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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

CHARLES B. UPTON
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

December 13, 1977

KOSHRC # 347

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THE MARLEY COOLING TOWER COMPANY

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 August 25, 1977, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Respondent.

The record in this case is lengthy due to the complex nature of the citations and legal issues involved. This Commission has made a thorough review of the case and has been greatly aided by the excellent briefs submitted by the parties.

A number of the Respondent's machines have been cited and alleged to be in violation of subsections of 29 CFR 1910.212 (as adopted by 803 KAR 2:020). The Respondent contends that the aforementioned standard was improperly promulgated. Hearing Officer Sparks has found that 29 CFR 1910.212 was properly promulgated, basing his finding on the decision of the Federal Review Commission in Diebold, Inc., 1975-1976 OSHD (20,333). This Commission is aware that Diebold is presently on appeal but we believe that the Federal Review Commission and Mr. Sparks have correctly found that 29 CFR 1910.212 was properly promulgated.

The second major issue on review is whether the requirements of 29 CFR 1910.212 (as adopted by 803 KAR 2:020) are applicable to the machines cited in this case. The Respondent claims that 29 CFR 1910.217 (as adopted by 803 KAR 2:020) provides specific guarding requirements for mechanical power presses and subsection (a)(5) of 29 CFR 1910.217 excludes press brakes from the guarding requirements of that section and thus from the more general requirements of 29 CFR 1910.212. Mr. Sparks has found that the citations under 29 CFR 1910.212 (as adopted by 802 KAR 2:020) were proper. This question of applicability of the requirements of 29 CFR 1910.212 to press brakes has been presented to the Federal Review Commission in several cases. That Commission has found, as did our Hearing Officer, that the press brakes can be cited under 29 CFR 1910.212. See, Irvington-Moore, 1974-1975 OSHD (19,523), Diebold, Inc., 1975-1976 OSHD (20,333), Western Steel Manufacturing Co., 1975-1976 OSHD (20,584). While the Federal Review Commission decisions are not binding on this Commission, we agree with their disposition of this issue and uphold the Hearing Officer's finding.

This Commission finds that the evidence introduced establishes existence of the violations as alleged and that employees were exposed to the hazards.


The Respondent has raised the issue of impossibility of compliance with the requirements of 29 CFR 1910.212 (as adopted by 803 KAR 2:020). This Commission, after thorough review of the evidence presented, agrees with the finding of Hearing Officer Sparks that it is difficult and inconvenient but not impossible for the Respondent to comply in this case. The burden of proof of feasibility of compliance is not upon the Department of Labor unless the employer shows no means of compliance. The evidence presented by the Respondent shows that a difficult task is involved but the level of proof is not sufficient to establish impossibility.

The alleged violation of 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) must be sustained. The evidence indicates a violation of the standard by the Respondent. The standard affords a reasonable warning as noted by the U. S. Court of Appeals for the Fifth Circuit in Ryder Truck Lines, Inc., v. Peter S. Brennan, 1973-1974 OSHD (18,238).

Finding no error in the application of the law to the facts herein, and the evidence appearing to adequately support the findings and conclusions of the Hearing Officer. It is the ORDER of the Review Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED. All findings of the Hearing Officer not inconsistent with this decision are likewise AFFIRMED.

KOSHRC #347

(Decision and Order of Review Commission)


Merle H. Stanton, Chairman

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

/s/ John C. Roberts
John C. Roberts, Commissioner

DATED: December 13, 1977
Frankfort, Kentucky

DECISION NO. 500

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. Frederick G. Huggins
Assistant Counsel

Honorable Gary V. Fulghum (Certified Mail #240805)
Attorney at Law
5800 Foxridge Drive
Mission, Kansas 66202

Mr. L. W. Armstrong (First Class Mail)
General Plant Superintendent
The Marley Cooling Tower Company
6333 Strawberry Lane
Louisville, Kentucky 40214

Mr. Paul B. Speckin, Ass't V-Pres. (First Class Mail)
The Marley Cooling Tower Company
5800 Foxridge Drive
Mission, Kansas 66202

This 13th day of December, 1977.


Iris R. Barrett
Executive Director

Agree



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 459*

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 25, 1977

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

KOSHRC # 347

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THE MARLEY COOLING TOWER COMPANY

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
Capital Plaza Tower - 1st Floor
Frankfort, Kentucky 40601
Attention: Hon. Frederick G. Huggins
Assistant Counsel

Hon. Gary V. Fulghum (Certified Mail #456844)
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Mr. L. W. Armstrong (Certified Mail #456845)
General Plant Superintendent
The Marley Cooling Tower Company
6333 Strawberry Lane
Louisville, Kentucky 40214

Mr. Paul B. Speckin, Ass't V-Pres (First Class Mail)
The Marley Cooling Tower Company
5800 Foxridge Drive
Mission, Kansas 66202

This 25th day of August, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC # 347

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

THE MARLEY COOLING TOWER COMPANY

RESPONDENT

* * * * *

Hon. Frederick G. Huggins, Assistant Counsel, Department of
Labor, Frankfort, Kentucky, for Complainant

Hon. Gary Fulghum, 5800 Foxridge Drive, Mission, Kansas 66202,
for Respondent

* * * * *

An inspection was made on November 15, 16, and 18 of 1976
by the Kentucky Department of Labor, Division of Occupational
Safety and Health at a place of employment located in Jefferson
County, Kentucky, where a cooling tower manufacturing business
was being conducted by and under the direction and control of
the Respondent. On the basis of that inspection it was alleged
in one citation issued December 21, 1976 that the Respondent
violated forty-three nonserious violations of the Act and
Standards.

On January 12, 1977 the Respondent contested ten of the forty-three items for which it received a citation. Subsequent to Respondent's contest of the above referenced items, the Respondent requested a meeting with Complainant's representative to obtain information and clarification of the issues raised by Complainant's citation of the items which Respondent had contested. As a result of that meeting, seven of the ten items contested were withdrawn from contest by Respondent (Tr. 133).

The citations which remained in issue and upon which evidence was heard were Items 41(a), (b) and (c), 42(a) and (b), and 43. Items 41 and 42 alleged violations of 29 CFR 1910.212(a)(3)(ii) and 29 CFR 1910.212(a)(1), respectively, (both as adopted by 803 KAR 2:020). These two standards specified general machine guarding standards. The items as alleged were as follows:

There was an alleged violation of 29 CFR 1910.212(a)(3)(ii) (as adopted by 803 KAR 2:020) in that:

"There was no point of operations guard on the machinery listed below in the locations listed:

(a) The press brakes shown below used in the brake department exposed employees' hands to the downward path of the ram;

1. The 'Chicago' 90 ton, LM#591
2. The 'Pacific' 150 ton, LM#822
3. The 'Verson' 60 ton, LM#183
4. The 'Chicago' 200 ton, LM#885

(b) The punches equipped on the following press brakes used in the punch department exposed employees' fingers to the points of operation;

1. The 'Chicago' 200 ton, LM#884
2. The 'Chicago' 90 ton, LM#590
3. The 'Rousselle SS-30-80' 100 ton,
LM#728
4. The 'Chicago' 90 ton, LM#491
5. The 'Verson' 60 ton, LM#230
6. The 'Verson' 115 ton, LM#192

(c) The following shears used in the sizing department exposed operators' hands to the downward path of the blade when the metal is being cut;

1. The 'Cincinnati' shear, LM#182, had sections of the finger guard broken.
2. The guard of the 'Cincinnati' shear, LM#988, was improperly adjusted."

Item No. 42 alleged a violation of 29 CFR 1910.212(a)(1)

(as adopted by 803 KAR 2:020) in that:

"(a) The press brakes listed below used in the punch department which were equipped with punches, had approximately two (2) inch openings between the ram and the punches which created unguarded pinch points;

1. The 'Chicago' 200 ton, LM#884
2. The 'Chicago' 90 ton, LM#590
3. The 'Rousselle SS-30-80', 100 ton,
LM#728
4. The 'Chicago' 90 ton, LM#491
5. The 'Verson' 60 ton, LM#230
6. The 'Verson' 115 ton, LM#192

(b) The foot hold downs provided on the shears listed below, used in the sizing department were improperly adjusted creating unguarded nip points between the foot hold downs and the stock being cut;

1. The 'Cincinnati' shear, LM#182
2. The 'Cincinnati' shear, LM#101
3. The 'Cincinnati' shear, LM#490
4. The 'Cincinnati' shear, LM#988"

Item No. 43 alleged a violation of 29 CFR 1910.132(a)

(as adopted by 803 KAR 2:020) in that:

"Employees of all departments were not required to wear safety-toe footwear meeting the requirements of 1910.136."

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was November 15, 16 and 18, 1976.
2. Citation was issued December 21, 1976 listing the standards as above set out.
3. The proposed penalty for the contested standards herein in question was \$52.00 for the alleged violation of 29 CFR 1910.212(a)(3)(ii), and there was no proposed penalty for the alleged violation of 29 CFR 1910.212(a)(i) and no proposed penalty for the alleged violation of 29 CFR 1910.132(a).
4. Notice of Contest was received January 13, 1977, and an additional contest letter was received January 17, 1977.
5. Notice of Receipt of Contest was mailed on January 19, 1977.
6. Certification of Employer Form was received in timely fashion.
7. The Complaint was received on February 7, 1977.
8. Answer was received on February 24, 1977.
9. The case was assigned to a Hearing Officer and was originally scheduled for hearing on Wednesday, March 16, 1977 at 10:00 a.m. There was a postponement of said hearing and it was eventually held on Tuesday, April 12, 1977 at 10:00 a.m. in Louisville, Kentucky.

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 the procedural aspects of the hearing. Under the provisions of 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 the exhibits filed and the 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

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

The primary issue of concern to this Hearing Officer is whether the evidence presented establishes the existence of the violations alleged. Respondent raised several other issues which he ably addresses in his brief, including, that 29 CFR 1910.212 is void as improperly promulgated; that 29 CFR 1910.217 excludes press brakes from the point of operation guarding requirements of that section and the intent of this exclusion was to likewise exclude press brakes from the more general guarding requirements of 29 CFR 1910.212; that compliance with 29 CFR 1910.212 is impossible; and further that Complainant failed to establish the violations alleged.

Two excellent briefs have been submitted to assist the the Hearing Officer and the Review Commission in the determination

of this case. After consideration of both well-written briefs it is the opinion of the Hearing Officer that the Complainant has sustained its burden as to all of the contested standards.

The Hearing Officer is compelled to agree with the Complainant that the question as to whether 29 CFR 1910.212 was properly promulgated and is valid, has been conclusively settled by Diebold, Inc., decided January 22, 1976, OSHRC Docket numbers 6767, 771, 9496, paragraph 20,333 CCH OSHD.

A considerable amount of testimony also was presented during the hearing concerning 29 CFR 1910.212 and 29 CFR 1910.217 (both as adopted by 803 KAR 2:020). Upon examination of these standards it is determined that 29 CFR 1910.212 provides general guarding requirements for all machines, while 29 CFR 1910.217 provides specific guarding requirements for mechanical power presses. The Respondent's position that the exclusion of press brakes from coverage under 29 CFR 1910.217 by subsection (a)(5) of that section was intended likewise to exclude press brakes from inclusion under 29 CFR 1910.212, the more general standard. It is the Hearing Officer's holding that the citation under 29 CFR 1910.212 was proper.

The Complainant presented evidence concerning the existence of the violations involved. These violations alleged that Respondent's failure to provide point of operation guards on press brakes and shears violated the standards, and further the failure to enclose or adjust excessive openings which left employees exposed to unguarded nip points on press brakes and shears was the seriousness of these violations.

As to the footwear requirement, the Complainant alleged a failure to require that safety-toe footwear be worn by employees exposed to a hazard requiring such safety equipment.

As to the guarding violations the Compliance Officer testified that in each instance cited there was no guard protecting the employees hands from the downward path of the press brake rams and that the opening between the rams and the punches did not conform to the proper standard, or that the foot hold down provided on certain shears were improperly adjusted creating hazardous conditions (Tr. 13-52). These conditions were personally observed by the Compliance Officer and the openings were measured by him where doing so did not interfere with Respondent's operations of machinery. There was entered into evidence a xeroxed copy of a measuring device employed by the Compliance Officer. Further, the Respondent's Superintendent of Fabrication, Mr. Tom Mills, testified that all of the machines cited were in use.

As to the impossibility of compliance, Respondent introduced testimony concerning the difficulty or impossibility of guarding the machines cited. The Hearing Officer feels that the Respondent's evidence is insufficient to establish impossibility and thus fails to provide him with a sufficient defense to the cited violations. The Hearing Officer is in sympathy with Respondent's position and it would seem to be quite a difficult proposition in dealing with these machines, however, it is believed that the Complainant has carried its burden of proof. It is also noted that the Respondent sent its employee, Mr. Mills, to four similar operations in the

state to observe their guarding techniques to seek some way to achieve compliance with the standards. Complainant ^cites Buckeye Industries, Inc., decided December 22, 1975, OSHRC Docket No. 8454, paragraph 20,239, CCH OSHD, as being the case which sets out the requirements of the defense of impossibility. Indeed, this case involved the point of operation guarding of sewing machines as required by 29 CFR 1910.212(a)(3)(ii), the standard involved herein. The commission there held that the burden of proof as to feasibility of guarding was not upon the Commissioner; nor did the Commissioner have to prove that the guards themselves do not create a hazard to employees. In Cagle's, Inc., decided July 29, 1976, OSHRC Docket No. 15694, paragraph 21,052 CCH OSHD, it was held that only when the employer shows no way of compliance does the burden shift to the Commission to show feasibility. It may be difficult and inconvenient for the employer to provide guards for the machines cited, however, it is not the Hearing Officer's holding that it is impossible.

As to the footwear standards, Respondent was alleged to have violated 29 CFR 1910.132(a) in failing to require protective safety footwear to be worn by employees. The Compliance Officer testified that he observed employees in the yard area and in the structural pipe shop handling steel beams weighing approximately 180 pounds without the required steel toed shoes (Tr. 61-63). Your Hearing Officer has examined Ryder Truck Lines, Inc., decided July 18, 1974, OSHRC Docket No. 73-3341, paragraph 18,238 CCH OSHD, which held that a reasonable man test was in-

herent in the standard and that where a reasonable man would recognize a hazard of foot injuries the proper safety shoes are required by the standard to be worn. In that case, there was such a hazard where dockmen manually handled heavy freight would be applicable here where the same hazard was presented in this instance by the manual handling of the approximately 180 pound steel beams.

In light of the foregoing it would seem appropriate to make the following Conclusions of Law.

CONCLUSIONS OF LAW

The Complainant has furnished the Hearing Officer with proof of the violations of the sections reflecting the protested charges and the charges are found to be other than serious violations.

In light of the foregoing it is ordered and adjudged as follows:

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein in question charging a nonserious violation of 29 CFR 1910.212 (a) (3) (ii) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained as Items 41(a), 41(b), and 41(c), and the proposed penalty of \$52.00 shall be and the same is hereby sustained.

IT IS FURTHER ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.212(a) (i) (as adopted by 803 KAR 2:020) which is Items 42(a) and 42(b), shall be and the same is hereby sustained and there is no proposed penalty.

IT IS FURTHER ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained as Item No. 43, and there is no proposed penalty for this violation.

These violations must be corrected without delay, but no later than thirty (30) days from the date of this Recommended Order.

This 22nd day of August, 1977.


HERBERT B. SPARKS, HEARING OFFICER

Dated: August 25, 1977
Frankfort, Kentucky

DECISION NO. 459