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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

July 29, 1977

KOSHRC # 317

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CENTRAL STATES VENEERS, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman, STOWERS and UPTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of 26 April 1977, is presently before this Commission for review. Respondent in this case contested only the penalty assessments.

This Commission finds that the Hearing Officer erred in denying Complainant's Motion to Dismiss the proposed penalty for Citation #3 pursuant to Departmental policies allowing the issuance of one citation for belt and pulley guarding where the belts and pulleys work together. In Hughes Masonry, Inc., KOSHRC #314, in which this Commission overruled a Recommended Order which held the Commissioner without authority to implement departmental policies concerning a two-year limitation on repeat violations, we articulated our opinion concerning the scope of administrative policy-making powers as follows:

The Commissioner of Labor has ample and broad powers to adopt relevant and necessary regulations to implement the statutory duties imposed on him by KRS Chapter 338. KRS 13.082 states that the power vested in every administrative agency to adopt regulations shall be uniform and shall be confined to the direct implementation of the duties of that administrative body as assigned by the general assembly. Further, KRS 12.080 gives the head of each department the power to prescribe such rules and regulations as he deems

expedient for the proper conduct of the work of that department. It is the opinion of this Commission that the policy decision in question is an administrative determination within the meaning of KRS 13.080. It is further held that the decision concerning the twenty-four (24) month limitation on repeat violations by the Commissioner is well within his prerogative and does not constitute an overstepping of his authority. The Commissioner of Labor has within his province a determination of charges of violations to be made against employers under this Act. (Emphasis added.)

It is the opinion of this Commission that the reasoning of Hughes Masonry applies equally to the departmental policies involved in this case. Clearly, the policy decision by the Commissioner of Labor to group the violation of 29 CFR 1910.219(d)(1) and 29 CFR 1910.219(e)(1)(i) (both as adopted by 803 KAR 2:020), into one citation in instances where the effect of issuing separate citations would be tantamount to multiple citations for the same violation is "expedient for the proper work of that department" under KRS 12.080. The motion to delete the penalty under Citation #3 was an admirable attempt by the Commissioner to treat Respondents cited prior to the implementation of this standards grouping policy on an equal basis with those Respondents who now benefit from that policy.

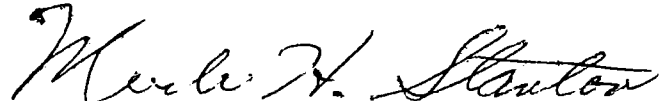
As both the grouping of the two standards into a single violation where the effect of not doing so would be multiple citation and deletion of the penalties involved where the violation is not contested merely eliminate a source of prejudicial treatment to some Respondents and therefore does not render enforcement of the Kentucky Occupational Safety and Health Act less effective than the Federal Act, we hold that the Hearing Officer erred in denying the Motion to Dismiss the penalty under Citation #3. We held in Hughes Masonry, Inc., supra, that

.... The Commissioner of Labor has within his province a determination of charges of violations to be made against employees under this Act.... (and that as long as the Kentucky program is as effective as its federal counterpart,...there is no prohibition...(which prevents) the states from adopting changes in policies and procedures more quickly than is done on the Federal level....

So be it here.

Accordingly, it is ORDERED that the Hearing Officer's denial of Complainant's Motion to Dismiss the penalty under Citation #3 for a violation of 29 CFR 1910.219(e)(1)(i) (as adopted by 803 KAR 2:020) is OVERRULED, and that Complainant's motion is hereby GRANTED, and that by order of this Commission the \$150 penalty under Citation #3 is VACATED. All other conclusions and findings of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.

KOSHRC # 317
(Decision and Order of Review Commission)


Merle H. Stanton, Chairman

s/H. L. Stowers
H. L. Stowers, Commissioner

s/Charles B. Upton
Charles B. Upton, Commissioner

DATED: July 29, 1977
Frankfort, Kentucky

DECISION NO. 446

KOSHRC #317
(Decision and Order of Review Commission)

This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

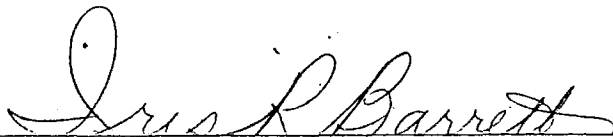
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601

Mr. John R. Lockwood (Certified Mail #114310)
Central States Veneers, Inc.
P. O. Box 1431 - Avondale Station
Paducah, Kentucky 42001

Central States Veneers, Inc. (First Class Mail)
1602 Prospect Street
High Point, North Carolina 27261

This 29th day of July, 1977.


Iris R. Barrett
Executive Director

Haynes



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 26, 1977

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 408*

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 317

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CENTRAL STATES VENEERS, 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 Decision, Findings of Fact, Conclusions of Law, and Recommended Order 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 within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during 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 Decision, Findings of Fact, Conclusions of Law, and 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 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.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:


Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601

Mr. John R. Lockwood (Certified Mail #456889)
Central States Veneers, Inc.
1431 Avondale Station
Paducah, Kentucky 42001

Central States Veneers, Inc. (First Class Mail)
1602 Prospect Street
High Point, North Carolina 27261

This 26th day of April, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #317

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS. FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDED DECISION

CENTRAL STATES VENEERS, INC.

RESPONDENT

STATEMENT OF THE CASE

This matter arises from four citations issued against Central States Veneers, Inc., hereinafter referred to as "Central States", by the Commissioner of Labor, hereinafter referred to as the "Commissioner", for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On July 26, 1976, a Compliance Officer for the Commissioner made an inspection of Central States manufacturing facilities in Paducah. As a result of that inspection, the Commissioner on August 9, 1976 issued 5 citations against Central States charging it with 4 nonserious violations of the Act and 4 nonserious repeat violations of the Act. The Commissioner proposed penalties totalling \$638.00 for the nonserious repeat violations.

On September 2, 1976, Central States filed a notice with the Commissioner contesting the proposed penalties. Notice of the contest was transmitted to this Review Commission on September 7, 1976, and notice of receipt of the contest was sent to Central States on September 8, 1976. The Commissioner then filed its complaint on September 20, 1976. By separate orders dated October 22, 1976, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held pursuant to KRS 338.070(4) on November 18, 1976. in Paducah. That section of the statute authorizes this Review Commission to rule on appeals from citations, notations and variances to the provisions of the Act, and to adopt and promulgate rules and regulations concerning the conduct of those hearings. KRS 338.081 further authorizes this Review Commission to appoint Hearing Officers to conduct its hearings and represent it in this manner. The decisions of Hearing Officers are subject to review by the Review Commission on appeal timely filed by either party, of upon its own motion.

The standards, adopted pursuant to KRS Chapter 338 allegedly violated, the descriptions of the alleged violations, and the penalty proposed for same are as follows:

| | | |
|--|--|----------|
| 29 CFR 1910.219(d) (1) (as adopted by 803 KAR 2:020) | Pulleys which were less than seven (7) feet from the floor were not guarded in accordance with the standards specified in paragraphs <u>M</u> and <u>Q</u> of this section. (Flitch Deck Machine; Sawmill) | \$188.00 |
| 29 CFR 1910.219(e) (1)(i) (as adopted by 803 KAR 2:020) | Horizontal belts which were less than forty-two (42) inches from the floor were not fully enclosed in accordance with paragraphs <u>M</u> and <u>Q</u> of this section. (Flitch Deck Machine; Sawmill) | \$150.00 |
| 29 CFR 1910.179(j) (2)(iv) (as adopted by 803 KAR 2:020) | Monthly signed reports on hoist load attachment chains were not kept (Yale overhead crane; Yard Area) | \$150.00 |
| 29 CFR 1910.23(d) (1)(iii) (as adopted by 803 KAR 2:020) | A stairway having four (4) or more risers, both sides open, and less than forty-four (44) inches wide was not provided with a stair railing on each open side. (Stairway leading from ground level up to the floor of the Sawmill) | |

All were cited as repeat violations contained in a citation issued against Central States by the Commissioner on June 13, 1974.

At the hearing, the Commissioner moved to dismiss the third citation which alleges that horizontal belts on the Flitch Deck Machine were not fully enclosed as required by 1910.219(e)(1). The belts in question were attached to the pulleys which were cited in the second citation for being improperly guarded in violation of 1910.219(d)(1). The Commissioner stated that even though there are separate standards for belts and for pulleys it was departmental policy to regard violations involving belts and pulleys attached to one another and operating as a unit, as a single violation of the Act. We believe this interpretation of the standards is erroneous.

Although, we can find no case where this specific point was raised, there are several cases involving belts and pulleys operating as a unit. In all those cases, if both standards were violated, the employer was cited for both violations. For example, in Osbron Mfg. Co. CCH-OSHD ¶ 18,941 (1974) the failure to guard the belts and pulleys on a "Morgan Nailer" was held to be a violation of both 1910.219(d) and 1910.219(e). Also, in Central Tire Co. and Mountain View Transportation Co. CCH-OSHD ¶ 17,211 (1974), the Review Commission treated the failure to guard the pulleys and the belts on an air compressor as two separate violations.

In our opinion this application is consistent with the intent of the standards. Even though a belt and a pulley may operate as a unit, the fact that there are separate standards governing their use indicates that the intention was to treat all belts and pulleys separately. Had the intention been otherwise, there would have been a standard specifically related to belts and pulleys operating as a unit.

Therefore, for these reasons, the motion is overruled.

In reaching this decision, we are not unmindful of the fact that the Commissioner is the principal agent charged with enforcement of the Act.

As such, his interpretation of the Act is entitled to be given considerable weight. But the Commissioner is not the only agent charged with this duty, and where a policy is of long standing it should not be changed unilaterally by the Commissioner.

Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law and Recommended Decision are hereby made.

FINDINGS OF FACT

Central States manufacturers wood veneers from logs brought to its plant facilities in Paducah. As a part of its manufacturing process, Central States uses a machine which was identified as a "Flitch Deck Machine". The machine has pulleys which are 18 inches above the floor and which are powered by a belt which is less than 42 inches above the floor. Neither the pulleys or the belts were guarded or enclosed.

There is an overhead crane in the yard outside the sawmill. This crane is equipped with attachment chains and is used to move logs into the sawmill. Although, the attachment chains on the crane were in good condition, Central States had no monthly reports to show that they were inspected regularly.

A wooden staircase leads from the yard to the sawmill deck. This stairway is 6 risers high and 26 inches wide, and is used by employees going to and from the mill. Both sides of the stairway were open.

In proposing the penalties for these violations, the Commissioner proposed an unadjusted penalty of \$100.00 for the violations involving the belts, the crane and the stairway. This is the minimum unadjusted penalty the Commissioner proposes for any repeat violation.

This Commissioner, however, believed that the violation involving the pulleys was more serious. He, therefore, proposed a slightly higher unadjusted penalty of \$125.00.

After applying an adjustment factor of 25% and then multiplying the two the Commissioner reached his proposed penalties of \$188.00 for the pulley violation and \$150.00 for the others.

CONCLUSIONS OF LAW

The standards alleged by the citations to have been violated provide as follows:

29 CFR 1910.219(d)(1) (as adopted by 803 KAR 2:020): Mechanical power-transmission apparatus Pulleys Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section

29 CFR 1910.219(e)(1)(i) (as adopted by 803 KAR 2:020): Mechanical power-transmission apparatus Belt rope and chain drives Horizontal belts and ropes. Where both runs of horizontal belts are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section

29 CFR 1910.179(j)(2)(iv) (as adopted by 803 KAR 2:020): Overhead and gantry cranes Inspection Frequent Inspection. The following items shall be inspected for defects at intervals as defined in subparagraphs (1)(ii) of this paragraph or as specifically indicated: Hoist or load attachment chains, including end connections, for excessive wear, twist, distorted links interfering with proper function, or stretch beyond manufacturer's recommendation. Visual inspection daily, monthly inspection with signed report.

29 CFR 1910.23(d)(1)(iii) (as adopted by 803 KAR 2:020): Guarding floor and wall opening and holes Stairway railings and guards. Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in subdivision (i) through (u) of this subparagraph th width of the stair to be measured clear of all obstructions On stairways less than 44 inches wide having both sides open, one stair railing on each side.

In the instant case, the failure to guard the pulleys on the Fritch Deck Machine which were only 18 inches high, the failure to enclose the

horizontal belts which were less than 49 inches above the floor and were attached to the pulleys, the failure to maintain monthly reports on the condition of the attachment chains on the overhead crane, and the failure to equip the stairway leading from the yard to the sawmill deck with standard handrails, were violations of the applicable standards cited above. Furthermore, because they were repeat violations, the penalties proposed for them were appropriate under the circumstances.

RECOMMENDED DECISION

NOW, THEREFORE, IT IS HEREBY ORDERED

That Citation 2 charging a nonserious repeat violation of 29 CFR 1910.219(d)(1) and fixing a penalty therefore of \$188.00 is hereby sustained.

That Citation 3 charging a nonserious repeat violation of 29 CFR 1910.219(e)(1)(i) and fixing a penalty therefor of \$150.00 is hereby sustained.

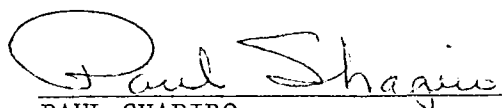
That Citation 4 charging a nonserious repeat violation of 29 CFR 1910.179(j)(2)(iv) and fixing a penalty therefor of \$150.00 is hereby sustained.

That Citation 5 charging a nonserious repeat violation of 29 CFR 1910.23(d)(1)(iii) and fixing a penalty therefor of \$150.00 is hereby sustained.

IT IS FURTHER ORDERED that the violations must be abated and the penalties paid without delay, but no later than 30 days from the date hereof.

Dated: April 26, 1977
Frankfort, Kentucky

DECISION NO. 408


PAUL SHAPIRO
HEARING OFFICER
KOSHR