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10-11-110

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision #
Order # 428*

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC #319

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

TICK BROTHERS, INCORPORATED

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and STOWERS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of 15 March 1977, is before this Commission for consideration and order pursuant to Respondent's petition for discretionary review.

Upon review of the record in this matter, it is found that the Hearing Officer's conclusions are well-supported by the evidence, and that a proper application of the law was made to the facts herein. In finding such, we have not failed to note Complainant's failure to file a brief in this case after motion to do so was made by Complainant and granted by this Commission on 19 April 1977.

Respondent here has further petitioned this Commission for relief in the form of an application for variance due to the prohibitive costs of compliance. Under KRS Chapter 338.153(1) the jurisdiction to grant such relief lies with the Commissioner of Labor; therefore this Commission is without jurisdiction to consider the merits of Respondent's petition. Any further relief of this nature sought by Respondent, therefore, should be sought from the Commissioner of Labor.

Accordingly, it is ORDERED that the Hearing Officer's Recommended Order of 15 March 1977, sustaining the citation in question herein is hereby AFFIRMED. It is further ORDERED that the length of abatement time ordered by the Hearing Officer is hereby REVERSED, and the original abatement periods of three and five months for 29 CFR 1910.107(c)(5) and 29 CFR 1910.94(c)(4) (as adopted by 803 KAR 2:030), respectively, are hereby GRANTED. All other findings of the Hearing Officer not inconsistent with this decision are AFFIRMED.


Merle H. Stanton, Chairman

(Agreed, but unavailable for signature.)
Charles B. Upton, Commissioner

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

DATED: June 14, 1977
Frankfort, Kentucky

DECISION NO. 428

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 and Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Capital Plaza Tower - 1st Floor
Frankfort, Kentucky

Mr. Pat F. Parrish, President (Certified Mail #114270)
Tick Brothers, Inc.
Post Office Box 2216
Paducah, Kentucky 42001

Mr. Robert Robinson, V-Pres./Treas (First Class Mail)
Tick Brothers, Inc.
Post Office Box 2216
Paducah, Kentucky 42001

This 14th day of June, 1977.


Iris R. Barrett, Executive Director



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 15, 1977

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 319

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

TICK BROTHERS, 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:

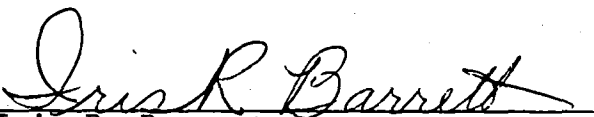
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. Pat F. Parrish, President (Certified Mail #976268)
Tick Brothers Inc.
Post Office Box 2216
Paducah, Kentucky 42001

Mr. Robert Robinson, V-Pres. & Treasurer (First Class Mail)
Tick Brothers Inc.
Post Office Box 2216
Paducah, Kentucky 42001

This 15th day of March, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #319

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDED DECISION

TICK BROTHERS, INC.

RESPONDENT

STATEMENT OF THE CASE

This matter arises from a citation issued against Tick Brothers, Inc., hereinafter referred to as "Tick Brothers", 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 August 3 and 4, 1976, an Industrial Hygienist for the Commissioner made an inspection of Tick Brothers' business facilities in Paducah. As a result of that inspection, the Commission on August 13, 1976, issued a citation against Tick Brothers, charging it with seven non-serious violations of the Act and proposing a penalty therefor of \$41.00. The citation was received by Tick Brothers on August 18, 1976.

On September 7, 1976, and within 15 working days from receipt of the citation, Tick Brothers filed a notice with the Commissioner contesting two items on the citation, including the item for which the penalty was proposed. Notice of the contest was transmitted to this Review Commission on September 9, 1976, and notice of receipt of the contest was sent to Tick Brothers on September 10, 1976. Thereafter on September 14, 1976, the Commissioner filed its Complaint.

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 statutes 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 on appeal timely filed by either party, or upon its on motion.

The standards, regulations or sections of KRS Chapter 338 allegedly violated, the description of the alleged violation and the penalty for same are as follows:

1910.94(c) (4)(i)	The spraying area was not constructed of noncombustible material.	None
1910.107(c) (5)	The electrical equipment located in the spraying area was not approved for locations containing both deposits of readily ignitable residue and explosive vapors (i.e. spot lights, fans, outlets junction boxes).	\$41.00

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

Tick Brothers is in the business of fabricating steel products. A small part of its business is the spray painting of its finished products. The spray painting is done in an area of a building located between two other buildings where the products are fabricated. By

locating the spray painting in the central building, Tick Brothers is able to minimize the handling of materials to be painted. This, in turn, enables Tick Brothers to operate more efficiently than if the spray painting were conducted at another location.

During the course of his inspection, the Industrial Hygienist found deposits of paint in the spraying area. He also found other combustible materials in the spraying area such as paint in cans, empty paint cans, and wooden two by fours. The floor of the spraying area was covered by a plastic cover, one wall was covered by plywood, and the ceiling was made of wood, all combustible materials. In addition, wiring in the area was not encased in rigid conduits, electric outlets and junction boxes were not approved for use in paint spraying areas, the motor of an exhaust fan was not encased in an approved explosion-proof housing, and overhead lights and spot lights were not explosion-proof. Since vapors emitted during spray painting create a combustible atmosphere, the conditions found by the Industrial Hygienist created a fire hazard in the spray painting area to which all employees working in the area were exposed.

Tick Brothers does not dispute the findings made by the Industrial Hygienist. Instead, they state that the cost of abating those conditions, within the time required by the citation (February 14, 1977 for removal of combustible materials and November 15, 1976 for the removal of non-complying electrical equipment) is financially prohibitive and may require them to discontinue their spray painting operations. Tick Brothers maintains that the abatement dates should have been longer, at least one year for the ceiling and six months for all other violations cited.

CONCLUSIONS OF LAW

CFR 1910.94(c)(4)(i) provides as follows:

Ventilation Spray-finishing operations
 Design and construction of spray rooms
 Spray rooms, including floors, shall be
constructed of masonry, concrete, or other
non-combustible material.

There can be little question that this standard was violated. The wooden walls, the wooden ceiling and the plastic floor were all combustible materials proscribed by the standard.

CFR 1910.107(c)(5) provides as follows:

Spray finishing using flammable and combustible
materials Electrical and other sources
of ignition Combustible residues, areas.
Unless specifically approved for locations
containing both deposits of readily ignitable
residue and explosive vapors, there shall be
no electrical equipment in any spraying area,
whereon deposits of combustible residue may
readily accumulate, except in wiring in rigid
conduit, or in boxes or fittings containing
no taps, splices or terminal connection.

Hear again, there is little question that the standard was violated. The unencased wires alone were violative of the standard, not to mention the other electrical fixtures found in the area.

The only real question raised by proceedings is the reasonableness of the abatement period. What constitutes a reasonable abatement period was discussed in Matthews and Fritts, Inc., CCH-OSHD ¶ 18,455 (1974).

There it was held that an abatement period should be long enough to permit an employer to evaluate the violation, formulate plans for its correction, and have time to implement corrective plans.

In the instant case the abatement periods proposed in the citation by the Commissioner were reasonable under the circumstances. The citation gave Tick Brothers three months to correct the violative conditions created by the electrical equipment, and five months to remove the combustible

materials from the spraying area. This allowed ample time for Tick Brothers to evaluate the situation and take whatever corrective action was deemed necessary or feasible.

There is one final issue raised by the pleadings and that involves the proposed penalty of \$41.00. At the hearing the Commissioner stated that pursuant to his interpretation of a recent Act of Congress relating to the funding of state OSHA programs, penalties could no longer be imposed where 10 or less nonserious violations are found. As a result no proof relative to the appropriateness of the penalty was presented. Whether the Commissioner is correct in his interpretation of the Congressional Act insofar as it applies to this situation is irrelevant, however, since the evidence contains no proof relating to the penalty. Therefore, the penalty should be vacated.


RECOMMENDED DECISION

NOW, THEREFORE, IT IS HEREBY ORDERED:

That Item 5 of the citation charging a nonserious violation of CFR 1910.94(c)(4)(i) is hereby sustained and the said violation must be abated without delay, but no later than 120 days from the date hereof.

That Item 6 of the citation charging a nonserious violation of CFR 1910.107(c)(5) is hereby sustained and the said violation must be abated without delay, but no later than 60 days from the date hereof.

That the penalty proposed for the violation of CFR 1910.107(c)(5) is hereby vacated.



PAUL SHAPIRO
HEARING OFFICER
KOSHRC

Dated: March 15, 1977
Frankfort, Kentucky

DECISION NO. 391