

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2666-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROSS BROTHERS CONSTRUCTION CO.

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us following Ross Brothers' petition for discretionary review¹ of the recommended order submitted by our hearing officer. We granted the petition, asking the parties to submit briefs which discussed (among other things) whether a typographical error is found in line 2 of paragraph 35 of the recommended order (page 20).

Ross Brothers, a large construction company, had in 1994, when inspected, a continuing relationship with AK Steel (formerly Armco) in Ashland repairing and installing equipment. Transcript of the evidence (TE) 208. In Ashland, AK has two plants: a steel mill and a coke plant. TE 29. Ross Brothers employees at AK's coke plant from time to time worked in areas where they were exposed to benzene. TE 29. Benzene is a highly toxic, carcinogenic chemical. 29 CFR 1926.1128. TE 84. The instant inspection arose at the coke plant on Winchester Avenue in Ashland. TE 27.

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

Following the inspection by an industrial hygienist compliance officer, the secretary of labor (the enforcer of the Kentucky occupational safety and health act (KRS chapter 338)) issued several citations, some written in the alternative, to respondent Ross. Citation 1, item 1, charged the company with not monitoring² the work place to determine whether its employees were exposed to benzene (an alleged violation of 29 CFR 1926.1128 (e) (2) (i)³) or in the alternative with not providing benzene monitoring records to the secretary upon request. 29 CFR 1926.1128 (k) (3) (ii). This serious citation carried a proposed penalty of \$5,000. KRS 338.991 (2). Next the secretary charged the company in citation 1, item 2a, with not maintaining a record of all measurements (monitoring) taken under the benzene standard (1926.1128 (k) (1) (i)) or in the alternative with not providing monitoring records to the secretary. This too was denominated a serious violation with a proposed penalty of \$5,000.

Citation 1, item 2b, grouped with 2a above, charged the company with not preserving benzene monitoring records for 30 years as required by 29 CFR 1926.33 (d) (1) (ii). Because of the grouping with item 2a, the secretary proposed no additional penalty.

Next the secretary issued nonserious citation 2, item 1, with no proposed penalty to Ross for not including information in its

² Here monitoring means drawing air through a filter placed in the employee's breathing zone and testing the filter for the presence of benzene.

³ Adopted in Kentucky by 803 KAR 2:425E.

hazard communications program specifying how it would warn its employees about hazards associated with chemicals in unlabeled pipes. 1926.59 (e) (1) (ii). As the compliance officer testified, the coke battery is basically "...a small chemical plant..." which ~~handles various substances, including benzene. TE 29. As one~~ might expect, AK moves chemicals around the plant in pipes.

Citation 2, item 2, was withdrawn by the secretary at the hearing. TE 13-14. Our hearing officer in his recommended order affirmed citation 1, item 1. He found that Ross Brothers failed to produce any benzene monitoring records. Along with the citation, the hearing officer affirmed the serious penalty of \$5,000.

Then the hearing officer affirmed citation 1, item 2a, finding Ross failed to produce any benzene monitoring records.⁴ Hearing officer Majors affirmed the \$5,000 penalty for this citation as well. Item 2a was grouped with 2b which charged Ross with failing to keep employee exposure records (benzene monitoring) for at least 30 years as required by 1926.33 (d) (1) (ii). Because the secretary grouped 2b with 2a, no additional penalty was proposed.

Hearing officer Majors concluded that a penalty for item 2 was supported independently by the 2b violation for failure to maintain records for 30 years. We agree, except we conclude the violations to be nonserious and thus subject to a lesser penalty as we shall explain.

Finally the hearing officer affirmed citation 2, item 1, which

⁴ Paragraph 35, line two, which reads "29 CFR 1926.1128 (k) (3) (ii) is in error and is corrected to read "29 CFR 1926.1128 (e) (2) (i)."

alleged a nonserious violation of the hazard communications standard because the existing hazard communications program, required by the standard, did not address how employees would be warned about non routine tasks such as opening unmarked pipes.

~~In its petition for discretionary review and brief filed with~~
this commission, Ross Brothers Construction raises several issues which we will take in turn. First Ross argues the issue involving citation 1, items 1 and 2, "...was whether or not the keeping of records by AK Steel was an accepted alternative to Respondent's keeping those same records." Petition for discretionary review p. 4. Admittedly, there was some proof in the record that AK Steel had performed benzene monitoring of Ross employees working at AK's facility, retaining those records.

Our hearing officer concluded Ross did indeed fail "...to produce any monitoring records to the secretary..." We agree. Section (k) (1) of 1926.1128 say in part:

The employer shall establish and maintain an accurate record of all measurements required by paragraph (e) of this section...
(emphasis added)

Since paragraph (e) deals with monitoring for benzene, we conclude the word measurements above means monitoring. See footnote 2. Section (k) (1) of 1926.1128, according to its plain reading, specifically requires the employer, not someone else, to establish and maintain records - barring any exceptions to the requirement. Specifically 1926.1128 (k) (3) (ii) says

Employee exposure monitoring records required by this paragraph shall be provided upon request for examination...

Ross was required to maintain and produce records but did neither.

Ross, in its petition for review, cited to a discussion at the hearing between counsel for the parties and the hearing officer about the meaning and import of 29 CFR 1904. TE 133. According to ~~Ross's counsel, 1904.12 (g) (1) says that, one, records may be kept~~ at a "A single physical location where business is conducted..." meaning AK Steel's coke plant and, two, AK, not Ross, may keep those records.

But Kentucky, when it created its own occupational safety and health program, adopted some but not all federal regulations under 29 Code of Federal Regulations (CFR). 803 KAR chapter 2 adopted 1910, 1926, 1915, 1917, 1918, 1919 and 1928 but did not adopt 29 CFR 1904. Therefore Ross's reliance on 1904 is misplaced. In any event, 29 CFR 1904 deals with the injury and illness logs, otherwise known as the OSHA 200, not with benzene monitoring records. In other words, 1904 would be of no help to respondent, assuming Kentucky had adopted it.

Then Ross argues that 29 CFR 1926.16 (a) creates a system where prime contractors and their subcontractors may arrange for one or the other to take over certain required OSH functions, such as the maintenance of a first aid facility, relieving the other from the requirement. Reading between the lines of the petition for review, we presume Ross argues that AK is prime contractor and Ross its sub. But we find there is no proof in this case that AK and Ross are in a prime-subcontractor relationship. AK Steel, from the facts in this case, is in the business of producing steel and coke.

Because of the size of the establishment, it hires contractors to make repairs and build new facilities. That, to us, makes AK a consumer of contractor services, not a prime contractor.⁵ AK, after all, is not building a steel mill in Ashland but operating one.

But Ross's reliance on 1926.16 (a) is further misdirected. In its petition to us, Ross argues that 1926.16 (a) permits it to make whatever arrangements it wants about benzene monitoring and the turning over of records. But 29 CFR 1910.12, adopted in Kentucky, takes that argument away from the respondent; the standard says in part:

...the standards (substantive rules) published in Subpart C and the following subparts of Part 1926 are applied. This section [1910.12] does not incorporate Subparts A and B of Part 1926 of this chapter. Subparts A and B have pertinence only to the application of section 107 of the Contract Work Hours and Safety Standards Act (the Construction Safety Act). 1910.12 (c)

Review of 1926's table of contents reveals that 1926.16 is within subpart B and not part of the construction standards. As the federal review commission put it in Tishman Realty & Construction Co⁶, CCH OSHD 16,400, where the administrative law judge had applied 1926.16 (a) to a case involving the construction

⁵ As the review commission empowered by KRS 338.071 (4) to hear and rule on appeals from citations, we regularly take cases litigated under the construction standard (1926) where subcontractors do indeed work for a prime on a work site. So we are familiar with the realities of the construction business and are familiar with the concept of prime and subcontractor.

⁶ This review commission often finds federal OSHA decisions persuasive as we do here.

standard (1926):

Reliance upon this second ground is misplaced. The provisions of 29 CFR 1910.12 (c) state that subpart B of 29 CFR 1926, which includes the cited section [1926.16 (a)], is not incorporated as an occupational safety and health standard...

Section 1910.12 excludes 1926.16 (a) from the construction standards. So, clearly, Ross Brothers cannot rely upon the language in 1926.16 (a) to support its case. Regulation 1926.16 is not, we hold, part of the construction standards within the occupational safety and health act (KRS chapter 338) but is intended, instead, for the Construction Safety Act.

Ross next refers to its motion to dismiss the citations because parts of 1926.1128 are missing from the version of 29 CFR 1926 published by Commerce Clearing House and distributed to the general public by the Kentucky Occupational Safety and Health Program. As Ross says, the hearing officer reserved his ruling on the motion and left it at that. It is true that sub paragraphs (c) through (g) of 1926.1128 are missing from the book. See pages 445 and 446.

But we infer, when the hearing officer affirmed the citations as written, he denied the motion to dismiss by implication.

Whether the complimentary copy of 1926 the labor cabinet furnishes contains the missing paragraphs is not the definitive answer to Ross's objections. After all, 803 KAR 2: 425E adopts 29 CFR 1926.1100 through .1148: recall the benzene standard is found at 1926.1128. The code of federal regulations and the Kentucky occupational safety and health act (KRS chapter 338) can be located

in any law library. It is the proper promulgation of 803 KAR 2:425E which authorizes the lawful adoption of 29 CFR 1926.1100 through .1148, not the handout provided by the cabinet. Ross complains that the printer's error in the CCH-labor cabinet version of 1926 deprives it of the due process of law. ~~Kentucky~~ constitution, section 2. But Kentucky's occupational safety and health law is replete with due process of law. Employers in Kentucky must furnish their employees with employment free from recognized hazards and must also comply with the occupational safety and health standards. KRS 338.031. If the secretary issues citations (KRS 338.101 and .141), the employer is provided the opportunity for a hearing. KRS 338.141. Parties may be represented by counsel. ROP 15. Before a hearing is held, the secretary must file a complaint and the employer an answer. ROP 20. The right of cross examination exists. ROP 38. The burden of proof rests with the secretary of labor. ROP 43. A hearing officer's recommended order may be reviewed by this commission. KRS 338.071 (4), ROP 47 and 48. Appeals from final orders of this commission may be appealed into Franklin circuit and the court of appeals. KRS 338.091. Most importantly for this case, Ross made no claim 29 CFR 1926.1128 was improperly adopted by 803 KAR 2:425E.

Finally, in its brief to us on review, Ross states that the secretary of labor's counsel at the hearing conceded the citations and administrative complaint do not allege employees were over exposed to benzene. TE 181, 199-200. Indeed the citations on their face contain no allegations of over exposure during the time

of the inspection - June 29, 1994 through December 28, 1994. No proof was offered by the compliance officer about over exposure. We find there to be no proof in this case that Ross Brothers' employees, at the time of the instant inspection, were exposed to ~~excessive levels of benzene (1 part per million over a time~~ weighted average of 8 hours. 1926.1128 (c) (1)). In any event, counsel's concession closes the door.

Ross argues to us that the citations cannot be serious violations due to the lack of proof of over exposure. We agree. In Gates Rubber Co., CCH OSHD 28,733, a federal ALJ held that while "...the Secretary need prove only potential exposure to a hazardous chemical mixture to establish a violation [of the hazard communications standard]..., there must be some evidence that employees could be exposed to health hazards that would probably result in death or serious physical harm in order to characterize the violation as 'serious.'"

In Kentucky, "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result from a condition which exists..." KRS 338.991 (11). The drafters of the benzene standard drew the line at one part per million. 1926.1128 (c) (1). Below that level, absent a regulated area (not an issue in this case), an employer need take no action to protect his employees from benzene. We find there is no showing in this case that Ross employees were exposed to benzene at levels which could cause serious physical harm or death. Indeed, counsel for the secretary conceded the point.

Gates Rubber says a hazard communications citation is nonserious without proof of exposure to hazards likely to cause death or serious physical harm. We conclude the same applies to a failure to retain and produce monitoring records. Absent some proof that Ross Brothers employees, during the instant inspection, were exposed to benzene at or above the permissible exposure limits, we hold the citations must be nonserious⁷. KRS 338.081 (3). Accordingly, we reduce citation 1, items 1, 2a and 2b to nonserious⁸. KRS 338.081 (3). We shall therefore modify the penalty as is our right under KRS 338.991 (6) and 338.081 (3).

When this commission hears an appeal from a citation (KRS 338.071 (4)), the statute is clear: we have the authority to "...sustain, modify⁹ or dismiss a citation or penalty." KRS

⁷ Complainant argues items 1 and 2 of citation 1 are per se serious. Armco, KOSHRC 1936-90. But the Armco case dealt with asbestos, not benzene. In Armco the secretary alleged that "airborne concentrations of asbestos 'could reasonably have been expected' to exceed the permissible exposure limits..." In the instant case, however, there was no testing for benzene (TE 185) and no citations charging either over exposure (1926.1128 (c)) or a reasonable expectation of over exposure. 1926.1128 (d). Labor's attorney conceded no over exposure to benzene (TE 181, 199-200) and said no citations (for over exposure) could be written for a situation that occurred more than six months before the inspection. TE 192.

We have here rejected citations alleging that no monitoring was done and that the employer did not establish and maintain accurate records. Under the benzene standard, we upheld citations for not providing records and not keeping them for 30 years.

⁸ We use the terms "other than serious" and "nonserious" interchangeably.

⁹ Our Black's Law Dictionary, 4th edition, defines modify as "To alter; to change...enlarge...limit, reduce" in other words to increase or decrease. We conclude that KRS 338.081 (3) and 338.991 (6) permits this commission to increase or decrease penalties, that is, to set penalties. In fact this commission has so held for many

338.081 (3). (emphasis added) The general assembly was sufficiently concerned with the commission's ability to modify a penalty, either up or down, that it reiterated that power in the penalty statute. KRS 338.991 (6).

~~This commission, when engaged in its statutory task of hearing~~ appeals from citations, must make findings of fact and conclusions of law. ROP 3 (1). But the setting or modifying of penalties is neither a finding of fact nor a conclusion of law. Instead, it is a discretionary act. As the court in Brennan v. OSHRC and Interstate Glass Co¹⁰, 487 F.2d 438 (CA8 1973), CCH OSHD 16,799, put it:

The assessment of penalties is not a finding but the exercise of a discretionary grant of power...the test of a penalty within the statutory range must be whether the Commission abused its discretion.

...the Commission had discretion to impose up to \$1,000 for each non-serious violation.¹¹

Certainly, were this commission to attempt to set a penalty beyond the statutory \$7,000 limitation, that would be an abuse of our discretion. Bunch v. Personnel Board, Ky.App., 719 S.W.2d 8, 10 (1986).

We turn, then, to setting penalties for citation 1, items 1 and 2. According to the statute, we could set no penalty since it

years. S & T Industries, My Buddy Division, KOSHRC 859, attached to this decision as appendix A.

¹⁰ Citing to Butz v. Glover Livestock Commission Company, Inc., 411 U.S. 182, 188, 93 S.Ct. 1455, 1459, 36 L.Ed.2d 142 (1973)

¹¹ The upper limit for a penalty in a nonserious case is now \$7,000. KRS 338.991 (3).

says a penalty up to \$7,000 may be imposed. KRS 338.991 (3). But Ross Brothers was not in a position to turn records over to the secretary of labor, and in fact did not keep them for the required 30 years or for any discernable period. So we determine that levying no penalty would be inappropriate. We could, on the other hand, set a penalty at \$7,000, the statutory maximum in Kentucky for a nonserious citation. KRS 338.991 (3). But there had been some monitoring of Ross employees, even though not by Ross. In fact, the alternative citations for not monitoring (citation 1, item 1) and for not maintaining accurate records (citation 1, item 2a) were rejected by the hearing officer with our approval. We agree with the reasoning of our hearing officer in this regard and adopt it as our own. Therefore, it appears to us that a maximum penalty would be inappropriate.

But Ross is a company with at least 250 employees. TE 94. Ross employees, during the course of the inspection, worked in areas where there was at least the potential for exposure to benzene, at or below the permissible exposure level of one part per million or higher perhaps since the record is silent on that point.

According to the facts of this case, we therefore set the penalty in this case for nonserious citation 1, item 1, at \$1,000 and \$1,000 for citation 1, item 2 (grouped). For company the size of Ross Brothers, a \$1,000 penalty for each item will reinforce the will expressed by the legislature that the occupational safety and health laws must be followed (KRS 338.031) and that consequences for not observing them will follow. KRS 338.991. On the other

hand, the penalty is not so large (within the limits of the statute) as might communicate the idea that Ross had done nothing whatsoever to protect its employees. After all, Ross had a hazard communications program (albeit one deficient as to methods for warning employees about the performance of non routine tasks) and Ross now does its own monitoring.

We agree with our hearing officer that the setting of no penalty for citation 2, item 1, was appropriate. As we said, Ross did have a hazard communications program.


We affirm the recommended order to the extent it is consistent with this decision.

We affirm citation 1, item 1, with a penalty of \$1,000. We affirm citation 1, item 2a and 2b, with a grouped penalty of \$1,000. We affirm citation 2, item 1, with no penalty.


If abatement has not already been accomplished by respondent, we order it to do so within 30 days.

It is so ordered.

Entered April 1, 1997.



Robert M. Winstead
Chairman



Donald A. Butler
Member

Thomas M. Bovitz
Thomas M. Bovitz
Member