records, it violated 1910.20 (e) (1) (1), as amended by 803 KAR 2:020 (1989). The issue is whether the omission is willful.

Kentucky in Louisville Gas and Electric Company, KOSHRC 1729-88, adopted the federal majority rule on the definition of a willful violation. That rule is found in Empire Detroit Steel Division Detroit Steel Co v. Occupational Safety and Health Review Commission and F. Ray Marshall, Secretary of Labor, 579 F.2d 378, 384 (6th cir. 1978), CCH OSHD 22,813, which says:

Willful means action taken knowingly by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is

described as willful, regardless of venial motive.⁹

About a willful citation involving employee records Caterpillar, Inc., CCH OSHD 29,962, a federal review commission decision, says:

A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions, and by a state of mind - conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard...

At CCH p. 41,007.

According to Caterpillar, without proof of employer familiarity with the standard, there must be proof of reckless disregard of employee safety or the law generally. But during the hearing William Gulasey, manager of engineering and in charge of the cleanup, testified his employees working on the cleanup received training in hazard communications, respirators and radiation. TE II 62 and exhibits introduced by both parties. That is not reckless disregard of employee safety, we find. So then the focus is whether there is proof of employer familiarity with 1910.20.

First of all, there is no prior citation for a 1910.20 violation which is so often an indication of willful conduct. Second, Mr. Faulkner of the union originally asked for "access" to medical records not copies (Secretary's exhibit 5) and on June 2 again failed to ask for copies. Mr. Faulkner got his "access" on June 2 but the union, we infer, did not get copies because it did not ask for them. Thus, NS was not on notice Mr. Faulkner wanted

⁹ While we often find federal OSH precedent helpful, as we do here, as a state program we are not compelled to follow it as precedent.

copies of the records. This is important since labor's position is that access means copies; but this is contradicted by 1910.20 (c) (1) which defines "access" as "...the right and opportunity to examine and copy."

The secretary of labor assumes that since the union received no copies of records until December of 1992, the alleged lack of "access" was willful. But the union did view the available records on June 2, 1992 - six days late according to the 15 day Kentucky standard. The six day delay is not in itself proof of knowledge of the standard anymore than a delay until December is.

Third, no company officer admitted knowledge of 1910.20 prior to June 2. While this is not unexpected in an adversarial setting, it fits with Don Faulkner's failure to ask for copies of the medical records. If Mr. Faulkner wrote "access" in his letter but meant copies and then simply waited to receive the copies from the company, that would explain why he did not get them up through June 2, 1992. Assuming for the sake of argument Newport did not know about the 1910.20 standard, then the violation is not willful. But if the company did know about the standard but understood Mr. Faulkner had not specifically asked for copies, then not turning over copies of the medical information is once again not willful conduct.

Fourth, Don Faulkner testified he gave copies of 1910.20 to company officers and cited the regulation in his letter. Secretary's exhibit 5. But which version: the federal 15 working days regulation or the Kentucky 15 day? We do not know and cannot

speculate. Certainly Newport is obligated to follow 1910.20 as amended by 803 KAR 2:020 (1989). But if Newport Steel did not get Kentucky's amended 1910.20, that is not proof of a willful violation.

We do not really even know if the company knew about 1910.20 on June 2 when Mr. Faulkner got access to the medical records. He represented the union during the opening conference with the compliance officer and, perhaps, just happened to be in the room when the documents appeared for the benefit of the CO.

Of course, once the company got Mr. Faulkner's letter (secretary's exhibit 5) which referred to 1910.20, then the company could have, with reasonable diligence, found out about the standard. Failure to do that would, under the circumstances, be either a serious or nonserious violation of the regulation. KRS 338.991 (11). Since the secretary did not attempt to prove the 1910.20 violation as a serious threat to employee safety or health, then we are left with a nonserious violation.

We find we cannot say Newport Steel knew of the 1910.20 standard or if it did whether Newport understood Mr. Faulkner wanted copies of the records and so we cannot uphold the willful violation. We find that a six day delay in the face of the emergency confronting the company is not necessarily dispositive on the issue of willful conduct either. Because the secretary of labor did not argue citation 1 was a willful-serious citation, we reduce the willful citation for not turning over the requested medical records in 15 days to a non-serious citation. Dye

Construction Co., CCH OSHD 22,810, P. 27,567

Although no motion was made to amend citation 1 and the complaint under CR 15.02, Newport Steel cannot be heard to object to our reducing citation 1 to nonserious since it asked for precisely that relief in its brief to us.

We reduce the willful to nonserious in this case reluctantly. Any release of radiation has potentially grave consequences for employees and the general public. Standard 1910.20 is designed so employees (or their representatives) may independently monitor their own health and safety when exposed to hazardous conditions. But just as Newport Steel must comply with the 15 day requirement when faced with a request for medical and exposure information, the union must also actively pursue its right to access under 1910.20 (c) (1) by demanding copies of records when that is necessary for meaningful access. Standard 1910.20 does not necessarily require an employer to hand over copies of medical records when "access" alone is sought.

The penalties in this case were figured on the old penalty structure which has dramatically lower penalties than today. The high range for non-serious citations in 1992 was \$300. Then that would be reduced by the 10% credit the company received for history (it received no credit for size or good faith) to \$270 for citation 2. Secretary's exhibit 7.

Citation 2

Next labor issued a serious citation with 20 items for not following the provisions of 1910.120 on hazardous waste. Hearing

officer Mason Trenaman dismissed all 20 items saying Newport did not have an unregulated hazardous waste site. we affirm that decision. Standard 1910.120, sections (a) through (p), come into effect when (in this case) certain criteria are met. 1910.120 (a) (1). Under section (a) (1) (i), .120 is invoked when the area of the cleanup is an "unregulated hazardous waste site." Examples in 1910.120 of an unregulated hazardous waste site are landfills, surface impoundments, dumps, tank farms or drum farms. 1910.120 (a) (3), "definitions." Labor contends that citing 1910.120 is proper in this case because the radiation contaminated baghouse and its surroundings are an uncontrolled hazardous waste site.

When asked on direct examination to characterize the baghouse where the dust was collected, compliance officer Michael Hutcherson said:

...it (the baghouse dust] is transported either to a landfill or off site to another point, so it's really a collection point, like a large vacuum cleaner, but it doesn't - - it's just more or less a collection point.

TE 14

Right out of the horse's mouth, we learn the baghouse is a collection point, not a landfill. After collection, it is shipped out of the plant on rail cars. TE 15. Later the CO calls the baghouse an "accumulation point." TE 190. We find the baghouse is a collection point for the baghouse dust before shipment to another location and not a landfill or other unregulated hazardous waste site.

When asked on cross examination why he believed the baghouse to be an uncontrolled hazardous waste site, the compliance officer

said another agency, the Kentucky Radiation Control Branch (RCB) of the cabinet for human resources, ordered it cleaned up. TE 183-184. Notice he did not say the RCB designated the baghouse an uncontrolled hazardous waste site, just that it ordered a cleanup.

Neither the testimony in this case nor the exhibits tend to prove Newport Steel's baghouse area to be an uncontrolled hazardous waste site. In his brief to us, the secretary of labor presents several arguments it hopes to prove the baghouse is such a site. Labor says the baghouse is a "temporary dump." But this is contradicted by its own witness who characterized the site as a collection or accumulation point for shipment elsewhere. Then the secretary equated the RCS's order to clean up the baghouse to a determination the site was an uncontrolled hazardous waste site. But reference to that document (secretary's exhibit 2) produces no such determination. Then labor argues the presence of the flue dust known as K061 under 401 KAR 31:040, section 3 makes the site an uncontrolled hazardous waste site. Actually 401 KAR chapter 31 is titled "lists of hazardous wastes" and contains no regulatory finding that possession of one of the denominated wastes makes the collection point an uncontrolled hazardous waste site. We agree with Mr. Trenaman's finding that the baghouse and its environs are not an uncontrolled hazardous waste site. Therefore, 1910.120 (a) (1) (i) does not apply.

The secretary of labor consistently **argued to our** hearing officer in post hearing briefs that Newport Steel, for the purposes of the 20 serious items cited, is covered either under 1910.120 (a)

(1) (i) or (a) (1) (v). But since Newport Steel was cited under section 1910.120 (a) (1) (i) as an uncontrolled hazardous waste site and Newport Steel at the hearing shut the door to proof which would tend to lead to a citation amended to 1910.120 (q) (TE 247-249), this commission is powerless to entertain such a notion.

We tend, however, to agree with the secretary of labor's post hearing contention that Newport Steel for the clean up operation should have been covered by 1910.120 (q). When the radiation was discovered, Newport Steel set off the alarms and emergency crews came running. TE II 66. But then the company concluded the contaminated baghouse was not an emergency. TE II 42. Still, because of the presence of cesium 137 in the baghouse and surroundings, the RCB ordered a clean up (secretary's exhibit 2) and Newport Steel elected to use its own employees. TE II 41-42.

Section (q) (11) (ii) of 1910.120 is set aside for situations where an emergency response took place and the company then chooses to use its own employees for the cleanup. Exhibits admitted by the secretary and Newport and testimony demonstrate Newport's compliance with at least parts of 1910.38 (a) on emergency plans, 1910.134 on respirator training, 1910.1200 on hazard communications and 1910.96 on radiation. TE II 62. Standard 1910. (q) (11) (ii) itself refers to 1910.38 (a), 1910.134 and 1910.1200. Section (q) (11) (ii) tends to fit the situation at Newport. But the labor cabinet did not write its citations based on section (q) but on sections (a) through (p) instead.

we sustain hearing officer Mason Trenaman's decision to

dismiss the 20 items of serious citation 2 based on paragraphs (a) through (p) of 1910.120. Labor simply should have cited Newport Steel under 1910.120 (q) (11) (ii) and did not.

Citation 3

Finally, the secretary of labor, in nonserious citation 3, cited Newport for its failure to comply with 1910.20, employee access to medical record, with a proposed penalty of \$150. Our hearing officer sustained these nonserious citations, items 1a, 1b, 1c and 1d. Because these nonserious citations were not called for review, we sustain them and the penalty of \$150 without discussion.

We affirm the decision of our hearing officer to the extent it is consistent with this decision.


We reduce citation 1 to nonserious with a penalty of \$270.

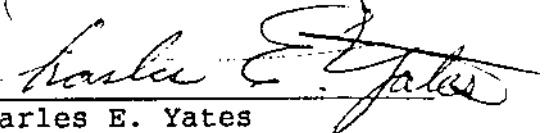
We dismiss citation 2 and affirm citation 3.

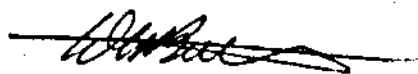
If abatement has not been completed to date, we order compliance with this order within 14 days from today.

It is so ordered.

Entered March 5, 1996.


George H. Wagoner
Chairman


Charles E. Yates
Member



Donald A. Butler
Member

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

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This 5th day of March, 1996.



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