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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 14, 1978

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC #388

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JOHNSON WELDING CO., INC.

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 28, 1977, is before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

It is clear that the Respondent did not post the original citation as required by 803 KAR 2:125. The Hearing Officer sustained this citation and the \$100.00 penalty. We agree with the decision regarding this item.

The Respondent contends that they were not aware of the serious results of failure to correct cited violations. We agree with the Hearing Officer that there is little merit to their contention. The statute, various documents and oral explanations from the Department of Labor gave notice of possible severe penalties for failure to abate.

After careful review of the testimony, pleadings, and documents in this case, the Review Commission has made the following findings regarding the failure to abate items:

Item 5 involving portable fire extinguishers with a penalty of \$231.00 is SUSTAINED.

Item 6 an improperly guarded blower with a penalty of \$350.00 is SUSTAINED.

Item 7 the failure to abate the work rest violation is SUSTAINED with a reduced penalty of \$100.00.

Item 8 the failure to correct the tongue violation is SUSTAINED with a reduced penalty of \$100.00.

Item 10 the failure to abate violation is SUSTAINED with a reduced penalty of \$70.00.

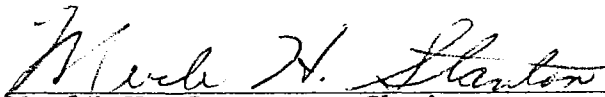
Item 14 is SUSTAINED for failure to abate the violation of uncovered welding terminals. A reduced penalty of \$175.00 is imposed.

Item 15, with a \$231.00 penalty, was sustained by the Hearing Officer. In reviewing the record we find that this item was corrected and thus possibly a repeat violation for which a new citation must be issued. Therefore, this item and the proposed penalty are DISMISSED.

Item 16 and the \$350.00 penalty are SUSTAINED.

Item 18 and the \$350.00 penalty are SUSTAINED.

Accordingly it is ORDERED that the violations, if not already corrected, must be abated no later than 30 days from the date of this order.

  
Merle H. Stanton, Chairman

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

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

Dated: March 14, 1978  
Frankfort, Kentucky

DECISION NO. 541

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

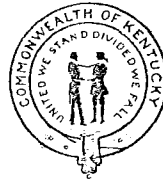
- ✓ Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health
  
- ✓ Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Larry D. Hamfeldt  
Assistant Counsel
  
- ✓ Honorable Jerry L. Moore (Certified Mail #783033)  
BELL, ORR, AYERS & MOORE  
Attorneys at Law  
1010 College Street  
Post Office Box 236  
Bowling Green, Ky. 42101
  
- ✓ Mr. Donald Hendrick, Secty.-Treas. (First Class Mail)  
Johnson Welding Co., Inc.  
439 Center Street  
Bowling Green, Kentucky 42101

This 14th day of March, 1978.

✓ *Chas L.*  
✓ *H. Noi*  
✓ *Barbara*

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

December 28, 1977

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC # 388

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JOHNSON WELDING 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: Larry D. Hamfeldt  
Assistant Counsel
  
- ✓ Hon. Jerry L. Moore (Certified Mail #240817)  
BELL, ORR, AYERS & MOORE  
Attorneys at Law  
1010 College Street  
Post Office Box 236  
Bowling Green, Ky. 42101
  
- ✓ Mr. Donald Hendrick, Secty.-Treas. (First Class Mail)  
Johnson Welding Co., Inc.  
439 Center Street  
Bowling Green, Ky. 42101

This 28th day of December, 1977.

✓ Otis R.  
✓ 3-Commiss  
✓ A.O's.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
KOSHRC #388

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

JOHNSON WELDING CO., INC.

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of two citations issued against Johnson Welding Co., Inc., hereinafter referred to as "Johnson", 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 April 26, 1977, a Compliance Officer for the Commissioner made an inspection of Johnson's welding shop in Bowling Green. As a result of that inspection, the Commissioner issued a citation on May 13, 1977, charging Johnson with 18 nonserious violations of the Act, but proposing no penalties therefor. The citation further directed that each violation be corrected no later than a certain date. The citation was not contested.

On June 13, 1977, the same Compliance Officer re-inspected the welding shop. As a result of that inspection, the Commissioner issued two citations on June 15, 1977, charging violations relating back to the earlier citation. The first citation charged Johnson with one regulatory violation and the second citation charged Johnson with failure to correct nine of the 18 nonserious violations charged in the earlier citation within the time directed by that citation. The Commissioner proposed a penalty of \$100.00 for the regulatory violation and a \$3,752.00 penalty for the failure to abate.

On June 23, 1977, and within 15 working days from receipt of the citation, Johnson filed a notice with the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on June 30, 1977, and notice of receipt of the contest was sent by the Review Commission to Johnson on July 5, 1977. Thereafter, the Commissioner filed its Complaint on July 7, 1977, and Johnson filed its Answer on July 13, 1977. On August 1, 1977 this matter was assigned to a Hearing Officer and scheduled for hearing on August 18, 1977. Upon motion of the Commissioner, an Order was entered on August 9, 1977, rescheduling the hearing to a later date.

The hearing was held in Bowling Green on September 9, 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 discretionary review by the Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

The regulation allegedly violated in Citation 1, and the description of the alleged violation is as follows:

803 KAR 2:125	Where upon receipt of a citation
Section 1 (a)	under Chapter 338, the employer
	did not immediately post such
	citation, or a copy thereof,
	unedited, at or near each place
	of an alleged violation referred
	to in the citation occurred.

The description of the alleged failure to abate the violation alleged in the citation of May 13, 1977, and the penalty proposed for each such failure is as follows:

<u>Item No.</u>	<u>Unadjusted Penalty</u>	<u>Credit for Partial Abatement</u>	<u>Proposed Penalty</u>
5	\$700.00	\$469.00	\$231.00
6	700.00	350.00	350.00
7	700.00	-0-	700.00
8	700.00	-0-	700.00
10	700.00	560.00	140.00
14	700.00	350.00	350.00
15	700.00	469.00	231.00
16	700.00	-0-	700.00
18	700.00	350.00	350.00
			<u>\$3752.00</u>

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

Johnson operates a welding shop where it repairs a wide range of objects. On April 26, 1977, Anthony Wayne Walters, a Compliance Officer for the Commissioner made a safety inspection of the shop. In making the inspection, the Compliance Officer followed his normal routine. Upon arrival at the shop he presented his credentials and then held an opening conference with Mr. Donald Hendrick, one of the company's supervisors. At the opening conference he explained the purpose of the inspection and the procedure to be followed. After the opening conference, the Compliance Officer made a walk-around inspection of the shop.

When the walk-around inspection was completed, the Compliance Officer held a closing conference with Mr. Hendrick. In the closing conference, he discussed some of the things he had found, as well as various things the company could expect or would be required to do if a citation was issued. In conducting the conference the Compliance Officer used a check list for each topic discussed and at the conclusion of the conference, Mr. Hendrick signed the check list.

At the closing conference, Mr. Hendrick was informed that if a citation was issued, Johnson would be required to correct any violation by the time prescribed in the citation. He was also informed that failure



to correct the violation within the time allowed could result in additional penalties being proposed, and if it was unable to correct the violations on time he could request an extension. The Compliance Officer also informed Mr. Hendrick that citations issued by the Commissioner must be posted in a conspicuous place for three days, or until the violations was corrected. All these topics were included in the Compliance Officer's checklist which was signed by Mr. Hendrick.

Before leaving the shop, the Compliance Officer gave Mr. Hendrick his business card with his local address and telephone number. This was also part of his normal routine.

After the inspection, the Commissioner issued a citation on May 13, 1977, charging Johnson with 18 nonserious of the Act. Attached to the citation was a cover sheet which briefly explained the employees rights and responsibilities under the Act. It informed the employer of his duty to post the citation and to abate the violations within the prescribed time. It also advised the employer of the possibility of a follow up inspection to ascertain if the violations were corrected, and that the failure to correct them within the time allowed could result in additional penalties.

On May 20, 1977, Johnson was sent an abatement notice relating to those items in the citation required to be corrected by May 18, 1977. Here again the notice informed Johnson of its duty to correct the violation by the time prescribed and the possible penalties for failure to do so.

On June 13, 1977, Mr. Walters made a follow-up inspection of Johnson's shop. In the course of his inspection he found that nine of the 18 violations had either been partially abated or had not been abated at all. These nine violations were described as follows:

Item 5 related to three portable fire extinguishers which were found without permanent tags to indicate maintenance and recharge dates in

violation of 29 CFR 1910.157(d)(3)(w). On the follow-up inspection, the Compliance Officer found only one of the fire extinguishers and it was still without the required tag. Because he could not locate the other two fire extinguishers, he did not regard them as not being in compliance and, therefore, determined that only one-third of the items involved remained in violation. The record herein indicates, however, that the other two probably did not have tags either.

Item 6 related to two blowers in the shop whose motors and moving parts, exclusive of belts and pulleys, were not properly guarded in violation of 29 CFR 1910.212(a)(1). When re-inspected, the Compliance Officer found that one blower was no longer in service and, therefore, no longer a hazard. The other blower, however, remained improperly guarded and it was therefore, determined that 50% of the violation remained.

Item 7 related to a work rest on a pedestal grinder which was not properly adjusted in violation of 29 CFR 1910.215(a)(4). On re-inspection it remained improperly guarded.

Item 8 related to adjustable tongues on the pedestal grinder not being properly adjusted in violation of 29 CFR 1910.215(b)(9). When re-inspected they were still improperly adjusted.

Item 10 related to belts and pulleys on a drill press and on the two blowers which were not adequately guarded in violation of 29 CFR 1910.219(d)(1) and 29 CFR 1910.219(e)(3)(i). On reinspection, the Compliance Officer found that the drill press, which contained three belts, and one of the blowers, which had one belt were no longer in service. The remaining blower was in service, but was not guarded. Since four of the five belts and pulleys no longer constituted a hazard, he determined that 80% of the violation had been abated.

Item 14 relates to welding terminals which were not covered on two welders in violation of 29 CFR 1910.252(b)(iv)(d). On reinspection, one

of the welders was not in the shop, but the Compliance Officer observed that the terminals on the other remained uncovered. He determined therefore, that at least 50% of the violation remained.

Item 15 relates to three electric receptacles which were not guarded with approved enclosures in violation of 29 CFR 1910.309(a). On reinspection two were properly guarded and it was determined that only one-third of the violation remained.

Item 16 related to four electric lights whose bulbs were not enclosed in violation of 29 CFR 1910.309(a). When reinspected, all were found to be still unenclosed.

Item 18 related to a band saw and a metal press which were not grounded in violation of 29 CFR 1910.309(a). On reinspection, the drill press was no longer in service, but the band saw was in operation and still ungrounded. Fifty percent of the original violation was, therefore, found to remain.

Johnson purchased the portable fire extinguishers in Item 5 from Southern Welding and Supply, who also maintained them for Johnson. When Johnson received the first citation he notified Southern Welding and Supply of the need to put the proper tags on them. However, it was not until after the second citation that they did so.

The two blowers mentioned in Item 6 were furnace blowers intended for use within an enclosed furnace. Therefore, there were no guards manufactured for them and in order to comply with the standards, Johnson was required to make its own guards. Since the second inspection, it has done so and the blowers are now apparently guarded.

The work rest on the pedestal grinder in Item 7 was ordered from the manufacturer after the first inspection. However, it was not received until after the second inspection. The adjustable tongues in Item 8 on the same machine, however, could not be ordered and after the second inspection, Johnson made its own and put them on the machine.

The guard for the belts and pulleys on the blower in Item 10 also had to be made by Johnson since none was manufactured for that type of blower. This part was made and installed after the second inspection.

After the initial inspection, Johnson attempted to find guards for the terminals on the welders in Item 14. They were unable to find any in Bowling Green, but a salesman for one of their suppliers did send them some from Nashville. However, they were not received until after the second inspection.

Johnson did cover the receptacle in Item 15 after the first inspection. However, the covers used were porcelain and one broke after it was installed. They have all since been replaced with metal covers.

After trying to purchase enclosures for the light bulbs in Item 18 from three hardware stores, Johnson was able to purchase some from an electrical parts wholesale. The purchase was made after the second inspection, but it is not established from the record whether he went to the hardware stores before or after the second inspection.

The Compliance Officer also found that the citation issued on May 13, 1977, had not been posted. For failure to post the citation he proposed a penalty of \$100.00.

To ensure uniformity in the proposal of penalties, the Commissioner has adopted certain guidelines which are contained in the compliance manual furnished to its Compliance Officer. Under these policies the failure to abate a violation carries with it a penalty of not less than \$100.00 per day from the abatement date to the date of the inspection with a maximum of 7 days or \$700.00 for each violation. In the instant case, the follow-up inspection was conducted more than 7 days after the violation described for each item was directed to have been corrected.

If a violation has been partially corrected, the penalty is reduced proportionally. Thus, as in the case of Item 14, where only 50% of

the violative condition remained on the second inspection, the actual penalty proposed for failing to completely abate the hazard was reduced from \$700.00 to \$350.00.

Under the same policy guidelines, the proposed penalty for failing to post a citation is \$100.00. From this amount there are no adjustments provided by the guidelines.

#### CONCLUSIONS OF LAW

KRS 338.051 created the Kentucky Occupational Safety and Health Standards Board and vested in that Board the authority to promulgate rules, regulations and standards to carry out the purposes of the Act. Pursuant to that authority the Board promulgated 803 KAR 2:125 which requires employees cited with violation of the Act to post a copy of the citation for three days, or until the violation has been abated, at or near each place of the alleged violation.

Here Johnson was clearly in violation of the regulation. Nine violations of the citation issued on May 13, 1977 were still found to exist on June 15, 1977, when a second inspection was made. However no copy of the citation was found posted anywhere in Johnson's shop.

Furthermore, although Johnson was informed of the requirement of posting the citation no reason was given for failing to do so. Therefore, the penalty proposed in accordance with the Commissioner's guidelines for failing to comply with the regulation was appropriate under the circumstances.

KRS 338.991(4) provides as follows:

Any employer who fails to correct a violation for which a citation has been issued within the period permitted for its correction, may be assessed a civil penalty of up to \$1000.00 for each day during which such failure or violation continues.

The actual amount of the penalty is discretionary with the Commissioner so long as it does not exceed the stated maximum. In exercising that

discretion, the Commissioner has adopted policy guidelines to follow in fixing different penalties for different types of violation. In the case of nonserious violations of the safety standards adopted pursuant to 803 KAR 2:020, the Commissioner has determined that a maximum penalty of \$100.00 per day for each such violation, not to exceed \$700.00 shall be proposed. These guidelines, however, do not take into account any mitigating factors that might exist for not correcting the violation within the time prescribed. Apparently, it is the position of the Commissioner that if such factors exist the proper procedure is for the employer to seek an extension of the abatement period.

Johnson contends that the penalties should be dismissed or lowered because it acted in good faith in attempting to comply with the Act, and had not been informed and was unaware of the Commissioners policy. Therefore, to impose such a penalty in this case is unreasonable. The facts of this case fail to support Johnson's contention.

Although, Johnson was probably not advised what the policy of the Commissioner was in fixing penalties for failing to abate a nonserious violation within the time prescribed, it was informed that a penalty could be imposed for such a failure. The information was furnished verbally at the closing conference and in written form in the citation and the abatement notices which followed. Because Johnson did not know exactly how much the penalty would be is not an excuse for not complying with the citation.

Johnson was also advised at the closing conference that if it were unable to correct the violations by the abatement date in the citation, it could apply for an extension. In view of the emphasis placed on it at the closing conference in the citation and particularly in the abatement notice, Johnson was made aware of the importance of the abatement date. Therefore, if Johnson was unable to correct the violations on time, it should have sought an extension from the Commissioner.

Finally, the evidence does not support the contention that Johnson attempted to correct the violations within the prescribed time, but because of factors beyond its control was unable to do so. With the exception of the tags for the portable fire extinguishers, the guard for the work rest on the pedestal grinder, and the guards for terminals on the welder which had to be ordered, all the remaining violations in contest here were corrected by Johnson either improvising a new part or by purchasing a needed part locally. Furthermore, with respect to the portable fire extinguishers that violation was corrected when the importance of the matter was effectively brought to the attention of the company maintaining them. Thus, all but two of the violation could have been corrected before the second inspection and the proposed penalty, therefore, seems appropriate under the circumstances.

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 issued June 15, 1977, charging a violation of 803 KAR 2:125(1)(a) and proposing a penalty therefor of \$100.00 is hereby sustained.

That the citation issued June 15, 1977, charging failure to correct alleged violations of an earlier citation issued April 26, 1977, and proposing a penalty therefor of \$3,752.00 is hereby sustained.

IT IS FURTHER ORDERED that the violations must be abated and the penalties paid without delay, but no later than 30 days from the date hereof.

Dated: December 28, 1977  
Frankfort, Kentucky  
DECISION NO. 508

  
\_\_\_\_\_  
PAUL SHAPIRO  
HEARING OFFICER  
KOSHR