

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #2625-94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

HORTON FRUIT COMPANY

RESPONDENT

DECISION AND ORDER
OF REVIEW COMMISSION

Before WAGONER, Chairman; BUTLER and YATES, Commissioners.

The hearing officer's recommended order in this matter was called for review by this Commission on November 14, 1996, and is now before us for a decision. After a thorough review of the testimony, exhibits, briefs and stipulations of the parties, and the entire record, this Commission finds as follows.

Discussion of the Case

An inspection of Respondent's place of business at 4701 Jennings Lane, Louisville, Jefferson County, Kentucky, was conducted on August 18, 1994, by a compliance officer in the employ of the Kentucky Labor Cabinet. (Transcript of Hearing [hereinafter 'TR I] of February 23, 1996, 5-6.) As a result of that inspection, a citation was issued to Respondent on September 30, 1994, alleging a violation of 29 CFR 1910.219(0)(3) ¹ which requires enclosure of sprockets and chains located seven or less feet above floors or platforms. Specifically, the citation charged that a sprocket and wheel chain on the Doboy

¹ Adopted in Kentucky as 803 KAR 2:314.

packaging machine was unguarded. This alleged violation was classified as "serious," and a penalty of \$3500 was proposed. Respondent's timely contest of this citation and penalty invoked the jurisdiction of this Commission. (KRS 338.141 (1).) The issues to be resolved by us are: 1) has the Secretary carried its burden of proof that Respondent was in violation of the cited standard and, if so, 2) is the proposed penalty appropriate.

Much emphasis in the record is placed upon an accident that occurred when, without deenergizing the Dobby packaging machine, the "sealer" reached into it to remove a piece of cellophane and lost the end of one of her fingers. We in no way minimize the injured employee's loss; however, it is the allegedly violative condition for which Respondent was cited, not the accident that occurred.

Kentucky's Occupational Safety and Health Act is remedial, not punitive in nature. It seeks to prevent injury-producing accidents in the workplace--to protect employees through recognizing hazards that exist which, if uncorrected, could jeopardize their safety and/or health. In this case, the violative condition existed and could have been cited by the Secretary in any inspection, regardless of whether an accident occurred. That such accident did occur in this case serves to demonstrate the need for the Act.

Our hearing officer ruled the Secretary met his burden that the Dobby machine had an unguarded sprocket. We agree.

The hearing officer then concluded Respondent met its burden to establish the defense of employee misconduct. National Engineering and Contracting Co. v. OSHRC, 838 F.2d 815, 819 (CA6 1987), CCH OSHD 28,135. We disagree with our hearing officer.

To prevail in an employee misconduct defense, the employer must prove it had a safety rule which it communicated to its employees and that the rule was enforced; further, the employer must prove the violation of the safety policy was idiosyncratic and unforeseeable. Brock v. L.E. Myers Co., High Voltage Division and OSHRC, 818 F.2d 1270, 1276-1277 (CA6 1987), CCH OSHD 27,919, p. 36,618. Our hearing officer concluded Respondent had " . . . a thorough and adequate safety program which had been communicated to the employees and the rules were uniformly enforced by appropriate sanctions for their violations." Our hearing officer found Respondent had work rules which it enforced through discipline. (Recommended Order, finding 18.) We agree. Respondent had work rules, but these concerned absenteeism, tardiness, drinking on the job, etc. (Respondent Exhibit 1.) They were not specific safety rules, and we so find. To prove an employee misconduct defense, the employer must show safety rules which deal with specific safety practices. In the L.E. Myers, supra, case, for example, the specific safety rule was the use of fall protection equipment such as safety belts and lanyards.

There is no showing that any employee at Horton, including the person injured by the Dobby machine, was ever disciplined for violating a safety rule, and we so find. (TR, September 19, 1996 [TR II], 8, 13, 15.) Discipline issued for violating a work rule on absenteeism or tardiness is not proof of discipline which would qualify for the employee misconduct defense. Junior J. Davis dba Davis Gas Shop, a federal All decision, CCH OSHD 25,040.

Finally, Horton argues that the employee violated a company work rule when she reached into the Dobby machine to remove the cellophane without turning off the machine first. As compliance officer Mike Shoulders testified, the occupational safety and health

regulations prohibit an employee from reaching into a machine to service or clean it except **when the machine is locked out or tagged out according to 29 CFR 1910.147.**² (TR II, 31.) In other words, Respondent's work rule that the operator of the Dobby was to turn the machine off before reaching into it to clean it violated a safety regulation on lockout-tag out. We conclude that is not the sort of proof which would qualify for the employee misconduct defense.

Had Respondent proved a valid safety rule prohibiting an employee from putting her hands into a packaging machine while it was turned on (which it did not), the language of 1910.219 (f) would still require us to affirm the citation; section 1910.219 (f) makes no provision for guarding by rule, safety or otherwise. Rather, the standard very explicitly says "All sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor . . ." (emphasis added) Since the unguarded parts were within easy reach of the employee and not over 7 feet above the floor or in a room where the employee did not venture, the Secretary proved exposure to the hazard. **KRS 338.991(11).**

Respondent stipulates that the Dobby machine was unguarded when it was purchased in 1990 and that no alterations had been made to the machine. (Joint Stipulation of Facts [hereinafter JSF], 2.) Respondent further stipulates that the "sprocket and wheel are not more than seven feet above the floor." (JSF, 6). Although Respondent admits violation of the standard, it attempts to defend the violation by stating that the Secretary did not prove it was aware of the violative condition. However, the Secretary need only show that Respondent could have known of the condition if reasonable

² Adopted in Kentucky as 803 KAR 2:309.

diligence were exercised. (KRS 338.991 (11).) The stipulations reveal that the unguarded sprocket and chain were within 8-14 inches of the sealer's work station and therefore not in some obscure and remote location. (JSF, 6.) The Secretary's burden has been met .

KRS 338.991 (11) states that a serious violation shall be deemed to exist in a place of employment if there is substantial probability that either death or serious physical harm could result from a condition or practice. We find that the motion of the sprocket and chain would likely produce serious injury to any employee who came into contact with the unguarded area and therefore affirm the violation as "serious."

The remaining question before us is the appropriateness of the \$3500.00 penalty proposed by the Secretary. This penalty was calculated by the compliance officer through the use of uniform guidelines contained in the Field Operations Manual. (TR I, 6.) The gravity-based penalty was calculated to be \$5000.00, based upon a "high" severity factor and a "greater" probability factor. (TR I, 8.) This amount was reduced by a total of 30 percent for size and history. (TR I, 9.) No reduction was made for good faith since the compliance officer did not receive written information on Respondent's safety program on the date of inspection. (TR I, 9.) The compliance officer testified that an additional reduction of as much as 25 percent for good faith could have been given if this information had been provided. (TR I, 9.)

We find that the probability factor of "greater" was accurately determined by the compliance officer. The record stipulates that the violative condition was 8-14 inches from the sealer's work station, making it within easy reach of the average individual. (JSF, 6.)

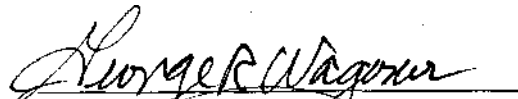
As to "good faith," the record stipulates that Respondent "acted in good faith" in furnishing written information regarding safety to counsel for Complainant subsequent to the inspection. (JSF, 11.) Although we find the "work rules" provided by Respondent deal with personnel matters and not matters of safety, we cannot ignore Joint Stipulation 11. We also note that abatement was accomplished by Respondent within two weeks after the inspection. (JSF, 12.) Upon authority of KRS 338.991 (6), we order a reduction in the gravity-based penalty of an additional 15 percent for good faith, bringing the total reduction factors to 45 percent

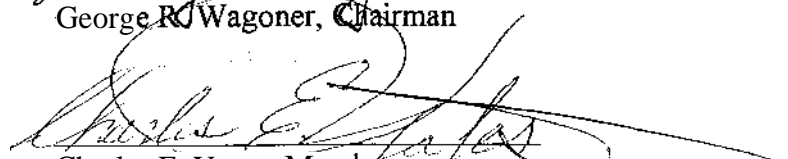
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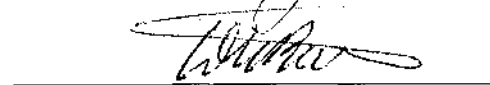
IT IS ORDERED that the hearing officer's recommended order vacating the serious citation and penalty for violation of 29 CFR 1910.219(f)(3) is REVERSED.

We affirm citation 1, item 1, as cited by the Secretary.

If not already accomplished, abatement shall be immediate and the reduced penalty in the amount of \$2250.00 shall be paid no later than thirty (30) days after issuance of this order.


George R. Wagoner, Chairman


Charles E. Yares, Member


Donald A. Butler, Member

Copy of the foregoing Order has been served upon the following by Messenger Mail:

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COUNSEL
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1047 U S 127 S STE 4
FRANKFORT KY 40601

and by Certified Mail, postage prepaid, upon:

HON KENNETH S HANDMAKER
MIDDLETON & REUTLINGER
2500 BROWN & WILLIAMSON TWR
LOUISVILLE KY 40202

This _____ day of February, 1997.

Sue Ramsey
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