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*10/15/78*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

CHARLES B. UPTON  
MEMBER

PHONE (502) 564-6892

JOHN C. ROBERTS  
MEMBER

January 4, 1978

*KOSHRC  
Decision +  
Order No. 512*

KOSHRC #367

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

C. E. LUMMUS COMPANY

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

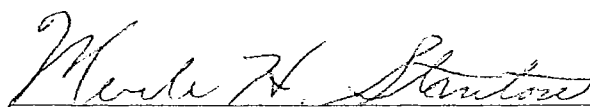
A Recommended Order of Hearing Officer Paul Shapiro, issued under date of October 7, 1977, is presently before this Commission for review, pursuant to an Order of Direction for Review.

The Respondent was cited for a violation of 29 CFR 1910.252(a)(2)(iv)(c) (as adopted by 803 KAR 2:020). Certain oxygen and gas cylinders, allegedly in storage, were not separated by distance or a noncombustible barrier as prescribed in the standard.

Hearing Officer Shapiro dismissed the citation finding that the cylinders were not in storage, and if they were in storage, the citation should have been under 29 CFR 1926.350(j) (as adopted by 803 KAR 2:030).

We agree with the Hearing Officer's dismissal in this case. This Commission finds that although the cylinders in question were probably in storage, the citation should have been made under the applicable construction standard. Accordingly it is ORDERED by this Commission that the Hearing Officer's decision

dismissing the citation under 29 CFR 1910.252(a)(2)(iv)(c) is AFFIRMED. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

  
Merle H. Stanton, Chairman

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

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

Dated: January 4, 1978  
Frankfort, Kentucky

DECISION NO. 512

This is to certify that copy of this Decision and Order  
has been served by mailing or personal delivery on the following:

Commissioner of Labor of Kentucky (Messenger Service)  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Hon. Timothy O'Mara  
Assistant Counsel

Hon. John W. Susen (Certified Mail #240819)  
Combustion Engineering, Inc.  
1000 Prospect Hill Road  
Windsor, Connecticut 06095

C. E. Lummus Company (First Class Mail)  
Post Office Box 387  
Calvert City, Kentucky 42029

This 4th day of January, 1978.



Iris R. Barrett  
Executive Director  
KOSH REVIEW COMMISSION

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367(478)

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KASHRC*  
*Decision*  
*Order No. 478*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 7, 1977

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

John C. Roberts  
MEMBER

KOSHRC #367

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

C. E. LUMMUS 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:

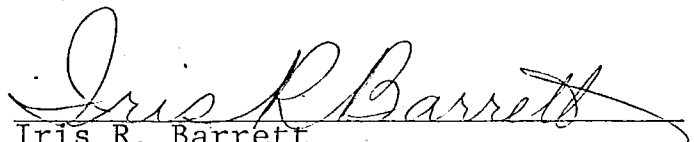
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Hon. Timothy P. O'Mara  
Assistant Counsel

Honorable John W. Susen (Certified Mail #240727)  
Combustion Engineering, Inc.  
1000 Prospect Hill Road  
Windsor, Connecticut 06095

C. E. Lummus Company (First Class Mail)  
Post Office Box 387  
Calvert City, Kentucky 42029

This 7th day of October, 1977.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
KOSHRC #367

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDED DECISION

C. E. LUMMUS COMPANY

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of a citation issued against C. E. Lummus Company, hereinafter referred to as "Lummus", 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 March 16, 1977, a Compliance Officer for the Commissioner made an inspection of a construction site at the GAF plant near Calvert City, Kentucky. As a result of that inspection, the Commissioner issued a citation on March 23, 1977, charging Lummus with 5 nonserious violations of the Act, but proposing no penalty therefor.

On April 15, 1977, and within 15 working days from receipt of the citation, Lummus by telegram filed a notice with the Commissioner contesting one item of the citation. Thereafter, on April 18, 1977, Lummus by letter filed a notice contesting the same item. Notice of the contest was transmitted to this Review Commission on April 19, 1977, and notice of receipt of the contest was mailed by this Review Commission to Lummus on the same date. The Commissioner then filed its Complaint on

April 27, 1977, and Lummus filed its Answer on May 4, 1977. By separate notices dated May 5, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing to be held on May 31, 1977.

Lummus on May 13, 1977, and the Commissioner on May 16, 1977, moved for a continuance of the hearing. By Order dated May 16, 1977, the hearing was rescheduled to June 6, 1977. On May 25, 1977, the Commissioner again moved for a continuance of the hearing and by Order dated May 26, 1977, it was rescheduled for June 8, 1977.

The hearing was held in Benton on June 8, 1977, pursuant to KRS 338.070(4). 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 adopt and promulgate 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 by the Review Commission on appeal timely filed by either party, or upon its own motion.

The standard alleged to have been violated (as adopted by 803 KAR 2:030, pursuant to KRS 338.061), and the description of the alleged violation are as follows:

29 CFR 1910.252 (a)(2)(iv)(e)	Oxygen cylinders in storage were not separated from fuel-gas cylinders a minimum distance of twenty (20) feet or by a non-combustible barrier at least five (5) feet having a fire resistance rating of at least one-half (1/2) hour. (north and south section of the PBT building).
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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

Lummus is a building contractor who, on the day of the inspection, was engaged in the construction of a building on the plant grounds of GAF Inc., near Calvert City. The building under construction actually consisted of two separate buildings joined together by a control room. When the inspection was made, the exterior of the buildings had been completed and Lummus was working in the interior.

The Compliance Officer did not arrive at the construction site until after 3:00 P.M. When he arrived, the employees of Lummus had finished working for the day and were leaving the jobsite. Consequently, the Compliance Officer was not able to observe the employees at work.

The items in dispute here are cylindrical tanks containing either oxygen or acetylene which Lummus used in its cutting operations. The tanks were used in sets, each set consisting of one tank of oxygen and one tank of acetylene joined together by a regulator valve and hose. In order to facilitate the movements of each set, the tanks were generally placed on carts.

The walk-around inspection, upon which the citation was based, began in the north building and proceeded through to the south building. The Compliance Officer was accompanied during the inspection by several people, including the company's field engineer. However, only the field engineer and the Compliance Officer testified at the hearing. Despite the fact they both ostensibly observed the same things during the inspection, there was considerable disagreement between them about what they did see.

The Compliance Officer testified that he observed four cylindrical tanks, two of oxygen and two of acetylene, which were chained together to a wall in the north building, and two more tanks, one of oxygen, the other of acetylene, which were standing together on the floor in the south



building. He stated that none of these tanks had regulator valves attached to them.

The Compliance Officer also testified that he observed other sets of oxygen and acetylene tanks in the building. These sets were on carts and had regulator valves and hoses connecting their tanks.

From his observations, the Compliance Officer concluded that the tanks he observed with regulator valves were being used by Lummus, and that the six tanks without regulator valves were being stored in the building for future use as replacements for the others. The Compliance Officer did not cite the tanks with regulator valves as being in violation of the standard.

The company's field engineer, on the other hand, testified that there were only two tanks, one of oxygen and one of acetylene, chained to the wall in the north building; and that there were four more tanks, two of oxygen and two of acetylene, in the south building. He stated that none of these tanks had regulator valves attached to them.

The field engineer also testified that there were an additional 10 to 12 sets of oxygen and acetylene in a separate room in the north building. This room had been set aside as a pipe fabrication shop and was kept locked at night. The sets in the pipe fabrication room were all on carts, and all had regulator valves and hoses connecting their tanks.

The field engineer stated that all the sets, including those observed without regulator valves, had been used the day of the inspection, and were also used the following day. Since only those in the pipe fabrication shop could be locked up for the night, however, the regulator valves had been removed from those outside the pipe fabrication shop to prevent their theft.

Since the testimony was based on the witnesses recollection of events which occurred approximately three months prior to the hearing, it is not surprising that they disagreed on certain details. However, based on their overall testimony, and also the fact that the Compliance Officer was unable to observe the men at work, we are inclined to accept the field engineer's version of the facts. We, therefore, find that there were two tanks in the north building, one containing oxygen, the other acetylene; and four tanks in the south building, two containing oxygen and two containing acetylene from which regulator valves and hoses connecting the tanks had been removed for safekeeping. There was an additional 10 to 12 sets of tanks; each set consisting of one tank of oxygen and one tank of acetylene, in the pipe fabrication room, all of which were on carts and all had regulator valves and hoses connecting their tanks. All the tanks including those with and without regulator valves, had been used by Lummus on the day of the inspection, and were used again the following day by Lummus, in cutting operations.

#### CONCLUSIONS OF LAW

29 CFR 1910.252(a)(2)(iv)(c) provides:

Welding, Cutting and Brazing . . . . Installation and operation of oxygen-fuel gas systems for welding and cutting . . . . Cylinders and containers . . . . Oxygen storage . . . .

Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet or by a noncombustible barrier at least five (5) feet high having a fire-resistance rating of at least one-half (1/2) hour.

In citing Lummus, the Compliance Officer made a distinction between those tanks which had regulator valves attached to them and those that did not. Those with regulator valves he determined were "in use" and not within the purview of this standard. Those without valves he determined were "in storage", and therefore, came within the purview of the standard.

Lummus contends, in effect, that the presence or absence of regulator valves makes no difference. Since all the tanks, whether connected by regulator valves or not, had been used on the day of the inspection and were to be used the following day, Lummus contends they were all "in use".

Clearly, the standard applies only to tanks which are in storage as opposed to those which are in use. In United Engineers and Constructors, Inc. CCH-OSHD ¶ 17,161 (1974), the Administrative Law Judge held that the term "in storage", as used in the standard, meant that the cylinders were put aside in a depository or central location for safekeeping to be available for use when needed. There a citation under this standard was vacated when it was found that, even though the cylinders observed did not have hoses or regulators, they were being used as needed and the hoses and regulators were removed each night as a safety precaution to prevent leaks. This decision was later affirmed by the Federal Review Commission. United Engineers and Constructors, Inc. CCH-OSHD ¶ 19,780 (1975).

In Grossman Steel and Aluminum Corp. CCH-OSHD ¶ 21,657 (1977), however, a different decision was reached. There the citation was affirmed even though the employer argued that cylinders were in use, or had been the previous day. In that case, though, the cylinders were not "hooked up", and there was no evidence to show they were not inactive.

In the instant case, although the cylinders were not "hooked up" at the time of the inspection, there was evidence to show that they had been used that day and were to be used again the following day. Therefore, they were "in use" at the time of the inspection and not in storage, and the citation with respect to the cylindrical gas tanks should be dismissed.

The citation should also be dismissed because the standard upon which it is based was not shown to be applicable in this situation. 29 CFR 1910.5(c)(2) provides that the standards contained in 29 CFR 1910. shall apply to all industries, except where a specific provision is prescribed for a particular industry. 29 CFR 1910.12(a) then goes on to provide that employers engaged in "construction work" are governed by the standards contained in 29 CFR 1926. These standards have been adopted by Kentucky by regulation and, therefore, if there is a standard in 29 CFR 1926 which applies to this situation then none of the standards contained in 29 CFR 1910, including the standard cited, are applicable.

Subpart J of 29 CFR 1926 sets safety standards for welding and cutting operations in the construction industry. Although the subpart contains no specific standards for the storage of gas cylinders used in such operations, 29 CFR 1926.350(j) adopts by incorporation the standards published by the American National Standards Institute (ANSI) Z 49-1 1976, Safety in Welding and Cutting.

The Commissioner, therefore, in order to establish the applicability of the standard cited, had the burden of proving that ANSI did not have a safety standard pertaining to the storage of cylinders used in construction. The Commissioner failed to meet the burden of proof in this regard.

#### RECOMMENDED DECISION


Upon the basis of the foregoing Findings of Fact, Conclusions of Law, and upon the entire record,

IT IS HEREBY ORDERED

That a portion of the citation issued March 23, 1977, charging a nonserious violation of 29 CFR 1910.252(a)(2)(iv)(e) be, and is hereby, dismissed.

Dated: October 7, 1977  
Frankfort, Ky.

DECISION NO. 478

  
PAUL SHAPIRO  
HEARING OFFICER  
KOSHRC