

Repeal



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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

March 13, 1978

*KOSHRC
Decision
Order No. 535*

KOSHRC #371

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SOUTH CENTRAL BELL TELEPHONE 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 December 7, 1977, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Respondent.

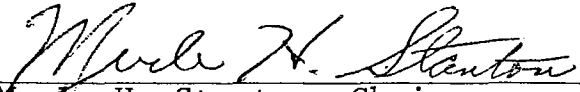
The record in this case indicates that the Respondent was cited for an alleged violation of a standard which is inapplicable to the fact situation. The Complainant was informed of the incorrect citation and the employer raised this issue as a defense. The Hearing Officer permitted amendment, sustaining a violation of the citation and complaint as amended.

The Complainant was aware of the error involved prior to the hearing on this matter and thus had ample opportunity to make a pre-hearing motion to amend. While we agree that the prejudice to the Respondent was perhaps minimal we disagree with the Hearing Officer's decision to allow amendment.

Accordingly it is ORDERED that the Hearing Officer's Order permitting amendment of the citation and complaint, is REVERSED. The alleged violation of 29 CFR 1910.136 (as adopted

KOSHRC #371
(Decision and Order of Review Commission)

by 803 KAR 2:020) is hereby DISMISSED.


Merle H. Stanton, Chairman

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

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

DATED: March 13, 1978
Frankfort, Kentucky

DECISION NO. 535

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
Capital Plaza Tower - 1st Floor
Frankfort, Kentucky 40601

Honorable Stephen M. Vinsavich (Certified Mail #783028)
Attorney
South Central Bell
P. O. Box 42310
Louisville, Kentucky 40232

Honorable William S. Connolly (Certified Mail #783029)
General Attorney
South Central Bell
P. O. Box 32410
Louisville, Kentucky 40232

Honorable Gail F. Barber (Certified Mail #783030)
Attorney at Law
P. O. Box 771
27th Floor, Headquarters Building
Birmingham, Alabama 35201

South Central Bell Telephone Co. (First Class Mail)
534 Armory Place
Louisville, Kentucky 40201

This 13th day of March, 1978.



Iris R. Barrett
Executive Director

Allegue



371 (498)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

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

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

John C. Roberts
MEMBER

December 7, 1977

*KOSHRC
Decision
Order No 498*

KOSHRC # 371

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY
(Formerly PUBLIC SERVICE COMMISSION OF KENTUCKY)

COMPLAINANT

VS.

SOUTH CENTRAL BELL TELEPHONE 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:

Honorable Stephen M. Vinsavich (Certified Mail #240806)
Attorney
South Central Bell
P. O. Box 42310
Louisville, Kentucky 40232

Hon. William S. Connolly (Certified Mail #240808)
General Attorney
South Central Bell
P. O. Box 32410
Louisville, Kentucky 40232

Hon. Gail F. Barber (First Class Mail)
Attorney at Law
P. O. Box 771
27th Floor, Headquarters Building
Birmingham, Alabama 35201

South Central Bell Telephone Co. (First Class Mail)
534 Armory Place
Louisville, Kentucky 40201

This 7th day of December, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #371

PUBLIC SERVICE COMMISSION OF KENTUCKY
(For and on behalf of Commissioner of
Labor)

COMPLAINANT

v.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

SOUTH CENTRAL BELL TELEPHONE COMPANY

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of a citation issued against South Central Bell Telephone Company, hereinafter referred to as "South Central Bell", by the Public Service Commission of Kentucky, hereinafter referred to as "PSC", for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On April 5, 1977, a Compliance Officer for the PSC made an inspection of South Central Bell's facilities in Owensboro. As a result of that inspection, the PSC issued a citation on April 8, 1977, charging South Central Bell with seven non-serious violations of the Act. There being less than 10 such violations, no penalty was proposed.

On May 4, 1977, and within 15 working days from its receipt of the citation, South Central Bell filed notice with the PSC contesting the citation. Notice of the contest was transmitted to this Review Commission on May 11, 1977, and notice of receipt of the contest was sent to South Central Bell by this Review Commission on May 12, 1977. Thereafter, on May 26, 1977, the PSC filed its Complaint and on June 7, 1977, South Central Bell filed its Answer. On June 13, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Owensboro on June 30, 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 Act, and to promulgate and adopt 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.

On the day of the hearing, by Executive Order 77-573, PSC's enforcement powers under the Act were transferred to the Commissioner of Labor. Pursuant thereto, the General Counsel for the Commissioner of Labor moved to be substituted as counsel. By Order dated August 3, 1977, the motion was sustained.

The standard (as adopted by 803 KAR 2:020) allegedly violated and the description of the alleged violation, are as follows:

1910.136	Failed to provide that where needed for protection of employees, safety-toe footwear for all employees shall meet the requirements and specifications of A.N.S.I. standards for Mens Safety-Toe Footwear Z41.1-1967 in that the supply service man in the construction storeroom does not have effective foot protection for the type of duties he must perform.
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At the conclusion of the Complainant's proof, South Central Bell moved to dismiss the citation on the grounds that the PSC had not sustained the burden of proving a violation of the Act. In support of its motion, South Central Bell contended that the standard relied upon does not require employees to wear safety-toe footwear, but merely prescribes the specifications such footwear must meet where it is used. South Central Bell further contended that the proper standard that should have been cited was 1910.132(a).

In response to the motion, the PSC contended that the Act does not require the citation to enumerate all standards applicable to a given situation, and that it is the policy of the PSC to refer only to the standard that is the most specific. The PSC further contended that if it was determined that the wrong standard was cited, it should be allowed to amend its Complaint to conform to the proof, and a motion to that effect was so made. The motion to amend the Complaint was overruled, subject to reconsideration upon the entire record.

Amendments to conform to the evidence are governed by Civil Rule 15.02. That rule provides in part, as follows:

. . . Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment . . .
. . . if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action on defense upon the merits

Here, the facts relied upon as the basis for the citation were clearly set out in the citation itself. As a result South Central Bell was fully aware of the conditions which PSC alleges is a violation of the Act, and was cognizant of the standards which are relevant to those conditions. This is underscored by the fact that it was South Central Bell itself, who pointed out the applicability of 1910.132 to the situation. Thus, an amendment of the Complaint to include 1910.132(a) in conformity with the proof would not prejudice South Central Bell and the earlier order overruling PSC's motion to amend is hereby vacated and the motion is sustained.

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

South Central is a public utility operating a telephone system in this state. It maintains an office in Owensboro which serves as one of its division headquarters. Other offices in the division are located in Henderson and Bowling Green.

As a part of its operation, South Central Bell has 30 supply rooms located in its offices throughout the state. These supply rooms are staffed by 69 supply servicemen. Four of its supply rooms are located in the Owensboro Division and they are staffed by 7 supply servicemen.

In making his inspection of the Owensboro facility, the Compliance Officer inspected the supply room located within it. This room was used to store various items including, reels of wire, cable, metal bolts, metal clamps, metal nuts, metal splicing devices, metal rods and five gallon containers of cable lubricant. The room was constructed on two levels connected by an open stairway. The materials on the first level were stored in shelves and the materials on the second level were stored on the floor.

When materials are delivered to the storeroom, the supply serviceman help to unload and store them. Based on his experience gained from working for a gas utility, the Compliance Officer assumed that the smaller items, such as metal nuts, metal clamps and metal bolts, are received in large packages. However, no estimate of how much these packages weigh was ever given. The reels of wire and cable were much larger items and the Compliance Officer estimated them to weigh between 1000 to 2000 pounds.

During the course of his inspection, the Compliance Officer found that the supply serviceman was wearing tennis shoes. In the opinion of the Compliance Officer, such shoes were not appropriate for the job he was performing in that they exposed the supply serviceman to a risk of injury

from materials falling on his feet in the course of his handling them, or in case they fell from a shelf.

A personnel officer for the company testified, however, that such injuries were unlikely. He based his testimony on the company records which showed that for the period of 1971 to the date of the hearing, there had been no injuries to any of its storeroom employees in the Owensboro division which could have been prevented by safety shoes, and only one such injury during that period to any of its storeroom employees in the entire state.

CONCLUSIONS OF LAW

29 CFR 1910.132(a) provides:

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 reasons of hazards of processes or environments, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any parts of the body through absorption, inhalation or physical contact (emphasis added)

29 CFR 1910.136 provides:

Safety toe footwear for employees shall meet the requirements and specifications in American National Standard for Men's Safety-Toe Footwear, Z41.1-1967.

The latter standard, 29 CFR 1910.136, does not require employees to wear safety footwear conforming to the standard in every instance where there is a possibility of injury to the employees feet. It merely requires that where such safety footwear is used to provide protection, it must conform to the standard. Where other safety measures can provide effective protection against hazards of injury, they may be used instead. Roadway Express, Inc. CCH-OSHD ¶ 21,496 (1976). Therefore, the failure of South

Central Bell's supply serviceman to wear safety toe footwear is not in and of itself a violation of the Act.

The question still remains, whether the employees were exposed to a hazard of injury to their feet from falling objects. The Compliance Officer testified that he was informed by the supply serviceman on duty during his inspection that as a part of his duties, he helped unload and store materials in the supply room. Although many of the items were small, such as nuts and bolts, the packages they came in were, according to the experience of the Compliance Officer, of sufficient weight to cause injury if dropped. This evidence, though not as strong as direct evidence as to the actual weight of the packages, is uncontroverted by South Central Bell.

In Strickland Transportation Co., Inc., CCH-OSHD ¶ 22,029 (1977), the United States Review Commission affirmed an Administrative Law Judge's decision sustaining a citation for violation of 29 CFR 1910.132(a) where employees were permitted to handle freight weighing up to 50 pounds in packages that were sometimes bulky and slipperly. There, as in this case, the evidence established that there had been no lost time accidents resulting from freight which had been dropped, but the Review Commission found that this did not negate the hazard.

Of similar import is the case of Cotter and Co., CCH-OSHD ¶ 21,769 (1977). There, a nonserious violation of 1910.132(a) was sustained against an employer for permitting its employees engaged in loading and unloading hardware items to work without safety shoes or other foot protection. In that case, employees handled items weighing up to 263 pounds, but most items weighing 22 pounds or more were handled by trucks dollies and forklifts. The failure to require employees to wear safety toe protective equipment was deemed to be a violation of the standard.

Although, the likelihood of an injury to the supply servicemen resulting from materials dropping on their feet is small, in this case the hazard of such injuries still exist. Therefore, South Central Bell should have required the supply servicemen to wear some sort of protective footwear, and the failure to do so was a violation of 1910.132(a).

RECOMMENDED DECISION

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

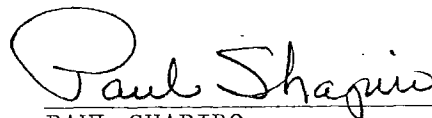
IT IS HEREBY ORDERED

That the citation alleging a violation of 29 CFR 1910.136 (as adopted by 803 KAR 2:020) is hereby vacated.

That the citation and complaint as amended alleging a violation of 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) is hereby sustained.

IT IS FURTHER ORDERED

That the violation sustained must be abated without delay, but no later than 30 days from the date hereof.



PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: December 7, 1977
Frankfort, Kentucky

DECISION NO. 498