

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 2, 1977

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

KOSHRC #333

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*YOSNRC
Decision +
Order No. 45-1*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

VS.

JONES TEER CONSTRUCTION CO.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners.

STOWERS, Commissioner, for the majority:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of April 26, 1977, is presently before this Commission for review pursuant to a petition for discretionary review filed by the Respondent.

At issue are three alleged violations of the standards, and the proposed penalties. The Hearing Officer, in his Recommended Order, has sustained one item and its penalty, the other two items and the proposed penalty have been dismissed.


Regarding Item 1, this Commission must disagree with the Hearing Officer's decision sustaining a nonserious violation of 29 CFR 1926.52(b) (as adopted by 803 KAR 2:030) and the proposed penalty of \$140.00. The evidence presented in the record is too speculative to be the basis for sustaining a citation. The Compliance Officer admitted that he took only a very brief reading which indicated a noise level of 108 decibels. The employees exposed to this noise level told the Compliance Officer that they had operated the jackhammer from 8 to 11:30 a.m. and from 12 Noon until 1 p.m. Other testimony at the hearing indicated that the jackhammer was operated approximately 25% of the work time or about 1 hour. Exposure to 108 decibels for 1 hour exceeds the permissible exposure of the standard. The total work time here is an estimate as is the total exposure time. The reading of 108 decibels was made over a brief period of time. A citation and penalty cannot be sustained on such evidence, therefore, the

Hearing Officer's decision regarding this item is reversed.

Item 13 involves an alleged violation of the National Electrical Code Article 400-4, as adopted by 29 CFR 1910.309(a), (as adopted by 803 KAR 2:020). Flexible cord was run through holes in the walls and ceilings of several shacks used for shelter and as an eating place by employees of the Respondent. The Hearing Officer has dismissed the citation and penalty finding that the flexible cord was being used only during construction and was therefore temporary and permissible under the temporary wiring Article of the National Electrical Code. This Commission finds that the Hearing Officer has made the proper disposition of this item.

An alleged violation of 29 CFR 1926.106(a) (as adopted by 803 KAR 2:030) is Item 18. Employees of the Respondent did not wear life jackets or buoyant vests while on a floating dock. This dock is used as a platform to board boats and it is not provided with guardrails or any perimeter protection. The Hearing Officer dismissed the item based upon his finding that the dock was not a work area and therefore the cited standard does not apply. The standard requires life jackets or buoyant work vests for employees working over or near water. The employees are working by the time they reach the dock, having clocked in prior to reaching that area. They are working near water in that there is a reasonable possibility that an employee might fall in. This Commission finds that the Hearing Officer is in error regarding this item and his decision is reversed.

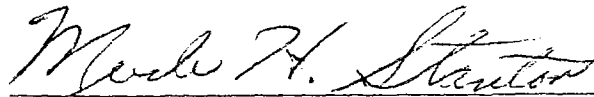
IT IS THEREFORE THE ORDER of this Commission that: Item 1, an alleged nonserious violation of 29 CFR 1926.52(b) (as adopted by 803 KAR 2:030) and the proposed penalty of \$140.00 be DISMISSED. The Hearing Officer's recommendation regarding this item is REVERSED. Item 13, an alleged nonserious violation of the National Electrical Code, Article 400-4 (as adopted by 1910.309(a)), (as adopted by 803 KAR 2:020), and the proposed penalty of \$50.00 is DISMISSED. The Hearing Officer's recommendation is SUSTAINED. Item 18, a nonserious violation of 29 CFR 1926.106(a) (as adopted by 803 KAR 2:030) is SUSTAINED. The Hearing Officer is REVERSED on this item. All other findings not inconsistent with this decision are likewise hereby AFFIRMED.


H. L. Stowers, Commissioner

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

STANTON, Concurring in part and dissenting in part:

I concur with the majority decision dismissing Item 1 and the proposed penalty and sustaining Item 18. It is my dissenting opinion that the alleged violation and proposed penalty for Item 13 should be sustained. The shacks in question are not under construction but merely located at a construction site. They will likely be used for a number of years in their current condition. The temporary wiring Article of the National Electrical Code does not apply to the facts and conditions at hand.

A handwritten signature in cursive script, reading "Merle H. Stanton", written in dark ink.

Merle H. Stanton, Chairman

DATED: August 2, 1977
Frankfort, Kentucky

DECISION NO. 451

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 (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601

Mr. Ronald F. Sullivan (Certified Mail #114312)
Corporate Safety Supervisor
J. A. Jones Construction Co.
Post Office Box 966
Charlotte, North Carolina 28231

Mr. Walter F. McDaniel, Safety Engr. (First Class Mail)
Jones-Teer Construction Co.
Smithland Dam Project
Post Office Box 337
Smithland, Kentucky 42081

This 2nd day of August, 1977.


Iris R. Barrett
Executive Director

Hayne



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 26, 1977

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision +
Order No. 410*

KOSHRC # 333

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JONES TEER CONSTRUCTION CO.

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
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Mr. Ronald F. Sullivan (Certified Mail #456891)
Corporate Safety Supervisor
J. A Jones Construction Co.
Post Office Box 966
Charlotte, North Carolina 28231

Mr. Walter F. McDaniel, Safety Engr. (First Class Mail)
Jones-Teer Construction Co.
Smithland Dam Project
Post Office Box 337
Smithland, Kentucky 42081

This 26th day of April, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #333

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS. FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDED DECISION

JONES TEER CONSTRUCTION CO.

RESPONDENT

STATEMENT OF THE CASE

This matter arises from a citation issued against Jones-Teer Construction Co., hereinafter referred to as "Jones-Teer", 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 September 30, 1976, and October 4, 1976, a Compliance Officer for the Commissioner made an inspection of the construction site of the Smithland Lock and Dam near Smithland. Jones-Teer is a contractor on the project. As a result of the inspection, the Commissioner on October 15, 1976, issued a citation against Jones-Teer charging it with 18 non-serious violations of the Act and proposing a total penalty therefor of \$250.00.

On October 28, 1976, and within 15 working days from the issuance of the citation, Jones-Teer filed a notice with the Commissioner contesting Items 1, 13 and 18 of the citation. Notice of the contest was transmitted to this Review Commission on November 1, 1976, and notice of receipt of the contest was transmitted to Jones-Teer on November 3, 1976. By separate orders dated December 8, 1976, this matter was assigned to a

Hearing Officer and scheduled for hearing on January 13, 1977. Because of severe weather conditions, the hearing was rescheduled by Order dated January 11, 1977.

The hearing was held pursuant to KRS 338.070(4) on January 25, 1977, 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 promulgate and adopt 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 own motion.

The standards, as adopted by KRS Chapter 338, allegedly violated, the descriptions of the alleged violations, and the penalties proposed for same are as follows:

29 CFR 1926.52(b) (as adopted by 803 KAR 2:030)	Employees using jackhammers were subjected to sound levels exceeding those listed in Table D-2 of this section and no personal protective equipment as required in Subpart E was being used.	\$140.00
National Electrical Code Article 400-4 (as adopted by 29 CFR 1910.309(a) (as adopted by 803 KAR 2:020)	The use of flexible cords violated the provisions of the National Electrical Code in that cords were attached to the building surfaces and run through holes in the walls and ceilings. (Throughout jobsite.)	\$ 50.00
29 CFR 1926.106 (a) (as adopted by 803 KAR 2:030)	Where guardrails were not installed on floating docks to protect employees from the hazard of drowning, life jackets or buoyant vest approved by the U. S. Coast Guard were not required to be worn.	None

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

Jones-Teer is a joint venture consisting of the J. A. Jones Construction Co. and the Nello L. Teer Construction. It is presently constructing the dam portion of the Smithland Lock and Dam project on the Ohio River, just north of Smithland. Because the project is in the river, employees working on it must be ferried to and from the dam by boat. The employees board the boats from two docks, one located on the shore, the other on the dam.

The dock on the shore is 10 feet wide by 40 feet long. A ramp extends from the shore to the middle of the dock and it is approximately 4 feet from the end of the ramp that is on the dock to the edge of the dock where the men board the boats. There are no guardrails on the dock, and although there are life jackets in the boats, the men do not wear any while on the dock.

The dock on the dam is much smaller, about 10 feet wide by 15 feet long. There is also a ramp from the dam onto the dock and the distance from the end of the ramp to the edge of the dock where the boats are boarded is approximately 6 feet. Like the dock on the shore, this dock also has no guardrails and the men are not required to wear life jackets while waiting to board the boats from it.

Several wooden shacks were located throughout the jobsites for the employees convenience. The employees used these shacks to warm up, to eat their lunch and to take their breaks. Electricity was supplied to the shacks through flexible electric cords which were attached to the building surfaces and run through holes in the walls and ceilings of the shacks.

While on the construction site, the Compliance Officer observed two men using a jackhammer to drill holes in rock for dynamite charges. The men had been engaged in this task for 4-1/2 hours, not counting the time they took for lunch, and were without any protection for sound. The Compliance Officer measured the sound of the jackhammer with his sound level meter and obtained a reading of 108 decibels. It is estimated that the jackhammer operated about 25% of the time.

In proposing penalties, the Compliance Officer used a form worksheet which the Commissioner has adopted to provide uniformity in the imposition of its penalties. The first form, known as OSHA Form 12, measures the hazard presented in terms of likelihood, severity and extent. Using this form, the Compliance Officer determined that the unadjusted penalty for the alleged sound violation should be \$350.00 and the unadjusted penalty for using flexible wires should be \$125.00. He further determined that no penalty should be assessed for the other alleged violation.

The Compliance Officer then used OSHA Form 10 which measures the violation and allows for certain credits or adjustments to be made. The adjustments are based on the good faith, history and size of the Company, and the assumption that the Company will abate the violation by the date set in the citation.

The maximum credit allowed for good faith and history is 40%, but because Jones-Teer had been cited previously for violation of the Act, it was only allowed a 20% credit for these items. No adjustments was allowed for size because Jones-Teer had more than 99 employees. An abatement credit of 50%, however, was also allowed reducing the penalties to \$140.00 for the alleged sound violation and \$50.00 for the alleged electrical violation.

CONCLUSIONS OF LAW

29 CFR 1926.52(b) (as adopted by 803 KAR 2:030) provides in part as follows:

Occupational noise exposure When employees are subjected to sound levels exceeding those listed in table D-2 of this section, feasible, administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of the table, personal protective equipment as required in Subpart E, shall be provided and used to reduce sound levels within the levels of the table.

Table D-2 prescribes the maximum decibel level an employee may be exposed to for any given length of time. A violation of the standard occurs when an employee is exposed to a higher decibel level of sound than permitted for a given length of time, Weyerhaeuser Co. OSHD-CCH ¶ 18,468, (1974).

Table D-2 provides that an employee may not be exposed to more than 95 decibels over a 4 hour period. Therefore, if it is assumed that the employees operating the jackhammer in the instant case were exposed to a continuous noise level of 108 decibels, the noise level measured by the Compliance Officer, there would be no question that a violation occurred.

Exposure need not be continuous, however, but may also be cumulative. For example, the table provides that an employee may not be exposed to more than 105 decibels for more than one hour. If an employee is exposed to 105 decibels continuously for more than one hour there is a violation. But there is also a violation if during the working day he is exposed to 105 decibels for several periods which, totalled together, last for more than one hour.

In this case, although the employees had been working with their jackhammers approximately 4-1/2 hours, it was estimated the jackhammers

were actually operated only 25% of the time, or approximately one hour. Therefore, one hour is the period of duration which must be used, rather than 4-1/2 hours, to determine whether there has been a violation.

As stated above, the maximum sound level to which an employee may be exposed for one hour is 105 decibels. Thus, the exposure to 108 decibels was still a violation of the standard and the penalty was appropriate under the circumstances.

29 CFR 1910.309(a) (as adopted by 803 KAR 2:020) adopts the requirements of the 1971 National Electrical Code for electrical installations and equipment, including flexible electric cords. Article 404-4 of the 1971 National Electrical Code provides as follows with respect to the use of such cords in permanent structures:

Except where installed in accordance with Article 645 flexible cord shall not be used (1) as a substitute for the fixed wiring of a structure; (2) where run through holes in walls, ceilings, or floors; (3) where run through doorways, windows, or similar openings; (4) where attached to building surfaces, or (5) where concealed behind walls, ceilings or floors.

There is little dispute between the parties that the flexible cords found by the Compliance Officer, and upon which the citation is based, violated the standard if the buildings in which they were used were permanent structures. Jones-Teer though contends that they were not permanent structures and, therefore, the wiring was only temporary.

Temporary wiring is covered by Article 305 of the National Electrical Code. In section 305-1 of the Article it specifically states that temporary electrical wiring may be used during periods of construction. Although, it does set a 90 day limit on temporary wiring used for decorative purposes, no similar limit is set for wiring used during construction. Therefore,

even though, this project may continue for an indefinite period of time, it does not alter the fact that the flexible cord was only being used during construction and was temporary. Thus, the use of the flexible cords was not a violation of the Act.

29 CFR 1926.106(a) (as adopted by 803 KAR 2:030) provides as follows:

Working over or near water Employees working over or near water, where the danger of drowning exists, shall be provided with U. S. Coast Guard - approved life jackets or buoyant work vests.

The standard requires life jackets to be worn when an employee works in an area where there is a reasonable possibility that he may fall in the water. Cornell and Co., Inc. OSHD-CCH-11 20,852 (1976). The standard makes no mention of guardrails. In the instant case, the docks upon which the citation is based was not a work area. Therefore, the failure to equip employees on the docks with life jackets did not violate the standard.

RECOMMENDED DECISION


NOW, THEREFORE, IT IS HEREBY ORDERED

That Item 1 of the Citation charging a nonserious violation of 29 CFR 1926.52(b) and fixing a penalty therefor of \$140.00 be, and the same is, hereby sustained.

That Item 13 of the Citation charging a nonserious violation of the National Electrical Code, Article 404-4 (as adopted by 1910.309(a)) and fixing a penalty therefor of \$50.00 be, and the same is, hereby dismissed and the penalty vacated.

That Item 18 of the Citation charging a nonserious violation of 29 CFR 1926.106(a), but fixing no penalty therefor be and the same is, hereby dismissed.

IT IS FURTHER ORDERED that the violation sustained must be abated immediately and without delay upon receipt of this decision, and the penalty paid no later than 30 days thereafter.

A handwritten signature in cursive script, reading "Paul Shapiro", is written over a horizontal line.

PAUL SHAPIRO
HEARING OFFICER
KOSHR

Dated: April 26, 1977
Frankfort, Kentucky

DECISION NO. 410