



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

WENDELL H. FORD
GOVERNOR

REVIEW COMMISSION

IRIS R. BARRETT
EXECUTIVE DIRECTOR

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

*KOSHRC Decision
and Order # 51*

KOSHRC # 32

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

vs.

SANDUSKY DISTRIBUTING COMPANY (MR. WIGGS)

RESPONDENT

REVIEW COMMISSION
DECISION

Before STOWERS, Chairman, UPTON and STANTON,
Commissioners.

STANTON, COMMISSIONER:

This matter is before the Commission on my order directing review of a recommended order issued by Honorable Roger D. Riggs, Hearing Officer. Mr. Riggs proposed that the Complainant's citation alleging nonserious violations of the Kentucky Occupational Safety and Health Act be affirmed and that the proposed penalties of \$34.00 for item #2 and \$34.00 for item #3 on the citation also be affirmed. Mr. Riggs further vacated the proposed penalty of \$34.00 for item #4, charging that the Complainant had not "...met his burden of proof in such a manner as to support the imposition of a penalty."

The Commission has reviewed the findings of fact and the recommended order of Mr. Riggs and the entire record of the case. The Commission hereby adopts and affirms the Hearing Officer's recommended order only to the extent that it is consistent with the following decision:

On March 12, 1974, the Department of Labor issued a citation to Respondent for alleged nonserious violations of 29 C.F.R. 1910.37 (q)(1), 1910.22 (b)(1), 1910.23 (d)(1)(ii) and (iii) and OSH regulation 116 sec. 5(d)(1) and the Department proposed penalties for three of the violations, each in the amount of \$34.00. Respondent admitted each and every alleged violation but it contested the fairness of the proposed penalties.

The proposed penalty which was vacated was issued for an alleged violation of 29 C.F.R. 1910.23 (d)(1)(iii). That standard requires a stairway less than 44" wide to have handrails on each side. The Respondent had a metal stairway without such handrails leading from the loading platform outside the building to the driveway below. It is Respondent's contention that the stairway is so seldom used that a penalty should not be assessed even though the violation did occur. It is the policy of this Commission to consider such factors as exposure of employees to danger and gravity of the violation in determining what, if any, penalty should reasonably be assessed.

In the instant case, the record indicates that normally, the stairway in question is not used for purposes of loading or unloading trucks because the trucks back up directly to the loading dock. (Tr. of Ev., p. 81). But other evidence indicated that the stairway was used at times (Tr. of Ev., p. 81) and that there were trash dumpsters in the immediate area; the inference being that primary access to the trash dumpsters was via the stairway in question. (Tr. of Ev., p. 29).

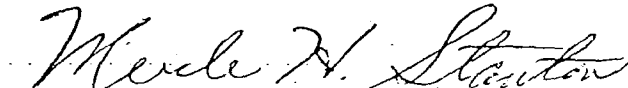
Further, the stairway is metal and it is exposed to the weather, adding considerably to the likelihood that an accident might occur, notwithstanding infrequent use of the stairway.

Although the Complainant did not show with great particularity the frequency of use of the stairway, the Complainant did show, without contradiction, that the stairway was used by employees. (Tr. of Ev., p. 105). This together with the fact that this is a metal stairway which is exposed to the weather leads us to the conclusion that there is sufficient proof to justify the imposition of a penalty and further, that a penalty in the amount of \$34.00 is not unreasonable.

ORDER

IT IS HEREBY ORDERED that the portions of the Hearing Officer's recommended order not inconsistent with this opinion be and hereby are affirmed; and that the proposed penalty of

\$34.00 for violation of 29 C.F.R. 1910.23 (d)(1)(iii) be and hereby is reinstated.


Merle H. Stanton, Commissioner

Concurring:

/s/H. L. Stowers
Herbert L. Stowers, Chairman

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

KOSHRC Decision No. 51

DATED: August 27, 1974
Frankfort, Kentucky



WENDELL H. FORD
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

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KOSHRC # 32

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

- VS -

SANDUSKY DISTRIBUTING COMPANY (MR. WIGGS)

RESPONDENT

NOTICE OF RECEIPT OF RECOMMENDED
DECISION OF HEARING OFFICER
AND ORDER

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a recommended decision of our hearing officer, the Honorable Roger D. Riggs, has this day been received and is attached hereto as a part of this Notice and Order of this Commission.

You will take further 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.

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 as recommended by the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, the decision of the hearing officer is adopted and affirmed as the decision 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 filed by one or more Review Commission members.

Received *AB*

23-74


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

Commissioner of Labor of Kentucky
Attention: Honorable Michael D. Ragland
OSHA Coordinator

Honorable Earl Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601

Sandusky Distributing Company
1800 Alexandria Drive
Lexington, Kentucky 40504

This 23rd day of July, 1974.



Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC Docket #32

Commissioner of Labor of Kentucky

Complainant

VS.

DECISION, FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

Sandusky Distributing Company
(Mr. Wiggs)

Respondent

* * * * *

This hearing was held on June 14, 1974, at 109 N. Mill Street, Lexington, Kentucky, under the provisions of KRS 338 of the Kentucky Revised Statutes dealing with the safety and health of employees, which authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of said Chapter and to adopt and promulgate rules and regulations with respect to the procedural aspect of its hearings. Under the provisions of KRS 338.081, hearing authorized thereunder may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing the Commission may sustain, modify, or dismiss a citation or penalty.

On March 12, 1974, as a result of an inspection made on February 17, 1974, at a retail department store operated by respondent and located at 1800 Alexandria Drive, Lexington, Kentucky, the Department of Labor

of Kentucky, Compliance Section of the Division of Occupational Safety and Health, issued a citation to the respondent alleging five (5) other than serious violations. On the basis of such inspection, it was alleged that respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

As to Item #1, the standard or regulation allegedly violated was 29 CFR 1910.37 (q) (1) (as adopted by OSH 11) and a description of the alleged violation was:

Exits and access to exits were not marked by readily visible signs (domestic stock room, shoe stock room).

and the date by which the alleged violation was to be corrected was without delay but no later than April 4, 1974. No penalty was proposed.

As to Item #2, the standard or regulation allegedly violated was 29 CFR 1910.22 (b) (1) (as adopted by OSH 11) and was described as:

Aisles and passageways were not kept clear or in a good condition, having obstruction across or in aisles that could create a hazard (receiving area).

and the date on which the alleged violation was to be corrected was without delay but no later than April 4, 1974. A penalty of \$34.00 was proposed.

As to Item #3, the standard or regulation allegedly violated was 29 CFR 1910.23 (d) (1) (ii) (as adopted by OSH 11) and the description of the alleged violation was:

A stairway less than forty-four (44) inches wide having one (1) open side did not have a railing on the open side (lawn and garden stock room).

and the date on which the alleged violation was to be corrected was without delay but no later than April 25, 1974. A penalty of \$34.00 was proposed.

As to Item #4, the standard or regulation allegedly violated was 29 CFR 1910.23 (d) (1) (iii) (as adopted by OSH 11) and the description thereof was as follows:

A stairway less than forty-four (44) inches wide having both sides open did not have railings on each side (receiving dock outside of bldg.).

and the date on which the alleged violation was to be corrected was without delay but no later than April 25, 1974. A penalty of \$34.00 was proposed.

As to Item #5, the standard or regulation allegedly violated was OSH 116 Sec. 5(d) (1) and the description of the alleged violation was:

The annual summary of occupational injuries and illnesses was not posted (i.e. OSHA Form No. 101; main plant).

and the date by which the alleged violation was to be corrected was without delay but no later than April 4, 1974. No penalty was proposed.

By letter dated March 25, 1974, respondent by Raymond T. Lester, Store Manager, notified the Occupational Safety and Health Division of

the Department of Labor that it was contesting the penalties proposed for items 2, 3, and 4 of the Labor Department's citation.

Thereafter, the Occupational Safety and Health Review Commission was notified by the Department of Labor, on April 4, 1974 that, in accordance with the KOSH RC Rules of Procedure, respondent intended to contest. Along with the notice of contest, the Labor Department also forwarded a copy of its citation and a copy of its notice of proposed penalty to respondent.

A notice of receipt of contest with instructions to the employer was mailed to each of the parties, along with a notice to employers of respondent a form for a certification of the employer and a notice from the Kentucky Occupational Safety and Health Review Commission.

On April 11, 1974, respondent certified that the notice supplied by the Commission advising affected employees of this case and of the fact that a copy of the employer's notice of contest was posted at each place where the Kentucky Occupational Safety and Health Act citation is required to be posted. It indicated therein that the name of the local union which represented affected employees was:

Teamster's Local 651
Goodwin Drive
Lexington, Kentucky.

A copy of the complaint was received by the Kentucky Occupational Safety and Health Review Commission on April 16, 1974.

On May 8, 1974 the Review Commission received a letter from respondent stating that it wished "to contest the penalty only before the KOSHA Review Commission", and an assurance that all of the violation

had been corrected within the prescribed times.

On agreement of the parties, hearing was held and limited to the question of the appropriateness of the proposed penalties in light of the gravity of the alleged violations. After hearing the testimony of the witnesses and having considered the same together with the exhibits and stipulations and representations of the parties, it is concluded that the substantial evidence, on the record considered as a whole, supports the following:

FINDINGS OF FACT

It is, on stipulation of the parties, found that the allegations hereinbefore described each occurred and there is no contest by respondent as to whether or not a violation occurred as to each item.

CONCLUSIONS OF LAW

1. Limiting the Review Commission's review to the fairness of the proposed penalties of Item #2, Item #3, and Item #4, as agreed upon by the parties, appears appropriate under the circumstances, since it does not appear that error would result from not reviewing the existence of the violations in these or the other items.

2. As to the fairness of the proposed penalties in question, respondent takes the position that it acted in good faith by immediately abating or initiating steps to abate, as quickly as possible, the conditions which constituted violations. Respondent feels that such good faith, and the fact that it has a somewhat formalized safety program should be sufficient to reduce or entirely eliminate the penalties imposed as to Items #2, #3, and #4. Certainly due

consideration should be given to good faith in proposing a penalty. But appropriate penalties will be proposed with respect to alleged violations (and imposed as to proven or admitted violations) even though having been informed of the alleged violation, the employer immediately abates or initiates abatement procedures. In assessing all civil penalties under Chapter 338, along with good faith, due consideration is also given to the appropriateness and fairness of the penalty with reference to the size of the employer's business, gravity of the violation, and the history of violations.

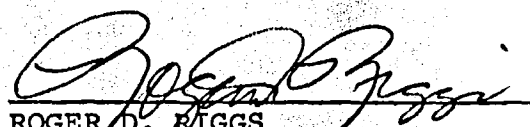
3. As to Item #2 and Item #3, the Compliance Officer gave effect to the prescribed criteria and gave them proper weight under the circumstances in assessing the proposed penalties.

4. As to Item #4, although it was admitted by the respondent that the conditions constituting a violation existed, the Commissioner did not meet his burden of proof in such a manner as to support the imposition of a penalty. The violation, by stipulation and admission of respondent, did occur. Photographic evidence also supported the basic idea that some danger existed. But the only proof of any exposure of the danger to the employees was the statement by respondent that the stairs were used "Very seldom." The burden of proof being on the complainant, this is not sufficient evidence that the situation was grave enough to support any penalty at all.

RECOMMENDED ORDER

IT IS ORDERED that the proposed penalty of \$34.00 for Item #2, and the proposed penalty of \$34.00 for Item #3 shall be and the same

are hereby sustained; and that the proposed penalty of \$34.00 for Item #4 shall be and the same is hereby vacated.


ROGER D. BIGGS
HEARING OFFICER, KOSHR

Dated: July 23, 1974
Frankfort, Kentucky

Decision No. 36