

**COMMONWEALTH OF KENTUCKY  
OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
ADMINISTRATIVE ACTION NO. 99-KOSH-0123  
KOSHRC D. NO. 3250-98**

**SECRETARY OF LABOR  
COMMONWEALTH OF KENTUCKY**

**COMPLAINANT**

**V. DECISION AND ORDER OF  
THIS REVIEW COMMISSION**

**DAVIS H. ELLIOT CO., INC.**

**RESPONDENT**

**\* \* \* \* \***

This case comes to us following the Respondent, Davis H. Elliot Company, Inc.'s ("Davis Elliot"), motion to dismiss a Commonwealth of Kentucky, Secretary of Labor ("Cabinet") Citation issued in October 2, 1998. Administrative Action No. 99-KOSH-0123 involves an employer contest to a Citation issued by the Cabinet arising from the death of a Davis Elliot employee.

A hearing was on held on June 23-24, 1999 before the Honorable Mathew L. Mooney, Hearing Officer, Division of Administrative Hearings, Office of the Attorney General, as a result of Respondent's January 6, 1999, Notice of Protest to a Citation and Notification of Penalty issued December 29, 1998. At the conclusion of this hearing and after considering the evidence presented, the Hearing Officer granted the Respondent's motion to dismiss with respect to Items 1, 2a, 2b, and 3. The Hearing Officer denied the Respondent's motion with respect to Item 4. On June 24, Respondent presented its defense to item 4, which is the only alleged violation remaining at issue.

## **FACTUAL BACKGROUND AND LEGAL ANALYSIS**

The Cabinet initiated an administrative investigation on October 2, 1998 concerning the death of a Davis Elliot lineman that occurred on September 29, 1998. As a result of this investigation, which included several interviews, and an examination of the physical evidence, the Cabinet recommended that a Citation be issued for OSHA violations. The Cabinet officially issued a Citation with four serious violations on December 29, 1998.

According to the Hearing Officer's dismissal ruling, Citation 1, Item 1 was dismissed because the Secretary was not able to substantiate the penalty without relying upon hearsay evidence. The only responsive evidence put forward by the Secretary was 1) the testimony of three eyewitnesses who contended that they did not see a body belt at the scene of the accident; and 2) the existence of a letter proclaiming that a body belt was discovered inside the victim's truck following the accident. Citation I, Item 2a was summarily dismissed for similar reasons regarding hearsay problems. The Secretary relied upon employee statements regarding Davis Elliot training which was not sufficient evidence to support the Citation.

In addition, Citation 1, Item 2b was dismissed because the Complainant could not establish a prima facie case regarding the employer's exercise of reasonable care and adherence to the OSHA requirements. The Hearing Officer determined that since the cause of fire remains unknown, the Complainant failed to establish that the employer failed to furnish a work environment free from recognized hazards as is required by KRS 338.030 (1) (a). Likewise, Citation 1 Item 3 was dismissed since the Secretary failed to provide admissible evidence that the employee-victim approached within the minimum

safe approach distance as required under CFR 1910.269 (1) (2). The Hearing Officer concluded that the Cabinet failed to establish a prima facie case and that the testimony of two witnesses that safety gloves were accessible, but not worn by the victim, was not persuasive.

Despite the orders of dismissal on the preceding items, the Hearing Officer refused to dismiss Citation 1, Item 4 against the Respondent. This was classified as a serious violation of 29 CFR 1910.269 (1)(6)(iii). This Regulation requires, in part, that employers must ensure that employees who are exposed to the flames or electrical areas must wear fire retardant clothing. According to the Citation, it was alleged that the employee-victim who was working on high voltage lines was not equipped with the appropriate clothing.

At the hearing, the only testifying witness was an employee who was present at the worksite at the time of the accident. According to his testimony, a crew of four men had been changing out a bad electrical pole on the day of the accident. Included among the men working was the victim, who was positioned in the bucket of the utility truck. It was the victim's responsibility to de-energize the electrical line at the pole. The witness testified that the victim was wearing a hard hat, a safety harness, a flame retardant shirt and a pair of safety glasses. Just as the new pole was being aligned into place, the witness noticed that the victim was on fire. The victim was conscious and was attempting to remove his clothing. Within only a few minutes, the victim was brought down and removed from the electrical bucket.

It was the witness's recollection that the employee-victim was not wearing his flame-retardant shirt when he was removed from the bucket. The witness testified that he

remembers that the victim's clothes were taken off and burn ointment was applied to several areas of the victim's body. Fearing the prospect of infection, the witness procured several articles of the victim's clothing from the victim's pick-up truck that was parked at the scene and placed the items on the ground underneath the victim until the paramedics arrived.

At the administrative hearing, several other witnesses testified on what they saw following the accident. Many of the witnesses that were produced arrived shortly after the victim was removed from the bucket. For example, Walter Miller, a service technician with Shelby Energy Cooperative, was summoned to the scene by Stewart through a radio call. Miller testified that when he arrived the victim was lying on the ground and still had his pants on. He could not remember what type or color of shirt the victim was wearing.

Another Shelby Energy Cooperative employee, David Martin, was also present at the accident site, but arrived after the ambulance. He recalled that the victim's clothing had been removed, and he remembered noticing that the victim's blue jeans had been burned along the belt line and his t-shirt was completely charred. He remembered seeing what appeared to be a flame-retardant shirt, but did not touch this clothing article.

The operations manager of Shelby Energy Cooperative, Donald Turner, and John Land, an Electrical Engineer with the Public Service Commission, also testified at the hearing. He had been in a company meeting with Land, when he was contacted by Stewart about disabling one of the electrical lines. When Turner and Land arrived on the scene to meet Stewart, the victim had already been airlifted from the site. Turner testified

that he saw a pair of boots with evidence of being burned, a pair of blue jeans and a t-shirt that mirrored Mr. Martin's description, and a flame retardant shirt in good condition.

At the hearing, Land stated that he arrived at the scene and heard Stewart comment that the victim did have on a fire retardant shirt. Stewart's statement stood out in Land's mind and he was reminded to examine the victim's shirt when he maneuvered over to where the accident occurred. It was Land's testimony that he looked carefully at the flame-retardant shirt that was lying on the ground and he vividly remembers thinking that the shirt was undamaged.

The investigator testified at the hearing that he issued Citation 1, Item 4 based on his professional review of the evidence—particularly, upon the statements by Elliot management Forte and Stewart and certain other witnesses who were privileged to evaluate the accident scene. The investigator placed significant weight on the testimony of John Land. Land's testimony that he examined the shirt immediately after encountering Stewart and that there was no damage to the shirt from fire appeared to be have great influence on the outcome of the Cabinet's investigation.

The Commission's review of the administrative action is confined to a determination of whether the action was taken arbitrarily. City of Louisville v. McDonald, Ky., 470 S.W. 2d 173, 178 (1971). The Commission, as trier-of-fact, is afforded significant latitude in its evaluation and assessment of the evidence. For example, the credibility of witnesses appearing before the Commission is an issue left to the sole discretion of this body. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W. 2d 298,309 (1972).

The Complainant's argument relies on several assumptions, the existence of a non-charred t-shirt found at the scene and the hearsay statements of 3<sup>rd</sup> party witnesses. In the Hearing Officer's Recommended Findings of Fact, Conclusion of Law and Notice of Appeal Rights, he states that the testimony of the three witnesses who were present when the damaged shirt was found was the most convincing evidence proffered by either party in support of their position.

In addition, the links in the chain of custody of the shirts are also at issue. The record indicates that both parties had discovered fire-retardant shirts allegedly owned by the victim. The Complainant's witnesses—particularly, Mr. Land—testified that they discovered the victim's shirt in an area where the victim was treated at the time of the accident. However, Mr. Land never saw the victim as he was already in route to a Louisville hospital when he arrived at the accident scene. This creates a significant obstacle for the Cabinet to authenticate the shirt as admissible evidence.

All of these issues have been discussed in exhaustive detail during the Commission's extensive evaluation of this matter. The difficulty in deciphering the evidentiary value of both the Complainant's and Respondent's evidence is problematic to the Commission, and, therefore, substantial consideration was afforded to the Hearing Officer's impressions and evidentiary findings.

### **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 KOSHA to rule on appeals from citations, notifications and variances issued under the provisions of the Act and to adopt or 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 the Commission's course of action. However, KOSHA reserves all rights to review the Hearing Officer's findings of fact and conclusions of law.

On the basis of the above and for reasons advanced by the Respondent, Davis H. Elliot Co., Inc., in its Brief, Reply Brief, and recommendation of the Hearing Officer, the record demonstrates that the Complainant failed to prove by the preponderance of the evidence its prima facie case that the Respondent was in violation of 29 CFR 1910.269 (1)(6)(iii) or its equivalent Kentucky provisions found in KRS Chapter 338.

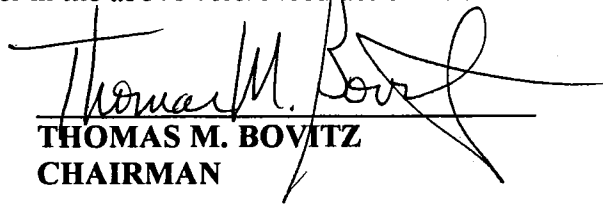
#### **ORDER**

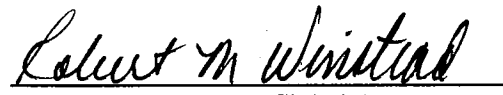
IT IS HEREBY ORDERED based upon the foregoing findings and conclusions that the December 29, 1998 Citation issued against Davis H. Elliot be dismissed.


the decision of the Commission that the decision of the Hearing Officer should be sustained.

**ORDER**

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer in the above-referenced action be affirmed.

  
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**THOMAS M. BOVITZ**  
**CHAIRMAN**

  
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**ROBERT M. WINSTEAD**  
**MEMBER**

  
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**DONALD A. BUTLER**  
**MEMBER**



**CERTIFICATE OF SERVICE**

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

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

  
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