

*Sparks*

FV

342 (1975)



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

104 BRIDGE ST.  
FRANKFORT, KENTUCKY 40601  
PHONE (502) 564-6892

CHARLES B. UPTON  
MEMBER

*KOSHRC  
Decision +  
Order No. 445*

July 29, 1977

HERBERT L. STOWERS  
MEMBER

KOSHRC #342

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

PAN AMERICAN MILLS

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners

PER CURIAM:

A Recommended Order of Hearing Officer Herbert B. Sparks, issued under date of May 10, 1977, is presently before this Commission for review pursuant to a petition for discretionary review filed by the Complainant.

At the hearing, Complainant moved to amend his Complaint in order that the citations would involve industrial rather than construction standards. This error was not discovered until commencement of the hearing even though the hearing was postponed two times. Hearing Officer Sparks reserved judgment on the motion and heard evidence in the case.

In the Recommended Order, the Hearing Officer has denied the motion to amend, vacated the alleged violations of 29 CFR 1926.500(d)(1), as adopted by 803 KAR 2:030, and 29 CFR 1926.28(a), as adopted by 803 KAR 2:030, and the proposed penalty of \$650 has been dismissed. This Commission finds that the Hearing Officer has made the proper disposition of the case.

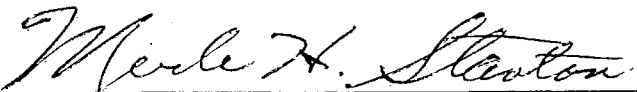
Section 4 of the Rules of Procedure of this Commission provides that in absence of a specific provision, procedure shall be in accordance with the Kentucky Rules of Civil Procedure. In

considering a motion to amend a complaint one must look to Rule 15.01. The position of the Rule is liberal in allowing amendment but at such a late point in the proceeding amendment is by leave of Court, (the Hearing Officer). The major considerations are timeliness, excuse for delay, and prejudice to the other party.

The prejudice to the Respondent is not great, the amended Complaint would allege the same facts and involve the same hazard. The wording of the standards is similar and the serious nature of the violation and proposed penalty of \$650 would be unchanged. The motion was untimely, however, being made at the Commencement of the hearing and the Complainant offers no substantial excuse for the delay in discovering the error.

The Hearing Officer's decision on the motion to amend is justified by the record. The construction standards do not apply to the Respondent in this actual situation and the decision to vacate the alleged violation and dismiss the proposed penalty is correct.

IT IS, THEREFORE, ORDERED that the decision of the Hearing Officer dismissing the citation and proposed penalty is hereby AFFIRMED. All conclusions and findings of the Hearing Officer not inconsistent with this decision are likewise hereby AFFIRMED.

  
Merle H. Stanton, Chairman

/s/ H. L. Stowers  
H. L. Stowers, Commissioner

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

DATED: July 29, 1977  
Frankfort, Kentucky

DECISION NO. 445

KOSHRC # 342  
(Decision and Order of Review Commission)


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  
Attention: Hon. Timothy O'Mara  
Assistant Counsel

Mr. L. E. Smith, President (Certified Mail #114309)  
Pan American Mills, Inc.  
Post Office Box 92  
Bowling Green, Kentucky 42101

This 29th day of July, 1977.

  
Iris R. Barrett  
Executive Director

*Make*

*342 (414)*



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 10, 1977

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision +  
Order No 414*

MERLE H. STANTON  
CHAIRMAN

HERBERT L. STOWERS  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC #342

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

PAN AMERICAN MILLS, INC.

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  
Frankfort, Kentucky 40601  
Attention: Hon. Timothy O'Mara  
Assistant Counsel

Mr. L. E. Smith, President (Certified Mail #114241)  
Pan American Mills, Inc.  
Post Office Box 92  
Bowling Green, Kentucky 42101

This 10th day of May, 1977.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC # 342

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

PAN AMERICAN MILLS, INC.

RESPONDENT

\* \* \* \* \*

Hon. Timothy P. O'Mara, Assistant Counsel, Department of Labor,  
Frankfort, Kentucky, for Complainant

Mr. L.E. Smith, President, Pan American Mills, Inc., P.O. Box  
92, Bowling Green, Kentucky 42101, for Respondent

\* \* \* \* \*

An inspection was made on or about December 2, 1976, by the Kentucky Department of Labor, Division of Occupational Safety and Health at a place of employment located in Warren County, Kentucky, and on the basis of the inspection it was alleged in a citation dated December 9, 1976 that the Respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in the following respects, which were alleged to be a serious violation:

There was an alleged violation in the Complaint of 29 CFR

1926.500(d)(1) (as adopted by 803 KAR 2:030) in that:

"An open-sided floor or platform six (6) feet or more above the adjacent ground level was not guarded by a standard stair railing (employee working on roof while approximately twenty-four (24) feet high, wheat holding bin);", or

In the alternative an alleged violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) in that:

"Appropriate personal protective equipment (i.e. safety belts, lifelines, or equivalent protection) was not worn by an employee while exposed to falling approximately twenty-four (24) feet while working on the roof of the wheat holding bin."

The date by which the alleged violation was to be corrected according to the Complaint was immediately upon the receipt of the citation and there was a proposed penalty of \$650.00.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was December 2, 1976.
2. Citation issued on December 9, 1976, listing eleven nonserious alleged violations of the Acts and Standards and one alleged serious violation which was the only one herein in issue.
3. Notice of Contest was received on December 20, 1976.
4. Notice of Receipt of Contest was mailed December 22, 1976.
5. Certification of Employer Form was received January 5, 1977.
6. Complaint was received January 3, 1977.
7. The hearing was originally scheduled for February 11, 1977 at 10:00 a.m., and pursuant to the motion of the Complainant herein, the hearing was rescheduled for March 10, 1977 and subsequently rescheduled for March 25, 1977 at which time the hearing was held.

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 on the record considered as a whole supports the following.

#### DISCUSSION OF CASE

In the opening comments of the Complainant, the Complainant's counsel revealed that in reviewing the file with the witness who would testify he was informed that the inspection which took place at Pan American Mills involved not only Pan American Mills itself, but also various construction companies were working at the time at Pan American Mills. He further revealed that the particular citation involved in this contested case was also a citation made against various construction companies at the work site or at Pan American Mills and in forming the citation which was given to Pan American Mills, the same standard was applied to Pan American Mills. The



same standard or citation was being given to both the construction companies and the general industry of Pan American Mills.

The Complainant's counsel revealed that the Compliance Officer had made notes and put down the proper standard for a nonconstruction or industrial situation. (Tr. P. 5).

In light of the fact that the Complainant was framed in terms of 29 CFR part 1926, or the construction industry standards, the Complainant moved to amend his complaint to read the proper number in order that the numbers be changed so that it would reflect the standard of an industrial standard rather than construction standard.

The Hearing Officer held his ruling in abeyance on this matter and ask the Complainant to submit a Memorandum at the conclusion of the hearing regarding this matter.

In considering the motion this Hearing Officer has reviewed the original citation dated December 2, 1976, wherein eleven (11) other than serious violations of various types were cited all under the 29 CFR 1910 standards. The alleged serious violation in the original citation issued on December 9, 1976, referred to 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) violation regarding the open-sided floor, or in the alternative 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030).

It is noted also that there were two continuances in this case, one of which was at the request of the Complainant and the other being at the request of the Respondent.

In his Memorandum Brief of Supporting Authority concerning this motion to amend, the Complainant noted that the original

citation was for a violation of 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) and 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030). The Complainant asks that these numbers be substituted by the numbers 29 CFR 1910.23(c)(1) (as adopted by 803 KAR 2:020) and 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020).

The standard 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) reads as follows:

"Guardrails, handrails and covers. (d) Guarding of open-sided floors, platforms and runways. (1) Every open-sided floor or platform six feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in Paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard."

The standard 29 CFR 1910.23(c)(1) (as adopted by 803 KAR 2:020) reads as follows:

"Guarding floor and wall openings and holes. (c) Protection of open-sided floors, platforms and runways. (1) Every open sided floor or platform four feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides, (i) Persons can pass, (ii) There is moving machinery, or, (iii) There is equipment with which falling materials could create a hazard."

The standard 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) reads as follows:

"Personal protective equipment. (a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards of the employees."

The standard 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) reads as follows:

"General requirements. (a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

In his Memorandum the Complainant points out that both standards cover the same set of facts, one being used in the construction industry (1926) and the other being used in general industry (1910). As he further correctly points out, the Respondent's place of employment is a general industry site.

In support of its request for amendment, the Complainant relies on and cites the case of J.L. Mabry Grading, Inc., Paragraph 15,686. In the Mabry case the Federal Review Commission allowed the secretary in this situation to amend his complaint, where a citation for a serious violation was based upon a regulation not in effect at the time of the alleged violation. The Review Commission indicated that the secretary should have been permitted to amend his complaint to set forth a different section of the governing regulations where the newly alleged provision prohibited essentially the same practices as those regulated by the original cited, but inapplicable regulation. An employer cited for a serious violation of 29 CFR 1926.602(a)(9)(i)-(ii) (as adopted by 803 KAR 2:030) for failing to provide backing alarms or signalman for dump trucks with obscured

vision, filed a motion for judgment on the pleadings based on the fact that the regulation was not in effect at the time of the alleged violation. Thereafter, the secretary moved to amend the Complaint to an alleged violation of 29 CFR 1926.601(b)(4)(i)-(ii) (as adopted by 803 KAR 2:030) prohibiting the operation of any motor vehicle equipment with an obstructed rear view without an audible reverse signal alarm or observer provided. In holding that the judge had erred in not permitting amendment of the complaint, the Commission cited Rule 11 of the Federal Rules of Civil Procedure providing the leave to amend shall be given when justice so requires, noting that the circumstances under review did not raise the issues of whether amendment of the complaint changed the basic factual allegation of the citation or the legal basis of its issuance.

In arriving at a conclusion in this case on the motion of the Complainant, the Hearing Officer has considered not only this Mabry case, but has considered numerous precedents by the Federal Review Commission.

Unfortunately, in his research, your Hearing Officer has been unable to find any cases dealing with a change from construction to general industry standards or from general industry to construction standards.

Of interest is a 1973-1974 OSHD case, Milton W. Priest, d/b/a Wasatch Roofing Company, paragraph 16,782, wherein a complaint alleging a serious violation of 29 CFR 1926.451(u)(3) (as adopted by 803 KAR 2:030), failure to install catch platforms beneath a sloping roof, and proposing a \$600.00 penalty was vacated where the

citation upon which it was based proposed only a \$60.00 penalty and characterized the violation as nonserious. The judge ruled that the attempted amendment of the citation was improper because such an amendment was not contemplated by Section 2200.33(a). The judge also held that he could not reinstitute the initial citation and hold the employer in nonserious violation of the cited standard.

#### CONCLUSIONS OF LAW

In light of all the circumstances here it would seem that the motion by the Complainant should not be properly sustained and a fairer holding to all parties concerned would be the vacation of the two alleged violations plead in the alternative alleging together one serious violation.

As Complainant noted, this first came to the Complainant's attention one-half hour before the hearing on the day in question. The proposed amendment completely changed the entire wording of the alleged wrongdoing by the Respondent, and placed the Respondent under an entirely different set of standards.

In light of all the foregoing and in consideration of the Federal precedent cited by Complainant, and additional Federal precedent researched and studied by your Hearing Officer, the following Recommended Order would seem appropriate.

#### RECOMMENDED ORDER

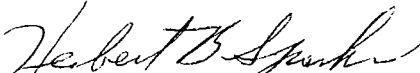
IT IS ORDERED AND ADJUDGED that the motion by Complainant to amend the alleged violations of 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) and/or 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) to read 29 CFR 1910.23(c)(1) (as adopted by 803

KAR 2:020) and/or 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) shall be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the alleged violations of 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) and/or 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) shall be and the same are hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that the proposed penalty of \$650.00 shall be and the same is hereby dismissed.

This 5<sup>th</sup> day of May, 1977.

  
\_\_\_\_\_  
HERBERT B. SPARKS  
HEARING OFFICER

Dated: May 10, 1977  
Frankfort, Kentucky

DECISION NO. 414