COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2805-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

T.B.A., INC. — RESPONDENT

* * * * * * * * * *

ORDER OF THIS
REVIEW COMMISSION

After a trial the hearing officer issued his recommended order on August 13, 1995. On September 9, 1996 respondent TBA filed a petition for discretionary review under section 48 (1) of our rules of procedure[1] which we denied on September 11, 1996.

On September 18, 1996 respondent TBA filed a document it styled as a "motion for stay of final order." Within that motion respondent seeks to submit additional proof. We take respondent's motion as a motion for new trial (CR 59.01 (g))[2] or relief from judgment (CR 60.02 (b)) as our rules permit a motion to reopen a hearing (ROP 36 (8)) only so long as the hearing officer retains jurisdiction. Once the recommended order has been issued, "...jurisdiction shall rest solely in the commission..." ROP 47 (2). At that point, then, authority for a new trial or other relief lies solely in Kentucky's civil rules of procedure. ROP 4

[1] Enacted as section 48 (1), 803 KAR 50:010.

[2] Section 4 (2) of our rules of procedure, enacted as section 4 (2), 803 KAR 50:010, provides for the application of Kentucky's civil rules of procedure in a situation not covered by our rules.

(2).

Because, however, respondent did not bring its motion to submit additional proof within 10 days of the date of the hearing officer's recommended order (CR 59.02), we shall treat the motion as if having been brought under civil rule 60.02 (b).

In its motion for stay, respondent says it discovered a material safety data sheet (MSDS) after September 11, 1996 and wishes to submit additional expert testimony based on that MSDS. According to CR 59.01 and CR 60.02, in order for a court, or in our case an administrative agency, to consider newly discovered evidence, there must be a showing that the evidence "...could not, with reasonable diligence, have [been] discovered and produced at trial." 29 CFR 1910.1200 (g) (1)[3] says "Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use." That means the MSDS must be on hand for employee inspection at any time.

On its face, the motion for stay of final order makes no showing why the MSDS, which should have been available for employee use prior to the compliance officer's inspection or before trial, could not have been discovered with reasonable diligence by company officers prior to that trial. Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675, 677 (1993).

We therefore deny respondent's motion for stay of final order and further deny respondent's motion to be relieved from final judgment under CR 60.02. We note the hearing officer's recommended

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[3] Adopted in Kentucky by 803 KAR 2:320E.

order which we did not take up for review became final on September 23, 1996. Thus respondent has 30 days from September 23, 1996 to appeal to Franklin circuit court. KRS 338.091 (1).

It is so ordered.

Entered October 1, 1996.

George R. Wagoner
Chairman

Charles E. Yates
Member

Donald A. Butler
Member

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

HON GORDON R SLONE
COUNSEL
LABOR CABINET
OFFICE OF GENERAL COUNSEL
1047 U S 127 S STE 4
FRANKFORT KY 40601

and by First Class Mail, postage prepaid, upon:

HON EDWARD C AIRHART PSC
AIRHART & ASSOC
STE 200 440 S 7TH ST
LOUISVILLE KY 40203

This 1st day of October, 1996.

Sue Ramsey
Assistant Director
KOSH REVIEW COMMISSION
#4 Millcreek Park
Millville Rd.
Frankfort, KY 40601
PH: (502) 573-6892
FAX: (502) 573-4619

COMMONWEALTH OF KENTUCKY

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #2805-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

T.B.A., INC. — RESPONDENT

NOTICE OF RECEIPT OF RECOMMENDED ORDER AND ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure, a Recommended Order of the Hearing Officer is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may submit a petition for discretionary review by this Commission. **The petition must be received by the Commission in its offices in Frankfort on or before the 25th day following the date of this notice.** Statements in opposition to petition for discretionary review may be filed during the review period, but must be **received by the Commission on or before the 35th day from date of issuance of the recommended order.**

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission, and it is hereby ordered that unless this Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or by the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

CERTIFICATE OF SERVICE

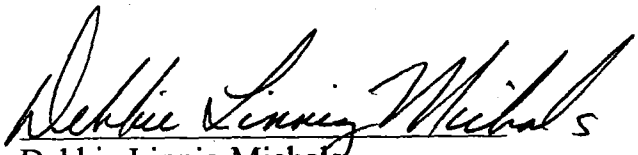
Copy of the foregoing Order has been served upon the following parties in the manner indicated:

GORDON R SLONE (MESSENGER MAIL)
OFFICE OF GENERAL COUNSEL
KY LABOR CABINET
1047 US 127 SOUTE STE 4
FRANKFORT KY 40601

EDWARD C AIRHART (CERT MAIL P 059 750 417)
AIRHART & ASSOCIATES
440 S 7TH ST STE 200
LOUISVILLE KY 40203

This 13th day of Aug,1996

KOSH REVIEW COMMISSION
#4 Millcreek Park
Route #3, Millville Road
Frankfort, KY 40601
PH: (502) 573-6892
FAX: (502) 573-4619



Debbie Linnig Michals
Executive Director

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 95-KOSH-1797

KOSHRC # 2805-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

T.B.A., INC. — RESPONDENT

* * * * * * * * * * *

INTRODUCTION

1. An inspection of the Respondent's work sites at 7400 Grade Lane and 6700 Enterprise Drive, Louisville, Kentucky, was conducted by the Kentucky Labor Cabinet, Division of Occupational Safety and Health Compliance, over a period of several days beginning on April 26, 1995.

2. The inspection was initiated as a result of a complaint.

3. Following the inspection, on October 10, 1995, the Secretary of Labor issued three citations to the Respondent alleging one repeat serious violation, eleven serious violations, and four other than serious violations.

4. The Respondent filed a timely Notice of Contest as to the citations and proposed penalties on October 29, 1995.

5. On November 14, 1995, the Secretary of Labor filed an administrative complaint with the Kentucky Occupational Safety and Health Review Commission.

6. On April 11, 1996, a hearing was conducted in Louisville, Kentucky, before Hearing Officer Nancy Yelton, Assistant Attorney General, Office of the Attorney General. Appearing at the hearing for the Secretary of Labor was Hon. Gordon R. Slone. Appearing on behalf of the Respondent was Hon. Edward C. Airhart.

Upon review of the pleadings, testimony and evidence herein presented, the Hearing Officer makes the following Findings of Fact, Conclusions of Law and Recommended Order.

FINDINGS OF FACT

1. The Respondent, T.B.A., Inc., is engaged in the manufacture of polyethylene and polyvinyl chloride water pipes. The company employs approximately one hundred persons in two divisions: a manufacturing division and a warehouse division. Both divisions are currently located at 6700 Enterprise Drive in Louisville, Kentucky. At the time of the inspection by the Kentucky Labor Cabinet, the manufacturing division was located at 7400 Grade Lane and the warehouse division was located at 6700 Enterprise Drive in Louisville. (Transcript of Record, pages 11-12, 21, 91, hereinafter, T.R., pp. __; Respondent's exhibit #1).

2. T.B.A., Inc. is a Kentucky corporation organized in 1972 by four shareholders. Two of the four shareholders formed a separate corporation in 1993 known as T.B.A. South

to purchase an existing manufacturing facility in Lincoln, Alabama, also engaged in the manufacture of polyvinyl chloride pipe. T.B.A. South is an Alabama corporation which employs approximately fifty people. (T.R., pp. 15-16, 20-23, 26).

3. For purposes of this action, the Hearing Officer finds T.B.A., Inc. and T.B.A. South to be two separate entities and employers.

4. In April, 1995, a complaint was filed with the Kentucky Labor Cabinet alleging six safety violations by T.B.A., Inc. at its manufacturing facility located at 4700 Grade Lane. (T.R., pp. 35-36).

5. As a result of the complaint, an inspection was initiated by Senior Industrial Hygienist Kimberlee Koeberlein of the Kentucky Labor Cabinet beginning on April 26, 1995. T.B.A., Inc. was subsequently cited for sixteen violations of workplace standards. Ms. Koeberlein was accompanied throughout the inspection by David Stringer, Purchasing Agent, and/or Sonny Devore, Production Manager, of T.B.A., Inc. (T.R., p. 31-32, 35; Citation Notification of Penalty).

Citation 1, Item 1

6. In its Citation 1, Item 1, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.1200(h)(1) and (2) for failure to provide information and training on hazardous chemicals to employees at the time of their initial assignment and whenever a new hazard was introduced in the work area. The citation specifically alleged the Respondent did not provide proper training to employees for exposure to virgin polyvinyl chloride, oxygen and acetylene. (Citation and Notification of Penalty).

7. Citation 1, Item 1 was assessed as a "repeat serious" violation with a proposed penalty of $4,000.00. (Citation and Notification of Penalty).

8. Tom Brooks, Jr., part-owner of T.B.A., Inc., and David Stringer, Purchasing Agent, advised Ms. Koeberlein T.B.A., Inc. had not conducted hazardous communication training for its employees. Four employees interviewed by Ms. Koeberlein confirmed they had not received hazardous communication training. (T.R., pp. 40, 90).

9. Ms. Koeberlein found production employees around the extrusion machines which make the pipes potentially exposed to vinyl chloride, polyvinyl chloride, oxygen and acetylene. (T.R., pp 40-41, 60-61).

10. Virgin polyvinyl chloride is occasionally used by T.B.A, Inc. in small amounts to mix with polyvinyl chloride to make the pipes. Approximately 35,000 pounds, or one truckload, is used per year. Potential hazards due to exposure to virgin polyvinyl chloride, which can contain as much as 8.5 ppm of vinyl chloride monomer according to a Material Safety Data Sheet provided by Purchasing Agent David Stringer, are irritation of the eyes and respiratory tract from off-gases and angiosarcoma of the liver, a rare form of liver cancer. (T.R., pp. 40, 40-45, 129).

11. Polyvinyl chloride is used extensively in the manufacturing process. It is loaded in a hopper which transports the material to an extruder which heats the polyvinyl chloride out of polyethylene through heater bands so that it will go through a die and produce a pipe. The pipe is then pulled through a cooling machine where it is subsequently cut and stacked. An operator's manual for the Cincinnati Millicron CM-111 extruders used at the

manufacturing plant, obtained from T.B.A., Inc. on May 2, 1995, details health and safety hazards associated with use of the extruders. Page III-23 of the manual introduced herein as Complainant's exhibit #3 states as follows:

> Cincinnati Multi-Screw Extruders are almost wholly used for processing PVC (polyvinyl chloride). PVC is an extremely heat sensitive material requiring well balanced conditions for processing. When it is exposed to heat for too great a period of time, it rapidly degrades. The degradation generates hydrochloric acid in a gaseous form. The HCL gas is extremely injurious to human tissue as well as very damaging to any part of the extruder exposed to it. Therefore, if and when the machine is shut down, extreme haste must be used to remove the PVC from the barrel and screws as well as the die head. With this in mind, it is quite important that we explain how to shut the machine down before we explain how to start it. (T.R., p. 47; Complainant's exhibit #3).

12. During her inspection, Ms. Koeberlein observed employees heating polyvinyl chloride with a blow torch to remove it from the barrel when the machine malfunctioned. Ms. Koeberlein advised this occurs several times a week when a foreign object is accidentally mixed with the polyvinyl chloride, causing discoloration on the finished pipe. (T.R., pp. 49, 126, 163-166).

13. Oxygen and acetylene are used in the blow torch and are considered a health and safety hazard because they are flammable gases which can explode if they come in contact with an ignition source, causing burns and serious physical injury. (T.R., pp. 41-42).

14. Koeberlein relied upon criteria in the Labor Cabinet's Field Operations Manual in determining the penalty of $4,000.00. (T.R., p. 61).

15. The criteria requires the initial determination of a gravity-based penalty for a

particular violation. The gravity of a violation rests upon the combination of a severity assessment and probability assessment. Severity relates to the seriousness of the type injury that might occur. The severity assessment has four gradations: high, medium, low and minimal. The probability assessment relates to the likelihood of an injury occurring. The probability can be either greater or lesser. (T.R., pp. 61-62; Field Operations Manual).

16. The gravity-based penalty for the violations in a citation can then be reduced by adjustment factors based on the number of employees in the plant (size), good faith, and past history. (T.R., p. 63).

17. In relation to Citation 1, Item 1, a high severity and a lesser probability were assigned for an initial gravity-based penalty of $2,500. High severity means permanent damage such as loss of eyes, loss of hearing, loss of appendage or death. Ms. Koeberlein determined the seriousness of the type injury which might occur from use of vinyl chloride, polyvinyl chloride, oxygen or acetylene to be high. Probability relates to the proximity of the employees to the hazards, the frequency, and the number of employees exposed. Ms. Koeberlein determined the likelihood of an injury occurring to be lesser. (T.R., pp. 60-62, 64).

18. The violation was classified as "repeat serious" because the company was previously cited for a violation of the same standard (no hazard communication training) in inspection #11595383E at its warehouse facility at 6700 Grade Lane on October 27, 1992, within three years of the citation issued on October 10, 1995. The violation was abated by the company by a notice of abatement filed with the Labor Cabinet on November 12, 1992,

which states as follows: "In a general meeting on 10/29/92, the warehouse employees were notified of all known chemical hazards in the work place." (T.R., pp. 50-51; Complainant's exhibits #4 and #5).

19. The Field Operations Manual requires the assessed penalty for a repeat violation to be doubled, resulting in a proposed gravity-based penalty of $5,000.00. (T.R., p.64).

20. The proposed penalty of $5,000.00 was reduced by the Labor Cabinet by 20% for size (101-250 employees) for a final proposed penalty of $4,000.00. No reduction was given for good faith or history pursuant to the Labor Cabinet's Field Operations Manual because the citation was a repeat citation. (T.R., p. 64).

21. As previously determined in paragraph 3, above, the company had 100 employees at the time of the inspection since T.B.A. South is considered to be a separate entity and employer for purposes of this action. The Field Operations Manual permits a 40% reduction for size for employers with 26-100 employees. (T.R., p. 63).

22. This Hearing Officer, therefore, finds the proposed penalty for Citation 1, Item 1 should be reduced by 40% for size to $3,000.00.

23. During the course of the inspection, Purchasing Agent David Stringer gave Ms. Koeberlein a written Hazard Communication Program adopted by T.B.A., Inc. on September 10, 1993. The program states in part:

> All employees whose job requires the handling of hazardous chemicals or whose job may take them into areas where these chemicals are being used, will receive training in the use and storage of these chemicals. The training will include, but not be limited to, the MSDS's, personal protective equipment, how to tell when there has been an exposure, the

labeling system, and the hazards of the chemicals used. (T.R., p. 53; Complainant's exhibit #6).

24. The following form appears as the last page of the Hazard Communication Program:

> 1. Procedures for Accidental Contamination form Chemicals. See the MSDS file book in the plant office on each chemical.
>
> 2. Procedures for Handling Hazardous Chemicals. See the MSDS file book in the plant office on each chemical.
>
> 3. Employee Training and Information.
>
> I have attended a safety class on hazardous chemicals in the work place, have received written material outlining the procedure in case of an accident.
>
> Signed_____
> Date_____ (Complainant's exhibit #6).

25. No signed forms were given to Ms. Koeberlein by T.B.A, Inc. officials during her inspection indicating training in the use of hazardous chemicals. (T.R., pp. 89-90).

26. In August, 1994, prior to the inspection, a major portion of the production facility at 4700 Grade Lane was destroyed by fire. Because of the fire, production was reduced from seven extrusion lines to four extrusion lines using salvaged equipment. Polyvinyl chloride pipes and process material were destroyed during the fire. Burning polyvinyl chloride forms hydrogen chloride gas fumes. During the fire everything within one-half mile of the plant was blocked off for several hours and health warnings were issued to the general public due to the presence of hydrogen chloride gas fumes. (T.R., pp. 11, 59,

118-119, 161, 168, 320).

27. The Respondent claimed lack of knowledge as a defense to Citation 1, Item 1. K.R.S. 338.991(11) provides: "A serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical injury could result from a condition which exists...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." (T.R., pp. 180-181).

28. In Citation 1, Item 1, the Labor Cabinet cited the Respondent for failure to provide information and training on hazardous chemicals. This Hearing Officer finds the Respondent had knowledge of the training requirement through its Hazard Communication Program and abatement of previous citation #11595383E for the same offense.

29. The Respondent further questioned the high severity of the citation. (T.R., p. 181). This Hearing Officer finds potential hazards associated with the use of polyvinyl chloride, oxygen and acetylene can cause serious permanent injury. The Hearing Officer further finds the Respondent had knowledge, or should have had knowledge, of the potential hazards from the Material Safety Data Sheets and operator's manual for the Cincinnati Millicron CM-111 extruders available at the facility and the known hazards created by the fire at the manufacturing plant in August, 1994.

30. The Respondent finally argued that Citation 1, Item 1 should not be considered a "repeat" citation because the citation dated October 27, 1995 was issued in reference to the warehouse division located at 6700 Enterprise Drive and the citation dated October 10, 1995,

was issued in reference to the manufacturing division then located at 4700 Grade Lane, and that because of the different locations, the manufacturing division was unaware of the previous citation. (T.R., pp. 12, 94-95). This Hearing Officer finds the argument is without merit.

Citation 2, Item 1a and Item 1b

31. In its Citation 2, Item 1a, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.22(a)(1) for failure to keep the workplace clean and orderly. The citation specifically alleged electrical cords and hoses were laying across the floors which could pose tripping hazards. (Citation and Notification of Penalty).

32. Citation 2, Item 1a was assessed as a serious violation with a proposed penalty of $1,300. (Citation and Notification of Penalty).

33. Photographs 3, 4, 5, 6, 8, 12, 14, 25, 27, 29, 30 and 35 taken on April 26, 1995, and May 2, 1995, introduced herein as Complainant's Exhibit #1, depict the electrical cords and hoses. (Complainant's exhibit #1).

34. Ms. Koeberlein determined the cord and hoses presented a hazard for tripping and falling on the floor or into unguarded heater bands on the extrusion machines or unguarded mechanical parts on the pipe puller and other machines. (T.R., pp. 187-188; Complainant's exhibit #1-9, 1-25, 1-29).

35. Possible injuries which could be sustained from the hazard include electrocution, cardiac arrest, severe burns, and smash injuries from moving mechanical parts. A medium severity and lesser probability were assigned for a gravity-based penalty

of $2,000, with a reduction of 20% in the amount of the penalty by the Labor Cabinet for size and 15% for "good faith", resulting in a proposed penalty of $1,300. (T.R., pp. 190-191).

36. A reduction of 25% for good faith is available if required safety programs have been written and implemented with minor deficiencies. A reduction of 15% for good faith is available if required safety programs have been written and implemented with more than minor deficiencies. (T.R., p. 53).

37. Citation 2, Item 1b was grouped with Citation 2, Item 1a, above. In Citation 2, Item 1b, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.22(a)(2) for failure to maintain drainage where wet processes were in use. The citation specifically alleged water was standing on the floor intermittently around the extrusion machines. The citation was designated a serious violation and grouped with Citation 2, Item 1a because of similar hazards. No penalty was assessed. (T.R., pp. 192-193; Citation and Notification of Penalty).

38. Citations may be grouped if they are closely related or to reinforce other citations. (T.R., pp. 194-195).

39. Photographs 3, 4, 5, 6, 8, 15, 17, 24, 25, 27, 30, 31 and 35 taken on April 26, 1995, and May 2, 1995, introduced herein as Complainant's exhibit #1, depict standing water at the work site. (Complainant's exhibit #1).

40. Ms. Koeberlein determined the standing water presented a hazard for slipping and electrocution. (T.R., p. 193).

41. Water is used extensively by the Respondent to cool the pipes as they are extruded from the machines. Standing water results when the cooling system is incorrectly vented or drains are clogged. (T.R., p. 192).

42. Purchase Agent David Stringer testified the electrical cords and hoses were placed as efficiently as possible as the plant was put back in operation after the fire in August, 1994. The plant at 4700 Grade Lane was operated as a temporary facility at the time of the inspection until a new manufacturing plant was completed at 6700 Enterprise Drive. Mars Electric installed the electrical system in place at the time of the inspection which was approved by state inspectors. (T.R., pp. 195-196).

43. Mr. Stringer acknowledged there was a drainage problem at the facility and burns could occur if someone fell against the heater bands on an extruder. (T.R., pp. 210-212).

44. It was previously determined in paragraph 3, above, T.B.A., Inc. had 100 employees at the time of the inspection. The Field Operations Manual permits a 40% reduction for size for employers with 26-100 employees. This Hearing Officer finds the proposed penalty for Citation 2, Item 1a, grouped with Citation 2, Item 1b, should be $900.

Citation 2, Item 2a and Item 2b

45. In its Citation 2, Item 2a, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.132(d)(1) for failure to assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment. The citation specifically alleged the Respondent did not perform a hazard

assessment for potential eye injuries from grinding rejected polyvinyl chloride or polyethylene pipes, potential exposure to vinyl chloride, exposure to noise, and potential exposure to hydrogen chloride from polyvinyl chloride. (Citation and Notification of Penalty).

46. Citation 2, Item 2a was assessed as a serious violation with a proposed penalty of $1,625. (Citation and Notification of Penalty).

47. During the inspection, Mr. Stringer appeared to be unaware of potential hazards when questioned by Ms. Koeberlein. No documents were provided to Ms. Koeberlein by the Respondent indicating an assessment had been performed. 29 CFR 1910.132(d)(2) states: "The employer shall verify that the required workplace hazard assessment has been performed through a certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment." [T.R., pp. 228-229; 29 CFR 1910.132(d)(2)].

48. Ms. Koeberlein placed a noise monitor on one employee at an extrusion machine. The eight-hour time rated noise level was determined to be 89.3 decibels. Under OSHA standards, a noise level over 85 decibels requires a hearing conservation program because of the possibility of hearing loss. Ms. Koeberlein stated this is one example of a hazard assessment which was not performed by the Respondent. (T.R., pp. 224-226; Complainant's exhibit #7 - Noise Survey Report).

49. Possible injuries which could result from violation of 29 CFR 1910.132(1)

include eye injuries, lung damage from hydrogen chloride exposure and hearing loss from overexposure to noise. A high severity and lesser probability were assigned for a gravity-based penalty of $2,500, with a reduction of 20% in the amount of the penalty by the Labor Cabinet for size and 15% for good faith, resulting in a proposed penalty of $1,625. (T.R., pp. 231-232).

50. This Hearing Officer finds the correct penalty reduction for size to be 40% based on the number of employees determined in paragraph 3, above, resulting in a proposed penalty of $1,125.00.

51. Citation 2, Item 2(b) was grouped with Citation 2, Item 1a, above. In Citation 2, Item 2b, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.132(f)(1) for failure to provide training to each employee required to use personal protective equipment pursuant to a workplace assessment. The citation specifically alleged the Respondent did not train its employees on the use of personal protective equipment necessary when performing tasks determined to be hazardous pursuant to a workplace assessment. (Citation and Notification of Penalty).

52. The citation was assessed as a serious violation and grouped with Citation 2, Item 1a because of related hazards. No penalty was assessed.

53. Written documentation of training in the use of personal protective equipment is required pursuant to 29 CFR 1910.132(4) which provides: "The employer shall verify that each affected employee has received and understood the required training through a written certification that contains the name of each employee trained, the date(s) of training, and that

identifies the subject of the certification." No written documentation of training in the use of personal protective equipment was provided by the Respondent. [T.R., p. 233; 29 CFR 1910.132(4)].

54. Mr. Stringer testified he did not provide training in the use of personal protective equipment and he did not know if anyone else provided training to the employees. (T.R., pp. 243-244).

Citation 2, Item 3

55. In its Citation 2, Item 3, the Labor Cabinet cited the Respondent for violation of 803 KAR 2:310 Section 1(2) for failure to have a person or persons adequately trained to render first aid. The citation specifically alleged the employees at T.B.A., Inc. identified to provide first aid at the work site had not received first aid training within three years. (Citation and Notification of Penalty).

56. Although designated employees had previously received first aid training provided by the American Red Cross, the employee certifications had expired at the time of the inspection by the Labor Cabinet in April, 1995. The American Red Cross certifies trainees in first aid for a period of three years and trainees in CPR for a period of one year. (T.R., pp. 255-256).

57. Citation 2, Item 3 was assessed as a serious violation with a proposed penalty of $1,625. (Citation and Notification of Penalty).

58. The citation was determined to be serious due to hazards in the workplace related to unguarded electrical equipment, unguarded moving machinery, water on the floor

and hoses and electrical cords on the floor. Possible injuries which could be sustained from the cited hazards include cardiac arrest from electrocution, burns, cuts, sprains, breaks, and smash injuries. (T.R., p. 257).

59. A high severity and lesser probability were assigned by the Labor Cabinet for a gravity-based penalty of $2,500, with a reduction of 20% in the amount of the penalty by the Labor Cabinet for size and 15% for good faith, resulting in a proposed penalty of $1,625. (T.R., p.258).

60. David Stringer acknowledged the T.B.A., Inc. employees designated to provide first aid did not have up-to-date certifications. Following the citation, four employees were recertified in first aid training and five employees were recertified in bloodborne pathogen training. (T.R., pp. 259-260; Respondent's exhibit #14).

61. This Hearing Officer finds the correct penalty reduction for size to be 40%, resulting in a proposed penalty of $1,125.

Citation 2, Item 4

62. In its Citation 2, Item 4, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.212(a)(1) for failure to provide machine guarding to protect operators and other employees from hazards created by ingoing nip points in rotating parts. The citation specifically alleged pipe pullers on extrusion machines located at the Respondent's manufacturing plant were unguarded. (Citation and Notification of Penalty).

63. Photograph 9 taken on April 26, 1995, introduced herein as Complainant's exhibit #1, depicts unguarded nip points and rotating parts on an extruder at the

Respondent's manufacturing plant. (T.R., p. 265; Complainant's exhibit #1-9).

64. Citation 2, Item 4 was assessed as a serious violation with a proposed penalty of $1,625. (Citation and Notification of Penalty).

65. Possible injuries which could be sustained from physical contact with an unguarded part include smash and crush injuries which could require hospitalization and therapy. A medium severity and lesser probability were assigned for a gravity-based penalty of $2,000, with a reduction of 20% in the amount of the penalty by the Labor Cabinet for size and 15% for good faith, resulting in a proposed penalty of $1,300. (T.R., pp. 269-270).

66. This Hearing Officer finds the correct penalty reduction for size to be 40%, resulting in a proposed penalty of $900.

67. Plant Manager Donald Kays acknowledged unguarded nip points existed on pipe pullers depicted in Complainant's exhibit #1-9 and that a serious injury could result from physical contact with a U-joint on the machines. The two unguarded machines were guarded when the Labor Cabinet returned to the Respondent's work site in May, 1995. (T.R., pp. 271, 274-275).

68. The Respondent's argument that this citation pertaining to unguarded machinery should be grouped with Citation 2, Item 2a and 2b pertaining to failure to assess the workplace for hazards and failure to provide training to employees in the use of personal protective equipment (T.R., pp. 226-227) is without merit since the citations are sufficiently distinct to comprise separate violations under the Kentucky Occupational Safety and Health Act.

Citation 2, Item 5

69. In its Citation 2, Item 5, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.303(g)(2)(i) for failure to guard live parts of electric equipment operating at 50 volts or more against accidental contact. The citation specifically alleged heating bands operating at 230 volts located on extruders at the Respondent's manufacturing plant were unguarded. (Citation and Notification of Penalty).

70. Photographs 14, 18, 26, and 27, taken on April 26 and May 2, 1995, introduced herein as Complainant's exhibit #1, depict unguarded heater bands on extruders at the Respondent's manufacturing plant. (T.R., p. 278; Complainant's exhibit #1).

71. An operator's manual for the extruders obtained from the Respondent on May 2, 1995, details safety precautions. On page 5 of Chapter 2, the manual states: "Danger. Also supplied are covers for the top and sides of the barrel assembly. These guards should never be removed from the machine. Fatal injury may result if the previous instructions are not completely followed." (T.R., pp. 47, 279-280; Complainant's exhibit #8).

72. Citation 2, Item 5 was assessed as a serious violation with a proposed penalty of $1,625. (Citation and Notification of Penalty).

73. Possible injuries which could be sustained from physical contact with an unguarded heater band include burns, electrocution and cardiac arrest. A high severity and a lesser probability were assigned for a gravity-based penalty of $2,500, with the reduction of 20% in the amount of the penalty by the Labor Cabinet for size and 15% for good faith, resulting in a proposed penalty of $1,625. (T.R., p. 281).

74. This Hearing Officer finds the correct penalty reduction for size to be 40%, resulting in a proposed penalty of $1,125.

75. The Respondent indicated all extruder machines used at the new manufacturing facility located at 6700 Enterprise Drive in Louisville are completely enclosed and that guards are being constructed for the old machines used at 4700 Grade Lane. (T.R., pp. 286-287; Respondent's exhibit #13).

76. The Respondent's argument that this citation pertaining to unguarded electrical equipment should be grouped with Citation 2, Item 1a and 1b pertaining to clean and orderly conditions in the workplace is found to be without merit since the citations are sufficiently distinct to comprise separate violations under the Kentucky Occupational Safety and Health Act.

Citation 2, Item 6a and Item 6b

77. In its Citation 2, Item 6a, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.1017(d)(i) for failure to establish a program of monitoring and measurement to determine if any employee is exposed to vinyl chloride above the action level requiring use of personal protective equipment. The action level for vinyl chloride is 1 ppm averaged over an 8-hour period or 5 ppm over any period not exceeding 15 minutes. The citation specifically alleged the Respondent did not monitor occasional employee exposure to a virgin polyvinyl chloride pellet which could have residual vinyl chloride monomer present. [Citation and Notification of Penalty; T.R., p. 229; 29 CFR 1910.1017(c)(1)(2)].

78. Ms. Koeberlein was advised by T.B.A. officials that no monitoring had been

done for potential exposure to vinyl chloride. (T.R., p. 298).

79. Citation 2, Item 6a was assessed as a serious violation with a proposed penalty of $1,625. (Citation and Notification of Penalty).

80. Potential hazards due to exposure to virgin polyvinyl chloride, which can contain as much as 8.5 ppm of vinyl chloride monomer, according to a Material Safety Data Sheet provided by Purchasing Agent David Stringer, are irritation of the eyes and respiratory tract from off-gases and angiosarcoma of the liver, a rare form of liver cancer. (T.R. 44-45, 299-300).

81. A high severity and a lesser probability were assigned by the Labor Cabinet for a gravity-based penalty of $2,500, with a reduction of 20% in the amount of the penalty for size and 15% for good faith, resulting in a proposed penalty of $1,625. (T.R., p. 301).

82. Citation 2, Item 6b was grouped with Citation 2, Item 6a, above. In Citation 2, Item 6b, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.1017(j) for failure to provide training related to hazards of vinyl chloride and precautions for its safe use to employees engaged in vinyl chloride or polyvinyl chloride operations. The citation specifically alleged the Respondent did not provide training to employees who occasionally used a virgin polyvinyl chloride pellet which could have residual vinyl chloride monomer present.

83. The citation was assessed as a serious violation and grouped with Citation 2, Item 6a because of related hazards. No penalty was assessed.

84. Employees at T.B.A., Inc. indicated to Ms. Koeberlein they had received no

training related to the use of vinyl chloride and the Respondent provided no evidence of training. (T.R., p. 302).

85. The Respondent argued Citation 2, Item 6a and Item 6b should be grouped with Citation 1, Item 1 pertaining to hazard communication. (T.R., pp. 305-306). This Hearing Officer finds the citations are sufficiently distinct to comprise separate standards and violations since Citation 1, Item 1 requires hazard communication and Citation 2, Item 6a specifically requires monitoring of vinyl chloride to determine if any employee is exposed above the action level.

86. Respondent's argument that it was unaware of the potential hazards of vinyl chloride because it did not receive a Material Safety Data Sheet outlining the hazards until after the virgin polyvinyl chloride was received and processed is also without merit because the Respondent's written Hazard Communication Program introduced herein as Complainant's exhibit #6 specifically states: "No hazardous chemical is to be allowed in the facility without a Material Safety Data Sheet. The policy of this company is to refuse shipment without the appropriate Material Safety Data Sheet." (T.R., pp. 305-306; Complaint's exhibit #6).

87. Because the Respondent only used one truckload of virgin polyvinyl chloride per year which took 18 hours to process and the Material Safety Data Sheet refers to repeated exposure to vinyl chloride in relation to the possible development of liver cancer (T.R., pp. 40, 300; Complainant's exhibit #2), this Hearing Officer finds it is unlikely the limited exposure would lead to liver cancer. The severity of Citation 2, Item 1a should, therefore,

be assessed at medium. This Hearing Officer further finds the correct penalty reduction for size to be 40%. The revised gravity-based penalty is $2,000, reduced 40% for size and 15% for good faith, for a total proposed penalty of $900.

Citation 2, Item 7a and 7b

88. In its Citation 2, Item 7a, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.1030(c)(i) for failure to establish a written Exposure Control Plan designed to eliminate or minimize exposure of employees who render first aid to bloodborne pathogens such as the hepatitis B virus and HIV. (T.R., pp. 307-308; Citation and Notification of Penalty).

89. Ms. Koeberlein was advised by Tom Brooks, Jr. of T.B.A., Inc., that the Respondent did not have a written Exposure Control Plan. 29 CFR 1910.1030(c) requires an Exposure Control Plan to include methods to prevent contact by employees with blood or other potentially infectious materials and post-exposure evaluation and follow-up. (T.R., p. 311).

90. Citation 2, Item 7a was assessed as a serious violation because of potential exposure to hepatitis B which can cause liver damage, liver cancer, and death and potential exposure to HIV which can lead to AIDS and death. A high severity and lesser probability were assigned for a gravity-based penalty of $2,500, with a reduction by the Labor Cabinet of 20% in amount of the penalty for size and 15% for good faith, resulting in a proposed penalty of $1,650. (T.R., pp. 311-312).

91. Citation 2, Item 7b was grouped with Citation 2, Item 7a, above. In Citation

2, Item 7b, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.1030(g)(2)(iv) for failure to provide annual training to employees who are potentially exposed to bloodborne pathogens. (T.R., p. 312; Citation and Notification of Penalty).

92. The citation was assessed as a serious violation and grouped with Citation 2, Item 7a because of related hazards. No penalty was assigned. (T.R., p. 313).

93. During the investigation, Ms. Koeberlein determined employees who render first aid had previously received Red Cross training related to bloodborne pathogens, but all certifications were out-of-date. (T.R., p. 312).

94. The Respondent argued Citation 2, Item 7a and Item 7b should be grouped with Citation 2, Item 3 related to failure to have a person or persons adequately trained to render first aid. (T.R., p. 315). This Hearing Officer finds Citation 2, Item 7a is a sufficiently distinct citation to comprise a separate standard and violation for failure to establish a written Exposure Control Plan related to exposure to bloodborne pathogens.

95. Since the citation was issued, five T.B.A., Inc., employees have received training or recertification in bloodborne pathogens. (T.R., p. 318; Respondent's exhibit #14).

96. This Hearing Officer finds the correct penalty reduction for size to be 40%, resulting in a proposed penalty of $1,125.

Citation 3, Item 1

97. In its Citation 3, Item 1, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.38(a)(1) for failure to have a written emergency action plan for evacuation of the workplace in the event of a fire emergency. 29 CFR 1910.120(q) requires an employer

to have a written emergency action plan if the place of employment contains materials which can release hazardous substances. According to the citation, T.B.A., Inc. uses over a million pounds of polyvinyl chloride per year, which, if burned, releases hydrogen chloride fumes. An emergency action plan must include such items as pre-emergency planning and coordination; training and communication; safe distances and places of refuge; site security and control; and evacuation routes and procedures. [T.R., pp. 320-321; Citation and Notification of Penalty; 29 CFR 1910.120(q)].

98. Ms. Koeberlein was advised by T.B.A. officials that the company did not have a written emergency action plan. (T.R., p. 321).

99. In August, 1994, the Respondent's manufacturing facility located at 4700 Grade Lane was destroyed by fire. Public warnings were issued because of the presence of hydrogen chloride fumes from the burning polyvinyl chloride. The Jefferson County Hazardous Materials Team was called to assist in fighting the blaze and road blocks were set up in a one-half mile area surrounding the plant. (T.R., pp. 118, 320-321).

100. Citation 3, Item 1 was assessed as an "other than serious" violation with a proposed penalty of $650. "Other than serious" refers to a violation which may cause an injury or illness other than a serious injury or illness. (T.R., pp. 222-223; Citation and Notification of Penalty).

101. The alleged violation was determined by the Labor Cabinet to be other than serious due to the small size of the facility, the close proximity of the exits, and the fact all employees knew they were supposed to evacuate the building in case of a fire. (T.R., p.

323).

102. A minimal severity and greater probability were assigned for a gravity-based penalty of $1,000, with a reduction by the Labor Cabinet of 20% in the amount of penalty for size and 15% for good faith, resulting in a proposed penalty of $650. A greater probability was assigned because of the previous fire at the manufacturing facility. (T.R., p. 323).

103. On the contrary, the Respondent argued a lesser probability should be assigned to the gravity-based penalty because of the previous fire which made the employees more aware of evacuation procedures.

104. This Hearing Officer finds the probability should be assessed at lesser for a gravity-based penalty of zero based on the Field Operations Manual adopted by the Labor Cabinet.

Citation 3, Item 2

105. In its Citation 3, Item 2, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.95(c)(1) for failure to institute a hearing conservation program when employee noise exposures equaled or exceeded an eight-hour time waited average sound level of 85 decibels. The citation specifically alleged that noise monitoring conducted on May 2, 1995, indicated that employees were exposed to continuous noise levels of 91.2 decibels. (Citation and Notification of Penalty).

106. A hearing conservation program requires initial monitoring to determine the noise level at the facility; yearly audiometric testing to determine if employees are suffering

any type of hearing loss; hearing protection; and training in the use of hearing protection. Ms. Koeberlein was advised by Tom Brooks, Jr. that the facility had ear plugs but no hearing conservation program. (T.R., pp. 329-330).

107. The most serious injury reasonably predictable as a result of the alleged violation is partial hearing loss. A minimal severity and a greater probability were assigned for a gravity based penalty of $1,000, with a reduction by the Labor Cabinet of 20% in the amount of the penalty for size and 15% for good faith, resulting in a proposed penalty of $650. The probability was determined to be greater because of the high noise level in the manufacturing facility around the extruders, saws and pipe pullers. (T.R., pp. 331-332).

108. The Respondent provided ear plugs for employees which most employees elected not to wear. Ms. Koeberlein saw two or three employees wearing ear plugs during her inspection. (T.R., p. 334).

109. The Respondent's argument that this citation pertaining to establishment of a hearing conversation program should be grouped with Citation 2, Item 2a pertaining to failure to access the workplace for hazards is without merit since the citations are sufficiently distinct to comprise separate violations under the Kentucky Occupational Safety and Health Act.

110. This Hearing Officer further finds the correct penalty reduction for size to be 40%, resulting in a proposed penalty of $450.

Citation 3, Item 3a and 3b

111. In its Citation 3, Item 3a, the Labor Cabinet cited the Respondent for violation

of 29 CFR 1910.134(b)(5) for failure to clean and disinfect respirators used by more than one employee after each use. The citation specifically alleged a North 7700-30M½ Face Negative Pressure Respirator was found hanging on a wooden peg by its head strap in an extremely dirty condition in the maintenance department at the Respondent's manufacturing facility. Photograph 2 taken on May 2, 1995, introduced herein as Complainant's exhibit #1, depicts the respirator as it appeared during the inspection. (Citation and Notification of Penalty; T.R., p. 341; Complainant's exhibit #1-2).

112. The respirator is the personal property of employee Jack Tipton. Other employees advised Ms. Koeberlein they used the respirator when adding post-industrial reground polyvinyl chloride to the hoppers for the extruders and when cleaning the barrels of the extruders for protection from hydrogen chloride fumes. 29 CFR 1910.134(b)(5) requires the respirator to be kept clean to prevent the spread of communicable diseases. Production Manager Sonny Devore was aware the respirator was on-site and being used by employees. (T.R., pp. 341-342).

113. Citation 3, Item 3a was assessed as an other than serious violation with no proposed penalty since the most serious reasonably predictable would be a cold or flu. (T.R., p. 343).

114. Citation 3, Item 3b, was grouped with Citation 3, Item 3a, above. In Citation 3, Item 3b, the Labor Cabinet cited the Respondent for violation of 29 CFR 1910.134(b)(6) for failure to store the North 700-30M ½ Face Negative Pressure Respiratory in a clean and sanitary place. The respirator was found in a dirty condition hanging by its head strap in the

maintenance department at the Respondent's manufacturing facility. Citation 3, Item 3b was assessed as an other than serious violation with no proposed penalty. (Citation and Notification of Penalty; T.R., p.343; Complainant's exhibit #1-2).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Facts the undersigned hereby makes the following Conclusions of Law:

1. T.B.A., Inc., is an employer within the meaning of K.R.S. 338.015(1). Consequently, the Kentucky Labor Cabinet and the Kentucky Occupational Safety and Health Review Commission have jurisdiction over this action.

2. Pursuant to K.R.S. 338.061(2), the Commission is authorized to adopt established federal standards for occupational safety and health. The Commission has adopted by administrative regulations various standards contained in the code of federal regulations. 803 KAR 2:300-2:600. The federal regulations which T.B.A., Inc., has been charged with violating have been adopted by the Kentucky Labor Cabinet.

3. The issuance of the citations against T.B.A., Inc., and the subsequent hearing were authorized pursuant to K.R.S. 338.141.

4. The Secretary of the Kentucky Labor Cabinet proved by a preponderance of the evidence that each violation occurred.

5. The violations were properly classified as serious or other than serious.

6. The correct penalty reduction for size for each violation is determined to be 40%, based on a size reduction factor of 40% for employers with 26-100 employees pursuant

to the Field Operations Manual adopted by the Kentucky Labor Cabinet.

7. The severity of Citation 2, Item 1a is determined to be minimal. The probability of Citation 3, Item 1 is determined to be lesser.

8. With the exception of the modifications determined in paragraphs 6 and 7, above, the proposed penalty for each violation is reasonable and appropriate.

RECOMMENDED ORDER

Now, therefore, IT IS HEREBY ORDERED:

1. That Citation 1, Item 1, and Citation 2, Item 1a, Item 1b, Item 2a, Item 2b, Item 3, Item 4, Item 5, Item 6a, Item 6b, Item 7a, Item 7b, and Citation 3, Item 1, Item 2, Item 3a and Item 3b charging one (1) repeat serious violation, eleven (11) serious violations and four (4) other than serious violations are hereby AFFIRMED.

2. That the recommended penalties in the total amount of $10,875 shall be paid by the Respondent without delay, but in no event later than thirty (30) days from the date of this Recommended Order.

3. That, if not already abated, all cited violations must be abated immediately upon receipt of this Recommended Order.

4. That the Respondent shall in the future comply with all applicable provisions of the Act and Standards.

REVIEW RIGHTS

Pursuant to 803 KAR 50:010, Section 47, this Recommended Order may be called for further review by the Kentucky Occupational Safety and Health Review Commission within

a forty (40) day period following issuance. If this Recommended Order is not ordered for further review, it shall become the final order of the Commission. Under 803 KAR 50:010, Section 48, a party aggrieved by this Recommended Order may submit a petition for discretionary review to the Commission. A party seeking review must file its petition for review with the Commission on or before twenty-five (25) days following the Commission's receipt of the Recommended Order. Thereafter, the opposing party may file a brief in opposition to the petition for review within thirty-five (35) days from the date this Recommended Order is issued. Under 803 KAR 50:010, Section 47(2), the Commission has sole jurisdiction over this matter following the issuance of this Recommended Order. All motions, petitions, and other pleadings filed in this contest after this Recommended Order is issued must be addressed to the Commission and not to the Hearing Officer.

Pursuant to K.R.S. 338.091, any party adversely affected or aggrieved by a final order of the Review Commission may appeal within thirty (30) days to the Franklin Circuit Court on the record for a review of such order. An appeal may be taken to the Court of Appeals from any decision of the Circuit Court.

Nancy Yelton

NANCY YELTON
HEARING OFFICER
DIVISION OF ADMINISTRATIVE HEARINGS
ATTORNEY GENERAL'S OFFICE
1024 CAPITAL CENTER DRIVE
P.O. BOX 2000
FRANKFORT, KY 40602-2000
(502) 573-5944