

COMMONWEALTH OF. KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2588-94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JEFFERSON COUNTY CORRECTIONS DEPARTMENT

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us on Jefferson County's petition for discretionary review of the recommended order entered by our hearing officer on April 2, 1996.¹ We granted review and asked for briefs which both parties submitted.

KRS 338.071 (4) says this commission "...shall hear and rule on appeals from citations..." To that end we employ hearing officers to take proof and issue recommended orders. KRS 338.081 and 803 KAR 50:010. But this commission, ultimately, bears the statutory authority to decide contested occupational safety and health cases in Kentucky. KRS 338.071 (4).

In his recommended order our hearing officer sustained citation 1, item 1 issued by the secretary of labor (enforcer of Kentucky's occupational safety and health act, KRS chapter 338) to Jefferson County on July 12, 1994 for not providing its corrections officers with high efficiency particulate air filter respirators

¹ Section 48(1) of our rules of procedure (ROP), enacted as section 48 (1), 803 KAR 50:010.

(HEPA) to use when in contact with inmates suspected of having tuberculosis.² Hearing officer Thomas Hellmann found the jail's correctional officers (employees of the Jefferson county jail) did not have access to HEPA masks; instead 3M 1814 respirators with no HEPA rating were available. He found Jefferson county jail, the respondent, held inmates with suspected cases of TB in plexiglass covered jail cells before transporting them to a University of Louisville's hospital for diagnosis (Transcript of the Evidence (TE) 109 and 169-170) and that guards periodically entered these plexiglass cells to restrain prisoners. TE 115.

According to the U.S. Department of Labor memorandum (secretary's exhibit 3, page 3), correctional facilities have a higher incident of TB infection than workplaces generally and we so find. TE 21. The memorandum is more credible than the less than disinterested testimony of jail employees to the contrary since the testifying employees are not physicians, have no special expertise in tuberculosis and introduced no documentary evidence on the point.

Our hearing officer also found that Tim Tucker, administrator of correctional medical programs for the jail (TE 123), became aware of the U.S. Department of Labor memorandum he studied during

² According to secretary's exhibit 3, page B-3 (physically page 16 of the exhibit), the TB bacilli is between 1 and 5 microns in diameter. HEPA filters, at the time of the inspection, were the only filters effective against bacteria in the 1 to 5 micron range.

Drug resistant TB is a serious health risk to employees who work in jails, health care institutions, homeless shelters and residences for the elderly and we so find. Complainant's exhibit 3, pp. 2-3.

a Kentucky occupational safety and health course (secretary's exhibit 3) which alerted him and by implication the jail to the potential for transmission of infectious TB and the need to protect employees. TE 128 to 136. We note that Mr. Tucker also received a memorandum (respondent's exhibit 7) from Erin Foley, course instructor, to the same effect. TE 161.

In its brief to us respondent Jefferson County argues first that it was improperly cited and in any event there is no occupational safety and health standard for TB. While it is true the U.S. Labor Department memo (complainant's exhibit 3) recommends citing under 1910.134 (a) (2), it also says 1910.134 (b) is cited where the respirator program is not in place - or in this case inadequate.

When we examine 1910.134 (a) (2), we find it requires

1. that respirators are to be provided when necessary to protect the health of employees,
2. that the employer shall provide suitable respirators and
3. that a respirator program shall be established.

According to the facts of the case, the jail did supply respirators but they did not have HEPA filters. Section 1910.134 (a) (2) applied in part to the situation at the Jefferson' County jail but not completely. What does cover the situation is 1910.134 (b) (11), the cited standard, because while the jail had respirators, they had not selected the proper one:

Respirators shall be selected from among those jointly approved by the Mine Safety and Health Administration and the National Institute for Occupational Safety and Health... 1910.134 (b) (11)

That meant NEPA respirators at the time of the inspection; the jail through Mr. Tucker had actual notice of the HEPA requirement.

Section 1910.134 (b) states the requirements for selection and use of respirators. Apparently the jail did have a respirator program as they were not cited for that and we so infer. TE 87.

We take respondent's assertion there is no TB standard and that enforcement is derived instead from the U.S. Department of Labor memorandum (complainant's exhibit 3) to be a notice argument. Stated another way, the issue is whether Jefferson County had notice that 1910.134 and the use of HEPA respirators applied to it. In Faultless Division, Bliss & Laughlin Industries, Inc., a Corporation v. Secretary of Labor,³ 674 F.2d 1177 (CA7 1982), CCH OSHD 25,989, on the issue whether an employer had notice an OSHA standard applied to it, the court said "The constitution does not demand that the employer be actually aware that the regulation is applicable to his conduct..." But in our case, the jail had actual notice⁴ of 1910.134 because health administrator Tim Tucker attended the Kentucky OSH seminar, studied complainant's exhibit 3 (which references to 1910.134) and later received the memo introduced at trial as respondent's exhibit 7 which also refers to

³ As a state program created by KRS chapter 338, we are not required to adhere to federal case law on occupational safety and health issues but we often find them persuasive as we do here.

⁴ Although not affecting the outcome of this case, when respondent has actual notice of a hazard but no specific standard exists, the general duty clause (KRS 338.031 (1) (a)) may be cited. So too may the general duty clause be cited where industry recognition of the hazard can be proven which is preferable to a situation where labor cites a vague standard triggering an employer defense of lack of fair notice.

1910.134 and HEPA respirators.

Conceivably, Jefferson County could have argued it did not have fair notice that 1910.134⁵ applied to correctional facilities and to protection against TB, citing American Bridge Co., a federal review commission decision, CCH OSHD 30,731. But as we stated above, the jail had better than the fair notice required in American Bridge, it had actual notice of 1910.134.⁶ Both complainant's exhibit 3 and respondent's 7 refer to 1910.134, correctional facilities and HEPA filters.

Next Jefferson County argues it does not house inmates with suspected cases of tuberculosis. Instead, it claims, the suspected cases are immediately removed from the jail and taken to University of Louisville hospital for examination. But while the jail does not house suspected inmates, they somehow find their way from the jail to the hospital. They must be kept somewhere within the jail pending transfer.

Here, in effect, the jail pleads ignorance. It says: we do not know inmates have TB until it is proven so HEPA respirators are not necessary. But that begs the question why the jail transports the inmates to the hospital in the first place.

James Wilder, a corrections officer at the Jefferson county jail, testified inmates were placed in the plexiglass covered cells

⁵ As of the date of this decision, 1910.134 is still in effect as written in 1994 and there is no specific TB standard.

⁶ The U.S. Department of Labor memorandum (complainant's exhibit 3) is not a regulation and is not enforceable in and of itself. But in this case the memo provided the jail with actual notice of the applicability of 1910.134.

with an "airborne precautions" sign. TE 108. He said inmates themselves tell the guards they have TB. TE 109. We know the jail would counter that inmates often claim ailments to improve their living conditions at the jail but nurse Cheri Green testified for the jail that inmates with skin tests positive for tuberculosis are placed in the plexiglass cells. TE 169. Mr. Tucker agreed. TE 152. The testimony, then, of the three jail employees confirms the hearsay testimony offered by compliance officer Diane Marraccini that the jail housed inmates who were suspected TB patients. TE 24-25. Obviously, these inmates do not just appear at the hospital for diagnosis so they must be, for some time, housed at the jail before transport and we so find.

The secretary proved employee exposure to the hazard of contracting tuberculosis because corrections officers periodically must enter the plexiglass cells to place restraints on prisoners (TE 115) and to rescue them from suicide attempts (TE 120). While inmates with suspected cases of *TB* are transported to U of L hospital in a van with a partition between driver and prisoner, precluding exposure during the ride, a guard remains with the inmate at the hospital during medical examination. TE 156-157.

We conclude the jail violated 1910.134 (b) (11) because it had actual knowledge the standard applied to it, because it did not provide HEPA respirators (required at the time of the inspection) for its corrections officers and because its officers were exposed to suspected cases of TB. Since the penalty and the seriousness of the violation were not raised as issues on discretionary review to

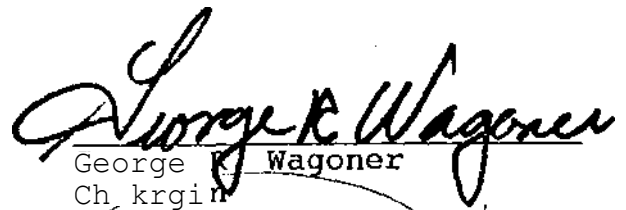
this commission, we do not consider them now.

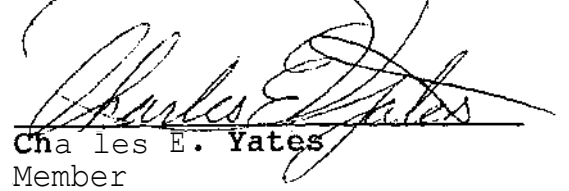
We affirm the recommended order of our hearing officer to the extent it is consistent with this decision.

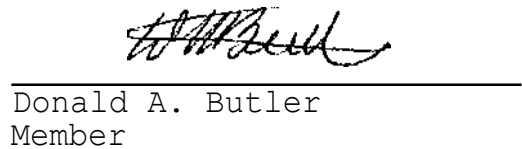
If abatement has not already been accomplished by respondent, we order him to do so within 30 days. The fine of \$1,700 is due upon receipt of this decision.

It is so ordered.

Entered July 9, 1996.


George K. Wagoner
Chairman


Charles E. Yates
Member


Donald A. Butler
Member