

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2516-94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS

GRW AERIAL SURVEYS, INC.

RESPONDENT

* * * * *

**DECISION AND ORDER
OF THIS COMMISSION**

Complainant secretary of labor presented its case to our hearing officer on October 24, 1994; representatives of GRW Aerial Surveys, Inc., (GRW) appeared at the hearing. Our hearing officer, in his recommended order to us, affirmed all citations and proposed penalties. We called this case for review on our own motion under 47 (3) of our rules of procedure (ROP) and requested briefs' on the issues of the number of employees at the inspected establishment and whether citations issued to respondent for alleged violations of 29 CFR 1910.1200 should have been cited as a single violation of 1910.1200 (e) (1). We received a brief from the secretary and a letter from GRW.

Following an inspection of GRW which commenced on December 10, 1993 and ended February 14, 1994, the secretary issued serious citation 1, items 1a and 1b (among others) to respondent. Item 1a alleged a violation of 803 KAR 2:310, section 1 (2), which requires "Employers with eight (8) or more employees within the

ROP 48 (5).

establishment" to have persons trained in first aid. Paragraph 1 (2) goes on to define outside salesmen who "...are away from the premises more than fifty (50) percent of the time..." as not being included in the count of employees "within the establishment."

We take the phrase "within the establishment" and the word "premises" contained in the standard to mean that 803 KAR 2:310, section 1 (2), applies to an employer's single location, factory, job site or office. For example, if a manufacturer has a factory in Ohio with 500 employees and an office in Kentucky with 5 employees, then the Kentucky office with the five employees is not subject to 803 KAR 2:310, section 1 (2), because there are fewer than 8 employees working at the Kentucky office.

KRS chapter 338 says the secretary of labor enforces the occupational safety and health act. Our rules of procedure, section 43 (1), places the burden of proof on the secretary (as it should be). In order to prove a violation of any 'of the occupational safety and health regulations, the secretary must prove the elements of the specific standard. ROP 43 (1). For 803 KAR 2:310, section 1 (2), the elements are these:

1. eight or more employees,
2. within establishment and
3. no person trained in first aid.

At the trial in this case, the secretary proved GRW had an establishment in Kentucky and that no person was trained in first aid. But there is no proof in the record, however, that GRW had 8 or more employees within the inspected GRW establishment.

When we asked the parties to brief us on this issue, GRW said they had approximately 50 employees nationwide; then labor cited us to pages 44 and 45 of the transcript of the evidence (TE) where labor argued there was proof GRW had 50 employees at the inspected establishment. Upon review of the testimony and discussion found on pages 44 and 45 of the transcript, we find the 50 employee figure to be the number of GRW employees in its subsidiary, not necessarily the number of employees at the inspected establishment. The compliance officer testifies "He told me that GRW Engineers controlled 175 employees nationwide." TE 44. But then Mr. Sallade (not apparently under oath but on the record) says GRW is a subsidiary with about 50 employees. TE 44. Then Mr. Sallade says "there's 50 there" referring to the subsidiary. TE 45. But there is no discussion or testimony on the point whether the subsidiary is at one location or scattered throughout the nation.

Certainly there is proof that four employees work at the laboratory of the inspected establishment (TE 24 and 45) but no proof the inspected GRW establishment had eight or more employees and we so find. When the secretary of labor fails to prove an element of an alleged violation, this review commission must dismiss the citation. ROP 43 (1). Whether a case is civil, administrative or criminal, the party with the burden of proof must make its case, must prove the elements of its case, or face dismissal.

While we dismiss citation 1, item 1a, which is grouped with citation 1, item 1b, we leave undisturbed the \$1,400 penalty for

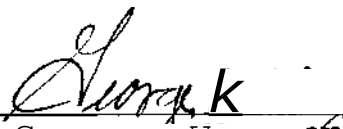
citation 1. Since lack of a quick drenching facility (where employees are exposed to harmful chemicals) can cause serious harm to exposed employees, we find the dismissal of citation 1, item 1a, does not affect the determination of the penalty adjustment factors for citation 1 (which included item 1b) testified to by the compliance officer.

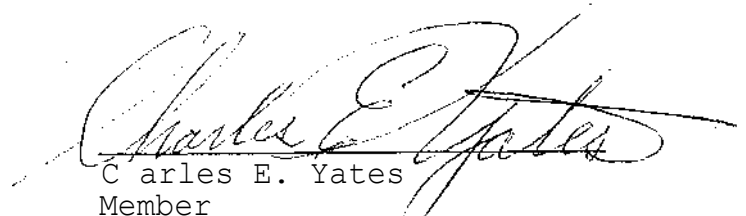
Next we called for review the secretary's citation 1, item 2 and citation 2, items 1 and 2, on the issue whether the hazard communications citations should have been issued as one citation (1910.1200 (e) (1)). We are persuaded by complainant's brief to us that these citations and proposed penalty of \$1,050 were properly written. See OSHA Instruction CPL 2-2.38C paragraph K, 5, b, (2). We therefore affirm citation 1, item 2, with the proposed penalty of \$1,050, and affirm citation 2, items 1 and 2.

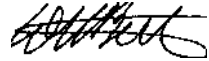
We affirm our hearing officer's recommended order to the extent it is consistent with this opinion.

It is so ordered.

Entered this June 21, 1995.


Georges Wagoner
Chairman


Charles E. Yates
Member



Donald A. Butler
Member

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

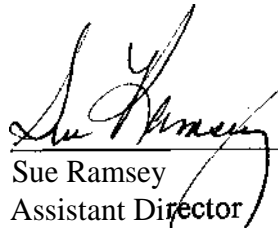
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This 22nd day of June, 1995.



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