

**COMMONWEALTH OF KENTUCKY  
OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
ADMINISTRATIVE ACTION NO. 99-KOSH-0086  
KOSHRC #D. 3238-98,**

**SECRETARY OF LABOR  
COMMONWEALTH OF KENTUCKY**

**COMPLAINANT**

**V.**

**DECISION AND ORDER OF  
THIS REVIEW COMMISSION**

**HAWLEY PRODUCTS, INC.**

**RESPONDENT**

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This case comes to us following the Secretary of Labor's, Commonwealth of Kentucky ("Secretary") Petition for Discretionary Review of the recommended Order submitted by the Hearing Officer. It is an employer contest to a citation issued by the Kentucky Labor Cabinet ("Cabinet") for violations of 29 CFR 1910.1200(h)(2)(ii) with a penalty of \$1100.00.

Following a timely filing of Notice of Contest by the Respondent, a formal administrative hearing was held on May 13, 1999 in Paducah, Kentucky. Upon review of the factual record and applicable administrative standard, the Hearing Officer recommended that the Kentucky Occupational Safety and Health Review Commission ("KOSHA") issue a final order dismissing the Citation and proposed penalty. Subsequently, the Complainant filed a Petition for Discretionary Review to further ascertain the allegations of the Cabinet against the Respondent that was granted.

## FACTUAL SUMMARY AND LEGAL CONCLUSIONS

Prompted by an employee complaint, Mr. Lawrence McNew ("McNew"), an Industrial Hygienist for the Labor Cabinet ("Cabinet") was contacted to conduct an investigation of the Respondent's plant. In August of 1998, two separate inspections were conducted of Hawley Products, Inc.'s ("Hawley") facility. This facility designs and produces cones for audio speakers.

Pursuant to Cabinet procedure, an opening conference was initially held wherein Hawley representatives were provided a copy of the Complaint and were explained the scope of McNew's inspection. The employee Complaint alleged that Hawley was exposing its employees to dangerous levels of airborne chemicals and was not taking the necessary safety precautions to protect its employees health and welfare. At the time of the first inspection, the Respondent's safety rules and regulations were discussed and McNew was provided a walk-through inspection of the hot press area that was the subject matter of the employee complaint. McNew also initiated partial air monitoring to determine the quantity of airborne chemicals.

At the second inspection, McNew did not discover any chemical exposures for airborne contaminants at or above the action level for the applicable safety standards within the hot press area. As a result, McNew did not issue any citations of Hawley for violating this part of the regulation. However, upon concluding the inspection, McNew's report to his supervisor indicated that 29 CFR 1910.1200 (h)(2)(ii) had been violated and recommended an administrative response. This safety regulation requires manufacturers utilizing certain chemical processes such as formaldehyde to train certain employees on

the physiological and health risks associated with such exposure. The Citation stated as follows:

**Citation 1 Item I Type of Violation: SERIOUS**

29 CFR 1910.1200 (h)(2)(ii): Employee training did not include the physical and health hazards of the chemicals in the work area:

- a. For the employees who worked in areas such as but not limited to the cloth treatment area where Druite SL-594 liquid phenolic resin which contained 1-5 percent (%) phenol (as well as other alcohols) was used on a daily basis. *The employees who are or could be affected by the use of the chemical must be informed of the chemical's physical and health hazards. (Emphasis added)*

It was alleged in the Cabinet's Citation that while the employees exposed to the chemical-mixing process occurring in a small area of the plant called 'the chemical room' were properly informed and trained, not all of the Hawley employees were receiving this vitally important information. It was the decision of the inspector that other Hawley employees "could be affected" by the use of the chemical and, therefore, must be informed of the chemical's physical and health hazards.

According to the record, only two Hawley employees work in the vicinity of the hazard: one on the day shift and one on the night shift. These employees are responsible for mixing the chemicals to treat the cloth for the company's product. It was determined that the two employees who treated and mixed the chemicals did receive training on the specific chemicals as well as the appropriate ratings for health, flammability and reactivity of all of the hazardous chemicals in the entire building. However, it was the Cabinet's position that every Hawley employee working in proximity of the chemical room should have understood the potential hazards associated with each of the potential chemicals.

According to McNew, the Citation was based upon interviews with employees who stated that they had not been provided important information regarding the actual health hazards of the chemical agents used at the manufacturing facility. These employees contended that they were never informed of the hazards and did not receive proper training.

Nevertheless, the Citation also emphasized that that the Cabinet did not detect levels of chemical concentration to be above the maximum standard requiring specific employee training. In fact, the Material Safety Data Sheets ("MSDS") maintained by the Respondent and allegedly dispersed to all employees, point out that the chemicals can cause chemical burns to the eyes and skin, and can create other health hazards, including central nervous system depression. McNew testified that he was aware of the MSDS warning sheets at the time he issued the Citation, but discovered that many employees were unaware of their existence. It was McNew's assessment that the potential for an environmental and/or safety accident was high and Hawley employees were not prepared to effectively respond to such a situation.

In its defense, Hawley demonstrated that every employee is required to sign a company form representing that they had been trained in accordance with the safety standards found in the administrative regulations. Every Hawley employee is required to sign this form attesting that this training did in fact take place and that they understood the information provided. Additionally, McNew has testified that the content of Hawley's training program are "pretty good".

Further, Hawley has argued from a due process standpoint that McNew did not identify any of the employees interviewed during its investigation, and Respondent was

not able to conduct cross-examination to determine the truth and veracity of their statements to the Cabinet. Also significant to Hawley's defense is the fact that the original employee grievance that prompted the investigation listed approximately six violations, none of which were confirmed as part of McNew's investigation. In fact, the Respondent introduced Todd Yocum, Hawley Safety Manager, who testified that he personally spent hundreds of hours during his tenure developing training programs for all aspects of the company's operations. As part of the orientation for new employees, every supervisor is responsible for completing a safety checklist to ensure that Hawley's safety programs, protective equipment, building layout, and other related safety issues have been addressed.

#### **DECISION OF THE COMMISSION**

Respondent is an "employer" within the meaning of KRS 338.015(1). KOSHA is the administrative agency with jurisdiction to hear appeals from citations, notifications, and variances issued under the provisions of KRS Chapter 338. The Secretary is required pursuant to KRS 338.011 to enforce the occupational safety and health regulations adopted by the Commonwealth. Further, individuals working for the Respondent are employees pursuant to KRS 338.015(2). Hence, the Secretary and KOSHA have jurisdiction over Respondent in this matter.

Moreover, the administrative hearing was held pursuant to KRS 338.071 (4) which authorizes KOHSA to rule on appeals from citations, notifications, and variances issued under the provisions of the Act and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Thus, a formal hearing may be conducted by a Hearing Officer appointed by KOSHA to consider the subject matter and

recommend an appropriate course of action. However, the decisions of the hearing officer are subject to review of KOSHA upon a timely appeal by either party, or upon its own motion. KOSHA reserves all rights to review the Hearing Officer's findings of fact and conclusion of law.

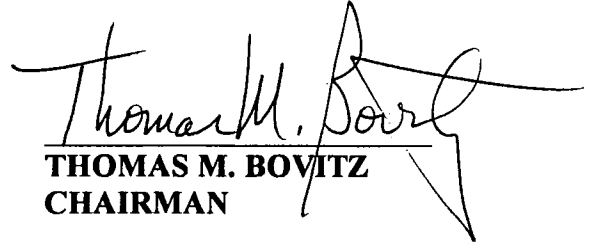
Pursuant to 803 KAR 50:010, Section 43 (1), the burden of proof in the present action rests with the Cabinet. See Energy Reg. Commission v. Kentucky Power Company, Ky. App., 605 S.W. 2d 46 (1980). The Cabinet must establish by a preponderance of the evidence Respondent's violation of Item 1, Citation 1.

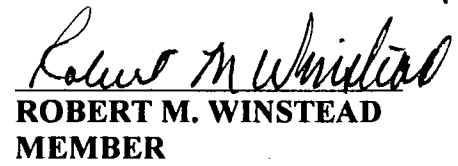
On the basis of the above and for reasons advanced by the Respondent, Hawley, in its response and the recommendation of the Hearing Officer, the record demonstrates that the decision of the Hearing Officer should be sustained. The Commission has determined upon a complete review of the record that the Cabinet has failed to demonstrate that the Respondent was in violation of 29 CFR 1910.1200 (h)(2)(ii). Upon reviewing the evidence, the Commission affirms the Hearing officer's conclusion that 29 CFR 1910.1200(h)(2)(ii) was followed and that all personnel who could be affected by the use of the chemical were informed in accordance with the administrative regulation.

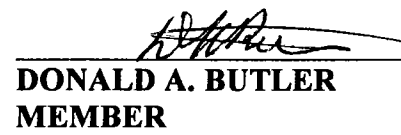
### **ORDER**

IT IS HEREBY ORDERED that the citation for violation of 29 CFR 1910.1200(h)(2)(ii) issued in the above-referenced action is overturned and the Complaint is dismissed.

**IT IS HEREBY ORDERED:**

  
THOMAS M. BOVITZ  
CHAIRMAN

  
ROBERT M. WINSTEAD  
MEMBER

  
DONALD A. BUTLER  
MEMBER

**CERTIFICATE OF SERVICE**

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

manner indicated:


**HONORABLE JAMES R. GRIDER**  
**COUNSEL**  
**LABOR CABINET**  
**OFFICE OF GENERAL COUNSEL**  
1047 US 127 South Suite 4  
Frankfort, Kentucky 40601

**(MESSENGER MAIL)**

**MR. JAMES BARONE**  
**GENERAL MANAGER**  
**HAWLEY PRODUCTS, INC.**  
1567 N. 8<sup>th</sup> Street  
Paducah, Kentucky 42001

**(CERT MAIL P 059 750 382)**

*7th*  
*June*  
This 3<sup>rd</sup> day of May, 2000

  
\_\_\_\_\_  
**JACQUES J. WIGGINTON**  
**EXECUTIVE DIRECTOR**  
**KOSH REVIEW COMMISSION**  
#4 Millcreek Park  
Rt. #3 Millville Road  
Frankfort, Kentucky 40601  
PH: (502) 573-6892  
FAX: (502) 573-4619