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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

September 14, 1977

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

KOSHRC # 320

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decisions &
Order No. 466*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WESTERN TOOL & DIE

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; Upton and Stowers, Commissioners.

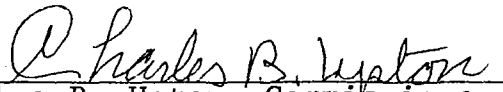
PER CURIAM:

A Recommended Order of Hearing Officer Herbert B. Sparks, issued under date of June 2, 1977, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by respondent.

It is the finding of this Commission that the Hearing Officer's decision in this case is substantially correct. We find, however, that the facts at hand do not warrant the penalty reduction for Item 7. Due to employee exposure, lack of effort at compliance, and the danger involved, a penalty of \$400 is imposed for Item 7.

Accordingly it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has reduced the proposed penalty for Item 7 to \$200 is REVERSED, and a penalty of \$400 is imposed for that item. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

Merle H. Stanton
Merle H. Stanton, Chairman



Charles B. Upton, Commissioner

/s/ H. L. Stowers

H. L. Stowers, Commissioner

DATED: September 14, 1977
Frankfort, Kentucky

DECISION NO. 466

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
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

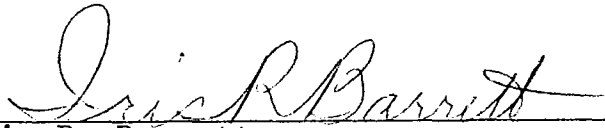
Honorable Kenneth E. Hollis, General Counsel (Messenger Service)
Department of Labor
Frankfort, Kentucky 40601
Attention: Hon. Timothy O'Mara
Assistant Counsel

Honorable Dixie Satterfield (Certified Mail #456847)
Safford & Satterfield
324 East Tenth Street
Bowling Green, Kentucky 42101

Western Tool and Die (Certified Mail #456848)
719 Kentucky Street
Bowling Green, Kentucky 42101

Messrs. Ronnie Merideth, (First Class Mail)
Avery M. Logsdon and
William C. Burke
211 B. Ragland Lane
Bowling Green, Kentucky 42101

This 14th day of September, 1977.


Iris R. Barrett
Executive Director

Stanton



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 2, 1977

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 320

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WESTERN TOOL AND DIE

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, General Counsel (Messenger Service)
Department of Labor
Frankfort, Kentucky 40601
Attention: Hon. Timothy O'Mara
Assistant Counsel

Honorable Dixie Satterfield (Certified Mail #114259)
Safford & Satterfield
324 East Tenth Street
Bowling Green, Kentucky 42101

Western Tool and Die (Certified Mail #114260)
719 Kentucky Street
Bowling Green, Kentucky 42101

Messrs. Ronnie Merideth, (Certified Mail #114261)
Avery M. Logsdon and
William C. Burke
211 B. Ragland Lane
Bowling Green, Kentucky 42101

This 2nd day of June, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

KOSHRC # 320

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

WESTERN TOOL AND DIE

RESPONDENT

* * * * *

Hon. Tim O'Mara, Attorney at Law, Frankfort, Kentucky, for
Complainant

Hon. Dixie R. Satterfield, Attorney at Law, Bowling Green,
Kentucky, for Respondent

* * * * *

The Respondent, Western Tool and Die, was cited for various violations of the Occupational Safety and Health Act on September 15, 1975. The Respondent contested the citation and a hearing was held on November 25, 1975. Following that hearing a Recommended Order was issued by the Review Commission on May 18, 1976. The abatement date on the sustained citations was set at thirty days from the date of the Recommended Order. No appeal was taken from this order.

On August 25, 1976, a follow-up inspection was conducted by the Complainant. Subsequent to and as a result of the follow-up

inspection, the Respondent was issued a failure to abate on seven of the items in the original inspection. An additional citation was issued with the failure to abate. The Respondent contested this action.

As a result of the follow-up inspection the Respondent was alleged to have failed to abated the conditions alleged in items 3, 4, 6, 7, 8, 9 and 10 of the original citation.

Those items were as follows:

Item No. 3 alleged a violation of 29 CFR 1910.219(d)(1) (as adopted by 803 KAR 2:020) in that:

"Pulleys less than seven (7) feet from the floor were not guarded (two 'Bridgeport' mill machines in the shop were partially guarded)."

Item No. 4 alleged a violation of 29 CFR 1910.219(e)(1) (as adopted by 803 KAR 2:020) in that:

"Horizontal belts seven (7) feet or less from the floor were not guarded (two 'Bridgeport' mill machines in the shop were partially guarded)."

Item No. 6 alleged a violation of 29 CFR 1910.217(b)(4)(i) (as adopted by 803 KAR 2:020) in that:

"The pedal mechanism on the 'Toledo' punch press in the shop was not protected to prevent unintended operation from falling or moving objects or by accidental stepping on the pedal."

Item No. 7 alleged a violation of 29 CFR 1910.212(b) (as adopted by 803 KAR 2:020) in that:

"The 'Toledo' punch press in the shop was designed for a fixed location and was not securely anchored to prevent walking or moving."

Item No. 8 alleged a violation of 29 CFR 1910.252(b)(2)(iv)(d) (as adopted by 803 KAR 2:020) in that:

"Terminals for welding leads on a 'Lincoln' Ideal arc 250 in the shop was not protected from accidental electrical contact by personnel or by metal objects."

Item No. 9 alleged a violation of 29 CFR 1910.215(a)(4) (as adopted by 803 KAR 2:020) in that:

"On a 'Dayton' pedestal grinder in the shop, the work rest was not kept adjusted closely to the wheel with a maximum opening of one-eighth (1/8) inch."

Item No. 10 alleged a violation of 29 CFR 1910.215(b)(9) (as adopted by 803 KAR 2:020) in that:

"On a 'Dayton' pedestal grinder in the shop the distance between the wheel periphery and adjustable tongue exceeded one-fourth (1/4) inch."

There was also an allegation that the follow-up inspection mentioned above revealed another violation of the act under 803 KAR 2:125, Section 1(b), in that:

"Upon receipt of a citation issued under KRS Chapter 338, the citation, or a copy thereof, unedited, was not posted at or near each place an alleged violation referred to in the citation occurred, or in a prominent place where it would be readily observable by all affected employees (citation issued September 16, 1975)."

The citation was issued for this violation on September 2, 1976. A penalty of \$100.00 was attached to this violation and an abatement date of September 7, 1976 was issued by the Complainant.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was August 25, 1976.
2. Citation was issued September 2, 1976.

3. The proposed penalty for the contested standards herein was \$700.00 for each of the alleged failures, to abate, and \$100.00 for the new alleged violation of the Acts and Standards.
4. Notice of Contest was received from the employer on September 17, 1976.
5. Complaint was received on September 23, 1976.
6. An Order of Intervention was ordered on September 27, 1976, allowing Ronald W. Merideth, Avery M. Logsdon, and William C. Burks, employees of Western Tool and Die, 719 Kentucky Street, Bowling Green, Kentucky, to appear as intervenors pursuant to Section 14 of the Rules of Procedure of this Commission.
7. An Answer from intervenors was received October 13, 1976.
8. Answer to Complaint received October 13, 1976, from the Respondent.
9. Case assigned to Hearing Officer on October 19, 1976.
10. Hearing was held on November 4, 1976, at the Department of Labor Conference Building, Room 108, Bowling Green, Kentucky.
11. Numerous requests for extensions were received regarding the Briefs in this case, and the Briefs were received during March of 1977.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorized the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of this chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearing. Under the provisions of KRS 338.081, the hearing was authorized by the provisions of said chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal the Review Commission may

sustain, modify or dismiss the citation or penalty.

After hearing the testimony of the witnesses, having considered same, together with exhibits filed and stipulations and representations of the parties, it is concluded that the substantial evidence of the record considered as a whole supports the following Findings of Fact.

FINDINGS OF FACT

The standards that were in question were as follows:

29 CFR 1910.219(d)(1) (as adopted by 803 KAR 2:020) reads as follows:

"Pulleys-(1) 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. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes."

29 CFR 1910.219(e)(1) (as adopted by 803 KAR 2:020) reads as follows:

"Belt, rope, and chain drives-(1) Horizontal belts and ropes. (i) Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt or to a standard height (see Table 0-12), except that where both runs of a horizontal belt 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 1910.217(b)(4)(i) (as adopted by 803 KAR 2:020) reads as follows:

"Foot pedals (treadle). (i) The pedal mechanism shall be protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedal."

29 CFR 1910.212(b) (as adopted by 803 KAR 2:020) reads as follows:

"General requirements for all machines. (b) Anchoring fixed machinery. Machines designed for a fixed location shall be securely anchored to prevent walking or moving."

29 CFR 1910.252(b)(2)(iv)(d) (as adopted by 803 KAR 2:020) reads as follows:

"Welding, cutting and brazing. (iv) Design. (d) Terminals for welding leads should be protected from accidental electrical contact by personnel or by metal objects i.e., vehicles, crane hooks, etc. Protection may be obtained by use of: dead-front receptacles for plug connections; recessed openings with nonremovable hinged covers; heavy insulating sleeving or taping or other equivalent electrical and mechanical protection. If a welding lead terminal which is intended to be used exclusively for connection to the work is connected to the grounded enclosure, it must be done by a conductor at least two AWG sizes smaller than the grounding conductor and the terminal shall be marked to indicate that it is grounded."

29 CFR 1910.215(a)(4) (as adopted by 803 KAR 2:020) reads as follows:

"General requirements-(4) Work rests. On offhand grinding machines, work rests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. Work rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage. The work rest shall be securely clamped after each adjustment. The adjustment shall not be made with the wheel in motion."

29 CFR 1910.215(b)(9) (as adopted by 803 KAR 2:020) reads as follows:

"Exposure adjustment. Safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in subparagraphs (3) and (4) of this paragraph shall never be exceeded, and the distance between

the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch."

803 KAR 2:125, Section 1(b) reads as follows:

"Upon receipt of a citation issued under KRS Chapter 338, the citation, or a copy thereof, unedited, was not posted at or near each place an alleged violation referred to in the citation occurred, or in a prominent place where it would be readily observable by all affected employees (citation issued September 16, 1975)."

Jurisdiction of the parties in the subject matter and due and timely notice of the hearing is found by the Hearing Officer.

As to Item No. 3, the pulley violation, the testimony of the Compliance Officer was "the situation was the same as the first time I was there. There were two Bridgeport Milling Machines, approximately 68 inches off the ground with openings 11 inches by two inches wide." The Compliance Officer testified that the Bridgeport Milling Machine was a machine which is similar to a drill press which the operator controls the upward and downward movements of it. "It bores^{holes}/in different materials. It is the type of operation where you change speeds to it." (TR. 29).

The Compliance Officer further testified that the belt pulley system was open, and there was a failure to abate because it was not guarded at the time of his inspection.

He further elaborated that any type of guard that was specified in the standards would be acceptable. In his experience, usually the type of guard that would be adjustable from the top, bottom or side, hinged so that the employee or employer can get to the belts as needed would be used.

The Compliance Officer further testified that there was no guard on the machine at the time and he believed Mr. Roundtree stated that he was in the process of designing a guard. The Compliance Officer further testified that such a guard could be made out of plexi-glass metal or expanded metal. (TR. 34-35).

Further, as to the alleged violation concerning the belts under 29 CFR 1910.219(e)(1) (as adopted by 803 KAR 2:020), the Compliance Officer testified that the same guard would have covered both operations. The machines involved were basically composed of a system where there were two pulleys, one being a drive pulley and a belt running around these two pulleys which drives the shaft.

The Compliance Officer further testified that the reason for the two citations being issued was because two standards were violated. However, one guard would correct both of the violations.

As to the alleged violation concerning 29 CFR 1910.217(b)(4)(i) (as adopted by 803 KAR 2:020) there was testimony that the foot pedal on a mechanical power press was not guarded. A photograph was introduced into evidence showing the foot pedal on the foot press and it showed no guard on that pedal. It further showed an anchoring hole for the press. The Compliance Officer testified that the pedal was not guarded to protect the employees, working on or with the press, from unintentional operation of it. The photograph showed materials around and about the pedal and that there had been work in the area. His testimony was that not only personnel could accidentally trip a pedal, but if the materials drop on the

pedal they could also accidentally trip this machine. The proposed foot pedal guard mentioned by the Compliance Officer was a U-shaped guard, which would allow the entrance of a foot in to operate the pedal, yet be protected from overhead danger. The Compliance Officer further testified that there had been no attempts of any kind to put any guard whatsoever on this particular pedal.

As to Item No. 7, alleging a violation of 29 CFR 1910.212(b) (as adopted by 803 KAR 2:020) and a machine not being anchored to the floor securely, there was photographs introduced showing the hole in the foots of the press where a bolt could be placed. The machine in question was designed for a fixed location. The specific standard herein in question states as follows: "Anchoring fixed machinery. Machines designed for a fixed location shall be securely anchored to prevent walking or moving." The Compliance Officer testified that there was no indication of any attempt to secure this particular machine or any attempt to abate the situation.

As to the alleged violation of 29 CFR 1910.252(b) (2) (iv) (d) (as adopted by 803 KAR 2:020) concerning the terminal leads on a welder being guarded, thus protecting it from accidental employee or material contact, a photograph was introduced which showed the welder in question. There were two leads on this welder which the cable was connected to, and the metal leads were not insulated or protected. The testimony from the Compliance Officer indicated that the leads were not insulated or guarded in any way to protect the employee or material from coming in contact with those leads. (TR. 45).

As to the alleged violation concerning the work rest on a grinder, and specifically Item No. 9, testimony from the Compliance Officer was that the rest was not adjusted to within one-eighth of an inch as specified in the standard. A photograph was introduced showing the work rest and the tongue guard. The Compliance Officer testified that he measured these items with a rule and took a photograph on the day of the inspection.

It was explained that a work rest is a piece of metal that the employee or employer can adjust closer to the wheel in order for him to lay his work upon it and use it to keep broken pieces from going down into the grinding wheel itself, thus damaging the wheel, or breaking it, or from accidentally letting the employee get part of his person caught in the moving parts of the wheel itself. The testimony was that the Compliance Officer found the work rest to be one-half inch from the wheel which was the same as the original inspection.

As to Item No. 10, the alleged violation concerning 29 CFR 1910.215(b)(9) (as adopted by 803 KAR 2:020), the Compliance Officer testified that on the same piece of equipment there was a guard known as a tongue guard. This was a guard at the top of the grinder which adjusted down. The purpose of this guard was to keep the flying pieces from the wheel from flying at the operator. The Compliance Officer found this guard to be an inch from the wheel, wherein the standard called for it to be a quarter of an inch from the wheel. He further testified that he saw no evidence of a change from the situation he found on his original inspection.

He testified further that Mr. Roundtree stated that there had been an correction, but they had come out of an adjustment..

As to the alleged violation of 803 KAR 2:125, Section 1(b), the Compliance Officer noted during his walk around that some of the items on the citation were not corrected and the citation was not posted. The citation containing the original ten items, the Compliance Officer testified that this was required to be posted for three days or until the violations were corrected, whichever is longer.

On the record, the parties stipulated that the procedure and mechanics followed in assessing the proposed penalties were in accordance with the directions of the Department of Labor.

KRS 338.991 states that an employer, for failure to abate, can be assessed a penalty of \$1,000.00 per day per item for the days over his atatement period. Under the Compliance Manual of the Department of Labor, the maximum number of seven days is utilized, and the particular penalties proposed on each one of the alleged failures to abate was \$700.00, which was \$100.00 per day with a maximum of seven days.

As to the alleged failure to post, the Compliance Manual set forth a recommended penalty of \$100.00.

The total amount of penalties proposed for the insepection in question was \$4,900.00 for failure to abate, and \$100.00 for failure to post the citation.

On cross-examination by Respondent's counsel, the Compliance Officer stated that the grinding violations which were referred to in Items No. 9 and 10 had been adjusted, but apparently had come

out of adjustment, and he had been told this by Mr. Roundtree, the owner of Respondent.

Testimony revealed further on cross-examination that the belts on the Bridgeport Milling Machine must be changed in order to vary the speed. The Compliance Officer further testified that in his past experience he had seen men resting their hands on the machines while they were in operation. He admitted that this would not be a prudent way of operating the machine.

Photographs were introduced by Respondent's counsel which indicated that the pedal extended upward and was attached to a spring on the press and that the spring was attached to a plate on the side of the press.

The Compliance Officer testified that he did not operate the machine, not did he see it operated. He testified further that Mr. Roundtree told him that the pedal operated the press. The Compliance Officer further stated that as to the welder, the terminal leads were a "little bit recessed" from the outside.

As to the guarding violations the Compliance Officer testified that if the screw or fastner became loosened, the guards on the grinders could work back and forth. The Compliance Officer further testified that as to the pedal on the punch press, there was no demonstration at anytime that the pedal was not in operation and could not be used. The Compliance Officer further testified that he had seen several Bridgeport Milling Machines in operation and, from his knowledge of the machines and in his opinion, they did revolve at a greater speed than 250 feet per minute.

It was basically the Respondent's contention that the Bridgeport Milling Machine was not a dangerous instrumentality when used by sober competent workmen. It was further his contention that he was complying with rules as best he could understand, and with a guard on the Bridgeport Milling Machine he would not be able to see when the belts and pulleys were turning. He further offered that the pedal on the press had no function on the machine. It was solely operated by the electrical buttons on the machine and has been ever since it has been in the shop. He further pointed out that he had attempted to get this in at the earlier hearing, but the fact that he was not an attorney and confused by the procedure had prevented him from doing so.

The Respondent further contended that the punch press had shock pads or cushions on and this was sufficient. As to the welding leads he pointed to the lack of possibility that there would be an accident with the welding leads on the welder. He testified that the difference in the periphery and tongue rest bench were simply matters that came out of adjustment. He testified that there was no guards on the Bridgeport Milling Machine when he bought it from the factory. (TR. 146). He testified further that one had to put their hands in there to change the speed of the machine. (TR. 147). He also testified that if a guard was there it would be difficult to see whether the belt was running or not. (TR. 148).

The Respondent's testimony as to the pedal on the Toledo punch press was that the pedal had nothing to do with the operation of the machine at all. He further testified that the machine had

been bought in 1974, and it was electrical and air operated. (TR. 156). He testified that as to the anchoring violation, on the machine that the machine was mounted on shock pads that are especially designed to keep the machine from moving in one direction or the other. (TR. 163). It was his opinion that the shock pads are superior to anchoring. He also believed that there is a good chance that one could shear off bolts or the machine would vibrate apart if it was bolted and stationary to the floor. Testimony revealed that the machine weighed about 500 pounds. (TR. 163).

As to the welding leads, it was his testimony that he was willing to cover them up if he could find some type of satisfactory way of doing it. (TR. 167). He further elaborated that the welding leads cable terminal on the welder were recessed.

Also with the brief of the Respondent, an Affidavit has been submitted indicating that he has removed the foot pedal from the punch press about which the citations are issued, being Item No. 6, due to the fact that it has no function on the punch press and the removal is to indicate its lack of use and to encourage the Review Commission to dismiss this item of the violations and complaint. A photograph was sent along as Exhibit "1A" to the Brief of the Respondent. Further there was attached a photograph being Exhibit "1B" which purports to show that although the Respondent contends there is no danger inherent in the welder, the welding leads have been covered as requested and ordered by the Compliance Officer.

As to the work rests it was his testimony that wear and vibration involved in the grinder at times kept him from keeping it within the limit of the rule. He usually did keep it set up within

the limit of the rule and it was corrected on the date of the hearing. (TR. 168-169).

The employees who acted as intervenors in this case basically agreed that everything there was safe. They could not see where there would be any chance of getting hands into the belts or pulley system of the Bridgeport Milling Machine. Employee Meredith felt this way. (TR. 217). Further he said that the pedal did not operate the machine. (TR. 219-220). He had never seen the machine either walk or move. (TR. 221). He believed that the shock pads were adequate to keep this machine constant. (TR. 222). As to the welding leads, he testified that some type of conducting material would have to touch both leads before there would be a shocking effect. (TR. 224). As to the grinder he testified that the Respondent kept them, as often as possible, under the regulation. (TR. 224).

On cross-examination of employee-intervenor Meredith, Mr. O'Mara elicited that plexi-glass would allow one to see through to the pulleys, and further that the grinder had been adjusted four or five times probably since January.

Employee-intervenor Logsdon testified that the danger of placing the guard on the Bridgeport Milling Machine would be that one could not see the pulleys running. Further, he believed it was possible that a guard could slip around and catch a hand in the machine thus creating a safety hazard. He testified that he did not use the punch press machine and has never seen the pedal activated or used to cause the machine to operate. (TR. 237). Also, he had never seen the machine walk or change its position. (TR. 237). He did not consider the welder unsafe. (TR. 238). He further elaborated that

if the grinder had been left unadjusted it would have been just an oversight.

Employee-intervenor Burks testified that he would prefer to leave the Bridgeport Milling Machine merely as it was. He also stated that he had never operated the punch press, but he had never seen it in operation where the foot pedal walked. (TR. 245).

CONCLUSIONS OF LAW

In light of all the foregoing it would seem that the Complainant has carried its burden of proof as to the alleged failures to abate on the Bridgeport Milling Machine. There are methods whereby employers can be granted variances from the Department of Labor for certain items and this would appear to have been the correct procedure in this case if the Respondent so desired. At the original inspection there was a violation of 1910.219(d)(1) and 29 CFR 1910.219(e)(1) (both as adopted by 803 KAR 2:020), and at the follow-up inspection on the day in question there were the same violations.

It would seem that the \$1,400.00 proposed penalty on this would be excessive, and the purposes of the act would not be fulfilled. It is recommended that each violation be reduced to \$200.00 each, that is, a \$200.00 penalty for 29 CFR 1910.219(d)(1) and 29 CFR 1910.219(e)(1) (both as adopted by 803 KAR 2:020).

Having considered both records and the testimony of the employees and employer, it would seem that if all the information that was made known at the second hearing had been known at the first hearing, the violation of 29 CFR 1910.217(b)(4)(i) (as

adopted by 803 KAR 2:020) would not have been sustained. The pedal press mechanism on the Toledo punch press in the shop was not used and had this been known it would not have been sustained. Therefore, it is believed that in fairness to all parties concerned this item and proposed penalty should be dismissed. (See 1976-1977 OSHD, para. 21,469, Savina Home Industries, Inc.)

There was a violation as to the Toledo punch press being designed and not being securely anchored to prevent walking or moving, thus the 29 CFR 1910.212(b) item should be sustained.

In the research of the standards, records and case law, the Hearing Officer has been unable to ascertain where the shock pads have been treated as an adequate substitute for bolting, which would seem to be the best measure in this instance. It would seem that the \$700.00 proposed penalty would be excessive and it would be recommended that the penalty be \$200.00 for this alleged violation.

There would seem to be little question that there was a failure to abate as to the alleged violation concerning the Lincoln Ideal Arc welder and 29 CFR 1910.252(b)(2)(iv)(d) (as adopted by 803 KAR 2:020). It would seem that the \$700.00 proposed penalty would be excessive in light of the employer's attitude and in light of his correcting the situation, and therefore a proposed penalty of \$200.00 would seem appropriate.

Further, it would seem that as to the Dayton Pedestal grinder in the shop and the two alleged violations of 29 CFR 1910.215(a)(4) and 29 CFR 1910.215(b)(9) (both as adopted by 803 KAR 2:020), the Complainant has failed to carry its burden of proof as to failures

to abate on these items. The testimony was replete from both the employer and the intervenor-employees that these had been adjusted, but they were kept out of adjustment from time to time. It would be inappropriate to sustain failures to abate as to these items in that they would seem to have become unadjusted in the period of time between the original citation and the follow-up inspection on the day in question. These two items should not be sustained.

The Complainant has carried its burden of proof as to the alleged violation of 803 KAR 2:125, Section 1(b), in that the citation was not posted.

In light of the foregoing, the following Recommended Order would seem appropriate.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation alleging a violation of 29 CFR 1910.219(d)(1) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained as a failure to abate, and the penalty shall be reduced from \$700.00 to \$200.00.

IT IS ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.219(e)(1) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained, and the proposed penalty of \$700.00 shall be and is hereby reduced to \$200.00.

IT IS ORDERED AND ADJUDGED that the alleged violation of failure to abate 29 CFR 1910.217(b)(4)(i) (as adopted by 803 KAR 2:020) shall be and the same is hereby dismissed. The proposed penalty of \$700.00 shall be and the same is hereby dismissed.

IT IS ORDERED AND ADJUDGED that the alleged violation of 29

CFR 1910.212(b) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained, and the proposed penalty of \$700.00 shall be and the same is hereby reduced to \$200.00.

IT IS ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.252(b)(2)(iv)(d) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained and the proposed penalty of \$700.00 shall be and the same is hereby reduced to \$200.00.

IT IS ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.215(a)(4) (as adopted by 803 KAR 2:020) shall be and the same is hereby dismissed along with the proposed penalty of \$700.00.

IT IS ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.215(b)(9) (as adopted by 803 KAR 2:020) shall be and the same is hereby dismissed along with the proposed penalty of \$700.00.

IT IS ORDERED AND ADJUDGED that the alleged violation of 803 KAR 2:125, Section 1(b) shall be and the same is hereby sustained, and the proposed penalty of \$100.00 shall be and the same is hereby sustained.

IT IS FURTHER ORDERED AND ADJUDGED that all conditions not herein corrected shall be corrected in a period not to exceed thirty (30) days from the date of this Recommended Order.

This 27th day of May, 1977.


HERBERT B. SPARKS, HEARING OFFICER

Dated: June 2, 1977
Frankfort, Kentucky

DECISON NO. 421