COMMONWEALTH OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2386-93

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY COMPLAINANT

VS.

ABNER CONSTRUCTION, INC. RESPONDENT

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**DECISION AND ORDER
OF THIS COMMISSION**

We called this case for review on February 28, 1995 on the issue whether serious citation 1, items la and lb, 2 and 3, should be grouped. Whether violations are grouped as one item or several directly affects the determination of penalties due. Although we asked both parties to file briefs on this issue, neither side responded so we shall resolve the case ourselves.

Grouping means the "...joining of violations of two or more specific standards under one citation item..." Field operations manual (FOM), V, C, 1, b. Violations are grouped when they are "...so closely related as to constitute a single hazardous condition." FOM V, C, 3, a, (1).

In the case at bar, respondent Abner Construction worked for Rookoastle Manufacturing at Rockcastle's factory. Kentucky's labor cabinet cited respondent for not developing or implementing a written hazard communications program under 29 CFR 1926.59 (e) (1) (item la) which says in part:

> Employers shall develop, implement, and maintain at the workplace, a written hazard communications program for their workplaces which at least describes how the criteria specified in paragraphs

> (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met...
> (emphasis added)

Item lb concerned exposure of Rockcastle employees to the same hazards to which Abner's employees were exposed. Respondent was also cited under item 2 for not having material safety data sheets (1926.59 (g) (8)) and item 3 for not providing information and training on hazardous chemicals (1926.59 (h)).

While testifying about the hazard communications citations, the compliance officer, an industrial hygienist, said he cited the company because their hazard communications program was not on site: "It was not there." TE 26. Instead it was in a company vehicle at another work site. TE 26, 30 and 39. Clearly, the hazardous condition here is employees not having a written hazard communication program as defined by 1926.59 (e) (1) at the work place to inform them of hazardous chemicals and we so find.

Our hearing officer sustained serious citation 1, items la and lb, 2 and 3 along with the proposed penalty of $1,125. We agree with our hearing officer's findings of fact and conclusions sustaining items la and lb, 2 and 3 and adopt them as our own as if fully set out in this decision. We disagree, however, with that portion of our hearing officer's decision which treats items 2 and 3 of serious citation 1 as separate items and we further disagree with her decision to order that the proposed penalty of $1,125 be paid by the respondent. We reverse our hearing officer's decision to treat items 2 and 3 as separate violations for the purpose of calculating the penalty in this case. Our reasoning follows.

It is quite clear from the testimony in this case that the only reason the labor cabinet cited Abner for not having a hazard communications program was because their written program was in a vehicle at another work site and we so find. TE 26, 30 and 39. In fact compliance officer Patton did get to review the program later. TE 25.

Section 1926.59 (e) (1) says an employer who needs a hazard communications program must also comply with paragraphs (f), (g) and (h) of 1926.59. So it seems to us that a citation for .59 (e) (1) includes by reference paragraphs (f), (g) and (h). In other words, once an employer has complied with 1926.59 (e) (1), he has already complied by definition with paragraphs (f), (g) and (h). If, on the other hand, an employer produces for inspection what he calls a hazard communications program but it does not contain those parts specified in paragraphs (f), (g) and (h), he really does not have a hazard communication program. His program will be insufficient.

Citing Abner for 1926.59 (g) and (h) along with .59 (e) (1) constitutes a kind of double jeopardy. Abner's offense, as the compliance officer testified, was its failure to have a hazard communication program at its Rockcastle worksite. Labor elicited no testimony that Abner's written program, when finally examined, was deficient in any manner. Presumably, we would have before us a citation for any noted deficiencies in the written communication program. We infer the written program was in compliance with the standards.

Our reading of 1926.59 (e) (1) leads us to the conclusion items 2 and 3 charging Abner with violating 1926.59 (g) and (h) should have been grouped with item la and lb. That being so, we set the penalty in this case at $375 which was the penalty proposed for serious citation 1, item la and lb.

Our reading of the language in 1926.59 (e) (1) would be sufficient, under the facts of this case, to support our decision. But there is more. Federal OSHA from time to time publishes OSHA instructions (or directives) to their compliance personnel. These instructions apply to state programs unless a state takes steps to create its own response to the subject of the instruction. Kentucky, of course, has a state occupational safety and health. program. Federal OSHA has written an instruction addressing the issue of grouping hazard communication violations which affects penalty determination. In this case the issue of grouping was litigated and is therefore the proper subject of this decision. Cooper industries Inc., 1974-1975 OSHD paragraph 19,599. But OSHA Instruction CPL 2-2.38C, inspection procedures for the hazard communication standard, 29 CFR 1910.1200, 1915.99, 1917.28, 1918.90, 1926.59 (emphasis added) and 1928.21, was not litigated below so we do not base our decision in this case solely on the language of the instruction. As we discussed above, we could and did reach our decision in this case based on the language of

· As a state program we do not cite federal occupational safety and health review commission decisions as precedent. Instead, we often find federal OSHA review commission decisions persuasive, as we have here.

1926.59 (e) (1) and the facts.

But we look to OSHA instruction CPL 2-2.38C[2] as being very persuasive on the issue whether the labor cabinet's department of workplace standards should have grouped serious items 2 and 3 with item la and lb for the purpose of calculating a penalty.

On the issue of grouping items in a hazard communication program citation, OSHA instruction CPL 2-2.38 C, paragraph K, 5, b, (1) says in part:

> Paragraph (e) (1) shall be cited by itself when no program exists (i.e., when no program has been developed). Paragraph (e) (1) shall also be cited in instances where the written program is <u>not maintained at a fixed worksite location</u>'. (emphasis added)

That defines the situation in Abner Construction's case precisely, confirming our judgment derived from a plain reading of the language of 1926.59 (e) (1).

Given the language of the cited OSHA instruction, the 1926.59 (e) (1) standard and the instant facts, we could have dismissed items 2 and 3 but do not do so since Abner in its letter of contest simply asked for a review of the penalties in the case. As we observed above, grouping of violations into a single item will affect (and here reduce) proposed penalties.

Instead we feel that grouping citations 2 and 3 with item la and lb for the purpose of penalty calculation is sufficient under

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[2] OSHA instruction CPL 2-2.380 is attached to this decision as appendix A.

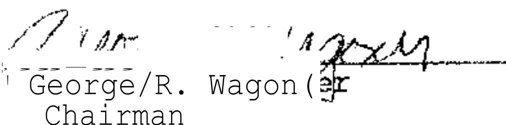
Subparagraph b (2) of the instruction goes on to say that when a written program exists but is deficient in some way, 1926.59 (e) (1) will be cited separately from specific violations of paragraph (f), (g) or (h).

Icts of this case. We will state, however, that the be
Lce, in a case where a construction company has a hazard
lication program but does not have a copy at the worksite, is
to 1926.59 (e) (1) but not paragraphs (f), (g) or (h).

We sustain serious citation 1, items la and lb, 2 and 3 but
) them as one item. We set the penalty in this case at $375
order immediate abatement of all violations not already
cted.

It is so ordered.

Entered April 19, 1995.



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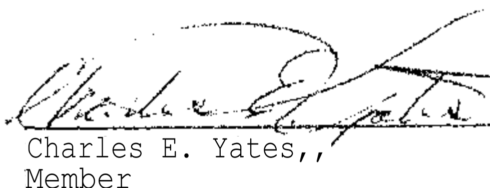
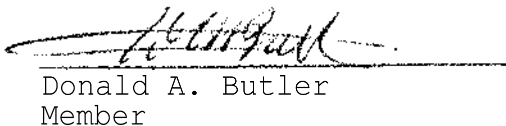


Charles E. Yates,,
Member



Donald A. Butler
Member

Copies of the foregoing Order have been served upon the following parties in the manner indicated:

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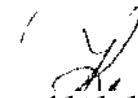
This 20th day of April, 1995.



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