

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2529-94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS

INDUSTRIAL ENTERPRISES, INC.

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS COMMISSION

We called this case for review of our hearing officer's decision rendered July 19, 1995 under our authority contained in our rules of procedure section 47 (3).¹ Both parties submitted briefs.

This case began as an accident investigation after an employee alleged an explosion had taken place. The employer uses various flammable and explosive solvents to manufacture vinyl wall coverings. The compliance officer sampled for noise and excess levels of solvents in the air but all tests proved negative; the compliance officer established that no explosion occurred.

The secretary of labor issued several citations:

1. two repeat serious citations for failure to have a written hazard communications program. These repeats were based on initial citations issued following an inspection in November of 1992 (KOSHRC 2222-92).
2. a serious citation because the employer lacked an

¹ Enacted as section 47 (3), 803 KAR 50:010.

acceptable eye wash facility where employees were exposed to hazardous chemicals capable of causing eye injuries.

3. a serious, grouped citation for failure to have personal protective equipment (gloves) capable of coping with the toxic chemical methyl ethyl ketone (MEK).

4. four non-serious citations for 1) not having accessible fire extinguishers, 2) not labeling toxic chemical containers under 1910.1200² (f), 3) not labeling hazardous chemicals with the proper warnings also under 1910.1200 (f) and 4) not maintaining an injury-illness log.

With the exception of citation 2, item 2b, which he dismissed as being a duplicate of citation 2, item 2a, hearing officer Mason Trenaman sustained all citations and penalties as proposed.

The hearing officer among other things found 1) the company indeed had no hazard communications program and had been previously cited, 2) lacked an acceptable eye wash facility (the one on the premises was inaccessible and not up to the job of rinsing eyes, 3) provided the neoprene gloves which did not protect employees from chemical burns and 4) did not maintain the illness-injury log.

Our review in this case is limited to the two repeat serious citations issued respondent Industrial Enterprises, each carrying a penalty of \$3,000.

We agree with our hearing officer's finding respondent Industrial Enterprises did not have a written hazard communications program. Transcript of the evidence (TE) 15 and 34. But the issue

² 29 CFR 1910.1200 is adopted in Kentucky by 803 KAR 2:320E.

remains whether it was proper for the secretary of labor to cite respondent for repeat serious violations of 1910.1200 (e) (1) as well as 1910.1200 (h) (1) and (2) when the company had no hazard communications program? Section 1910.1200 (e) (1) says in part:

Employers shall develop, implement, and maintain at each workplace, a written hazard communications program which at least describes how the criteria specified in paragraphs (f), (g), and (h)...will be met...

Hearing officer Trenaman asked the inspecting industrial hygienist Kimberlee Mays why she did not group the citations under 1910.1200. She said the company had been previously cited for not having a written program. "A lot of times a facility can have a written program but no training, so we do keep those separate." TE 34. Indeed, respondent received one repeat serious citation with a penalty of \$3,000 for not having a written program under 1910.1200 (e) and another repeat serious citation for not training its employees under 1910.1200 (h), also with a \$3,000 penalty.

So the issue whether respondent was properly cited for multiple violations of 1910.1200 was raised, albeit by the hearing officer without objection. This commission dealt with the issue of multiple citations when an employer does not have a hazard communications program in Abner Construction, Incorporated, KOSHRC 2386-93.³

In that case the secretary cited Abner for multiple violations

³ A copy of the Abner case is attached to this decision as appendix A.

of 1926.59⁴, the construction standard's equivalent to 1910.⁵ While in the Abner case the company had a hazard communications program as required by 1926.59, the program was not at the construction site. We wrote then that paragraph (e) of the hazard communications standard requires employers to comply with paragraphs (f), (g) and (h) of the same standard. "Citing Abner for 1926.59 (g) and (h) along with .59 (e) (1) constitutes a kind of double jeopardy." Abner page 3. We hold the secretary of labor may cite an employer who has no required hazard communications program under 1910.1200 (e) (1) but not under paragraphs (f), (g) or (h) of the same standard. We reach this decision on the facts of this case and the plain language of 1910.1200 (e). But, as we stated in Abner, our decision is reinforced by OSHA instruction CPL 2-2.38C, paragraph K, 5, b, (1)⁶ which says in part "Paragraph (e) (1) shall be cited by itself when no program exists..."

Accordingly, we dismiss citation 1, item 2, along with the proposed penalty of \$3,000.

Citation 1, item 1, with a penalty of \$3,000 is affirmed.

Citation 2, item 1, with a penalty of \$1,500 is affirmed.

⁴ Enacted in Kentucky as 803 KAR 2:403E.

⁵ For our purposes 1910.1200 (e) (1) and 1926.59 (e) (1) make equivalent demands of employers with employees exposed to hazardous substances. Thus the Abner case (a construction company case under 29 CFR 1926) is applicable to cases involving general industry under 29 CFR 1910.

⁶ The U.S. Department of Labor issues OSHA instructions from time to time to guide its compliance staff in the difficult task of interpreting and applying the occupational safety and health standards.

Citation 2, item 2a, with a penalty of \$3,000 is affirmed.

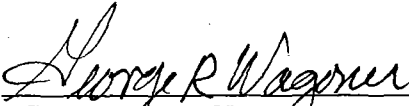
Citation 2, item 2b, is dismissed.

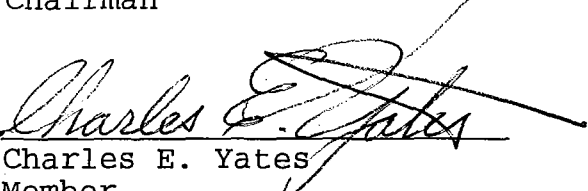
Citation 3, items 1, 2, 3 and 4, with no penalty are affirmed.

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

It is so ordered.

Entered this December ²⁸~~20~~, 1995.


George R. Wagoner
Chairman


Charles E. Yates
Member

Donald A. Butler
Member