

Hayes



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358 (402)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

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

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

September 13, 1977

KOSHRC #358

*KOSHRC
Decision +
Order No. 462*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ELIZABETHTOWN READY MIX CONCRETE CO., INC.
d/b/a MT. WASHINGTON READY MIX CONCRETE

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and STOWERS, Commissioners.

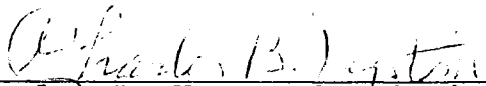
PER CURIAM:

A Recommended Order of Hearing Officer Herbert B. Sparks, issued under date of June 17, 1977, is called before this Commission for review pursuant to an order of the Commission.

A review of this case indicates that the Respondent's operation is not a "service station" as contemplated by the cited standard and therefore the standard does not apply to the Respondent. Only the penalty was contested within 15 working days of the Notification of Failure to Abate; thus the citation has become a final order.

Therefore, it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has proposed a penalty of \$175.00 is REVERSED, and the penalty is hereby VACATED. All other findings of the Hearing Officer not inconsistent with this Decision are hereby AFFIRMED.

Merle H. Stanton
Merle H. Stanton, Chairman



Charles B. Upton, Commissioner

/s/ H. L. Stowers

H. L. Stowers, Commissioner

DATED: September 13, 1977
Frankfort, Kentucky

DECISION NO. 462

KOSHRC #358

(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
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky
Attention: Frederick G. Huggins
Assistant Counsel

Mr. Charles R. Hite (Certified Mail #456854)
Elizabethtown Ready Mix Concrete
d/b/a Mt. Washington Ready Mix Concrete
Post Office Box 117
Bardstown, Kentucky 40004

This 13th day of September, 1977.


Iris R. Barrett
Executive Director

Haynes
Rose



3581 (431)

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

HERBERT L. STOWERS
MEMBER

PHONE (502) 564-6892

CHARLES B. UPTON
MEMBER

June 17, 1977

KASHRO
Decision &
Order No. 431

KOSHRC # 358

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ELIZABETHTOWN READY MIX CONCRETE CO., INC.
d/b/a MT. WASHINGTON READY MIX CONCRETE

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
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky
Attention: Frederick G. Huggins
Assistant Counsel

Mr. Charles R. Hite (Certified Mail #114281)
Elizabethtown Ready Mix Concrete
d/b/a Mt. Washington Ready Mix Concrete
Post Office Box 117
Bardstown, Kentucky 40004

This 17th day of June, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

KOSHRC # 358

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

ELIZABETHTOWN READY MIX CONCRETE CO., INC.
D/B/A MT. WASHINGTON READY MIX CONCRETE

RESPONDENT

* * *

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

Mr. Charles R. Hite, Secretary, Elizabethtown Ready Mix Concrete
Co., Inc., P. O. Box 117, Bardstown, Kentucky, for Respondent

An inspection was made December 14, 1976, by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located in Bullitt County, Kentucky, at or near Landis Lane, Mt. Washington, Kentucky, where the Respondent was engaged in the manufacture of ready mixed concrete, and a follow-up inspection was conducted on March 7, 1977, and on the basis of the follow-up inspection it was alleged in the citation issued March 17, 1977, that the Respondent violated provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in the following manner, which was alleged to be a failure to abate:

There was an alleged violation of 29 CFR 1910.106(g)(3)(iv)(d) in that the dispensing unit (gas pump) was not protected against collision damage by suitable means (yard).

Procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was December 14, 1976, with a follow-up inspection on March 7, 1977.
2. Citation was issued March 17, 1977.
3. The proposed penalty for the contested standard and the failure to abate same herein in question was \$700.00.
4. Notice of Contest was received March 28, 1977.
5. Notice of Receipt of Contest was mailed March 31, 1977.
6. Certification of Employer Form was received April 11, 1977.
7. The Complaint was received April 14, 1977.
8. Case was assigned to Hearing Officer on May 4, 1977, and hearing was originally scheduled for May 17, 1977. The hearing was subsequently changed and was held on May 31, 1977, at 10:00 A.M., District No. 4, Bureau of Highways Office, Route 31W, in Elizabethtown, 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 procedural aspects of the hearing. Under the provisions of KRS 338.081, the hearing was authorized under 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 the stipulations and representations of the parties, it is concluded that the substantial evidence on the record considered as a whole supports the following Findings of Fact.

DISCUSSION OF THE CASE AND 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 Respondent admitted to violating the standard herein in question, and the sole issue that was before the Hearing Officer was the appropriateness of the proposed penalty of \$700.00.

Testimony disclosed that, and an exhibit was introduced indicating same, the alleged violation which had occurred was the failure of the Respondent to abate a violation from an earlier inspection. The gas pump was located in front of the building of the office and manufacturing area, and the Compliance Officer testified that the gas pump "needs to be protected from collision or damage and it can be done in two or three different ways" (Transcript p. 11). The alternatives that were noted were "guarding by post or railing around the gas pump or putting same on an island, just in order that the gas pump would be guarded in some manner and keep any vehicle, from bumping into it, knocking it off of its foundation and knocking

it over" (Transcript p. 12). It was the Compliance Officer's testimony that during the second inspection that there was no protection around the gasoline pump which was the thrust of the violation from the earlier inspection which had been conducted in December of 1976.

Further testimony indicated that there were approximately four (4) trucks that worked out of this location and there were approximately that same amount of trucks on the date of the second inspection (Transcript p. 13). The Compliance Officer further indicated that the number of days between the first inspection and the follow-up inspection was approximately eighty-three (83) days, and there had been one abatement date extension from January 17 1977 to February 15, 1977 pursuant to the request of the Respondent. Respondent's secretary and sole representative at the hearing, Mr. Charles Hite, stated that the Respondent was originally cited for eighteen (18) different violations, and all of these were corrected excepting one. The one that wasn't corrected was putting posts in around this gasoline pump, and during this time period of December, January, and February, the plant wasn't open in January. There was no work in January of this year and there were only about two work weeks in February, the last two weeks. This was due to extremely bad weather.

It was his testimony that the first inspection was made in December and the Respondent's business closed for Christmas, and it

was a week after that that the items were all corrected except this one. He further stated that he believed that as soon as posts could be put in the ground, the ground being frozen solid, that the matter would have been abated, and his testimony was that he had already asked for one abatement extension and he did not want to ask for another.

He testified that it was his fault. He felt like this was the only violation he had made and this was due to not asking for an extension of time. It was his belief that he had acted in very good faith during the whole thing. He further reiterated that he desired to cooperate with the Department of Labor and he didn't feel that a penalty would be appropriate in this instance.

In light of the foregoing it would seem appropriate that the following Conclusions of Law would be appropriate.

CONCLUSIONS OF LAW

The violation by stipulation has been proven and the Complainant has adequately furnished the Hearing Officer with proof of the alleged violation of the failure to abate this item.

The record is devoid of evidence which would indicate that the proposed penalty of \$700.00 should be sustained in that amount. Numerous cases at state level and at the federal level have seen fit to reduce proposed penalties on failures to abate where there are extenuating circumstances. 1976-1977 OSHD, paragraph 20, 804 George T. Gerhardt Company, Inc., held that a judge's decision in

reducing \$2580.00 in penalties for three unabated violations to \$300.00 on the grounds of extenuating circumstances was appropriate. The violations were of low gravity, the company president and repairmen were both on vacation when the original notice was received, and the closing conference was not explicit in the actions they were to take.

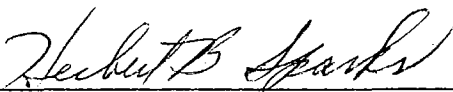
Your Hearing Officer has also examined the 1976-1977 OSHD case, paragraph 21, 193 Concrete Technology Corporation, where a proposed nonabatement penalty of \$400.00 was reduced to \$75.00 for a construction firm's failure to provide bulb guards required by 1916.52(b)(i) for temporary lights on concrete vessel under construction. There had been a manufacturer's delay in delivery of the guards until after the reinspection.

In light of the Respondent's evident good faith, the testimony in the record that this item was abated three days after the reinspection on March 10, 1977, and in light of the extremely harsh winter weather that the Respondent had undergone during the period between the original inspection and the follow-up inspection, and the size of the business of the Respondent wherein there are six (6) employees employed at this place of business, it would seem that the proposed penalty of \$700.00 would not be appropriate. It does not appear that the purposes of the Act would be fulfilled, nor that justice would be served by assessing a penalty in the proposed amount of \$700.00. Thus the penalty for failure to abate should be reduced to \$175.00.

In light of the foregoing the following Recommended Order would seem appropriate.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein in question charging a failure to abate a violation of 29 CFR 1910.106 (g)(3)(iv)(d) (as adopted by 803 KAR 2-020) shall be, and the same is hereby, sustained, and the proposed penalty of \$700.00 shall be and the same is hereby reduced to \$175.00. In light of the testimony that this condition has already been abated it is not necessary to set a new abatement date.


HERBERT B. SPARKS
HEARING OFFICER - KOSHRC

Dated June 17, 1977.
Frankfort, Kentucky
Decision No. 431