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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

September 14, 1977

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision
Order No. 468*

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

KOSHRC #365

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

OHIO VALLEY ALUMINUM CO., INC.

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 June 13, 1977, is before this Commission for consideration pursuant to an Order of Direction for Review.

We find that the facts at hand do not warrant the recommended reduction in penalty from the proposed penalty of \$150.00 to \$50.00.

Accordingly, it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has reduced the proposed penalty to \$50.00 is REVERSED, and the original proposed penalty of \$150.00 is hereby REINSTATED. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

Merle H. Stanton
Merle H. Stanton, Chairman

Dated: September 14, 1977
Frankfort, Ky.

DECISION NO. 468

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

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


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: Frederick G. Huggins
Assistant Counsel

Mr. William Wiegand, Jr., Pers. Mgr. (Certified Mail #456851)
Ohio Valley Aluminum Co., Inc.
Post Office Box 69
Shelbyville, Kentucky 40065

This 14th day of September, 1977.


Iris R. Barrett
Executive Director

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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.
FRANKFORT, KENTUCKY 40601

HERBERT L. STOWERS
MEMBER

PHONE (502) 564-6892

CHARLES B. UPTON
MEMBER

June 13, 1977

*KOSHRC
Division +
Order No. 426*

KOSHRC # 365

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

OHIO VALLEY ALUMINUM CO., 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: Frederick G. Huggins
Assistant Counsel

Mr. William Wiegand, Jr., Pers. Mgr. (Certified Mail #114274)
Ohio Valley Aluminum Co., Inc.
Post Office Box 69
Shelbyville, Kentucky 40065

This 13th day of June, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC # 365

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

OHIO VALLEY ALUMINUM CO., INC.

RESPONDENT

* * * * *

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

Mr. William Wiegand, Jr., Personnel Manager, Ohio Valley
Aluminum Co., Inc., Post Office Box 69, Shelbyville,
Kentucky, representing Respondent

* * * * *

An inspection was made on February 8, 1977 by the Kentucky Department of Labor, Division of Occupational Safety and Health at a place of employment located in Shelby County, Kentucky, where the Respondent was engaged in an aluminum scrap processing business. On the basis of that inspection there were issued two citations alleging twenty-seven (27) nonserious violations and one (1) repeated nonserious violation of the Acts and Standards. The sole item that was in issue at this hearing was whether there had been a violation of 29 CFR 1910.22(c) (as adopted by 803 KAR 2:020), in that:

"Covers and/or guardrails were not provided at the drainage channel across the entrance to Homo. oven #4 to protect the employees in the area."

This was alleged to be a repeated violation of Citation No. 1, Item No. 2, issued on October 3, 1975.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was February 8, 1977.
2. Citation issued on February 28, 1977.
3. There was a proposed penalty of \$150.00, with an abatement date recommended of March 15, 1977.
4. Notice of Contest was received March 31, 1977.
5. Notice of Receipt of Contest was mailed April 15, 1977.
6. Certification of Employer Form was received April 19, 1977.
7. Complaint was received April 18, 1977.
8. Case was assigned to Hearing Officer on May 4, 1977.
9. Hearing was set for May 25, 1977 and held on that date at 10:00 a.m. in the offices of Kentucky Occupational Safety and Health Review Commission, 104 Bridge Street, Frankfort, 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 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.

DISCUSSION OF CASE AND
FINDINGS OF FACT

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

With the use of a diagram prepared by the Compliance Officer, the Compliance Officer described the violation as being the absence of a cover over a drainage channel across the front of the homogenized oven. This drainage channel was described as being "approximately 2-1/2 feet wide and approximately 12 inches deep." (TR. 17). The Compliance Officer further elaborated that "the employees crossed this distance in opening and closing the doors and pushing these carts in and out of these ovens." He further testified that "the drainage ditch was used in order that the water could drain from the oven." (TR. 18).

A citation of a previous inspection conducted on September 22, 1975 was introduced into evidence and there was a violation of 29 CFR 1910.22(c) (as adopted by 803 KAR 2:020) listed thereon as Item No. 2.

The hazard to the employees in a situation like this was described as "basically tripping, stumbling, or falling on a concrete floor or in the oven." (TR. 22).

It was pointed out that there were four homogenized heating ovens on the premises, and this was the only one that did not comply with the standard with the exception of one that was not in use. (TR. 31).

It was further pointed out that this was a newly constructed oven. (TR. 31). There was also evidence that there was three to four employees that operated these ovens. The Respondent's personnel manager noted that this was a new furnace and the reason that the ditch was not covered was that employees were working there from time to time. He further related that it takes from six to eight months to get the furnace where you can have consistency as far as operation. (TR. 34). He clarified that it was a separate furnace from the previous citations and the other furnaces had been corrected. He further related that it was now covered with a plating which had been welded over the area.

CONCLUSIONS OF LAW

The Complainant has adequately sustained its burden as to the alleged repeated violation of 29 CFR 1910.22(c) (as adopted by 803 KAR 2:020), and has further sustained its burden as to this being a repeated violation of a previous citation issued on October 3, 1975.

As has been noted by this Review Commission in numerous cases and by the Federal decisions, 1973-1974 OSHD, para. 16,373, Todd

Shipyards Corporation, "it is not necessary in issuing a citation for a repeated violation to prove that the violations were substantially similar. It is sufficient to simply show that a standard has once again been violated."

In light of the abatement that had taken place prior to the hearing and in light of the extenuating circumstances of this being a new oven, and also in light of the lack of gravity of the violation and evident good faith of the Respondent, it is not believed that the purposes of the act would be fulfilled in sustaining the penalty in the amount of \$150.00, and a penalty reduction to \$50.00 would seem to be appropriate.

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 repeated nonserious violation of 29 CFR 1910.22(c) (as adopted by 803 KAR 2:020) shall be and the same is hereby sustained, and the proposed penalty of \$150.00 shall be and the same is hereby reduced to \$50.00. In light of the record reflecting that the violation has been corrected it is not necessary to set an abatement date.

This 8th day of June, 1977.


HERBERT B. SPARKS
HEARING OFFICER

Dated: June 13, 1977
Frankfort, Kentucky

DECISION NO. 426