



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6992

December 27, 1978

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC #402

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

BARMET OF KENTUCKY, INC.

RESPONDENT

\* \* \* \* \*

EDITH DARLENE SALLEE, ADMINISTRATRIX  
OF THE ESTATE OF JAMES ROLAND SALLEE

INTERVENOR


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 28 August 1978, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Finding no error in the application of the law to the facts herein, and the evidence appearing to adequately support the findings and conclusions of the Hearing Officer, it is the unanimous ORDER of this Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED.

  
Merle H. Stanton, Chairman

Dated: December 27, 1978  
Frankfort, Ky.

DECISION NO. 649

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

/s/ John C. Roberts  
John C. Roberts, 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: Hon. Timothy P. O'Mara  
Assistant Counsel

✓ Honorable David L. Yewell (Certified Mail #988934)  
RUMMAGE, KAMUF & YEWELL  
322 Frederica Street  
Lincoln Federal Building  
Owensboro, Kentucky 42301

✓ Mr. John A. Grunigen, Jr., (Certified Mail #988935)  
Plant Manager  
Barmet of Kentucky, Inc.  
Post Office Box 98  
Utica, Kentucky 42376

✓ Hon. Stephen D. Gray (First Class Mail)  
DORSEY, SULLIVAN, KING & GRAY  
Ohio Valley National Bank Building  
Henderson, Kentucky 42420

✓ Hon. Richard M. Joiner (First Class Mail)  
MILLS, MITCHEL, TURNER AND DONAN  
123 East Center Street  
Madisonville, Kentucky 42431

ATTORNEYS FOR RESPONDENT

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403 West Third Street  
Owensboro, Kentucky 42301

ATTORNEY FOR HIGDON CONSTRUCTION CO.

✓ *Q. R.*

✓ Hon. Charles S. Wible (First Class Mail)  
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ATTORNEY FOR ESTATE OF WILLIAM HAROLD CLARK

✓ Hon. Philip G. Abshier (First Class Mail)  
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Owensboro, Kentucky 42301

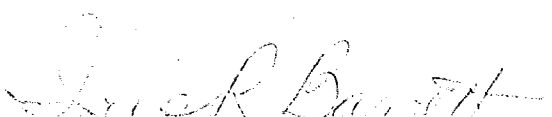
ATTORNEY FOR ESTATE OF JAMES RONNIE SALLEE

✓ Hon. Ronald G. Ingham (First Class Mail)  
HUMPHREYS, HUTCHESON & MOSELEY  
The Crawford Building  
308 Walnut Street  
Chattanooga, Tenn. 37403

ATTORNEY FOR WESTINGHOUSE ELECTRIC CORP.

✓ Hon. William M. Deep (First Class Mail)  
Hon. Harry L. Mathison  
KING, DEEP & BRANAMAN  
Ohio Valley National Bank Bldg.  
Henderson, Kentucky 42420

This 27th day of December 1978.

  
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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

August 28, 1978

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

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COMPLAINANT

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EDITH DARLENE SALLEE, ADMINISTRATRIX  
OF THE ESTATE OF JAMES ROLAND SALLEE

INTERVENOR

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 David L. Yewell ✓ (Certified Mail #457501)  
RUMMAGE, KAMUF & YEWELL  
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Mr. John A. Grunigen, Jr., ✓ (Certified Mail #457502)  
Plant Manager  
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Hon. Stephen D. Gray ✓ (First Class Mail)  
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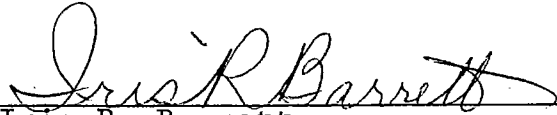
Hon. Ronald G. Ingham ✓ (First Class Mail)  
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308 Walnut Street  
Chattanooga, Tenn. 37403

ATTORNEY FOR WESTINGHOUSE ELECTRIC CORP.

Hon. William M. Deep ✓ (First Class Mail)  
Hon. Harry L. Mathison  
KING, DEEP & BRANAMAN  
Ohio Valley National Bank Bldg.  
Henderson, Kentucky 42420

This 28th day of August, 1978.

✓ 3-Commiss  
✓ O. H. R.  
✓ H. D. S.  
✓ Hender

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
KOSHRC #402

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDED DECISION

BARMET OF KENTUCKY, INC.

RESPONDENT

AND

EDITH DARLENE SALLEE  
ADMINISTRATRIX OF THE  
ESTATE OF JAMES RONALD SALLEE

INTREVENOR

STATEMENT OF THE CASE

This matter arises out of two citations issued August 10, 1977, against Barmet of Kentucky, Inc. hereinafter referred to as "Barmet", 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 June 29, 1977 and July 1, 1977, a Compliance Officer for the Commissioner made an inspection of Barmet's manufacturing plant in Livia. As a result of that inspection, the Commissioner issued two citations on August 10, 1977, charging Barmet with one nonserious violation, and one serious violation, and proposing a penalty of \$750.00 for the serious violation.

On August 22, 1977, and within 15 working days from receipt of the citation, Barmet filed a notice with the Commissioner contesting the citations. Notice of the contest was transmitted to this Review Commission on August 24, 1977, and notice of receipt of the contest was sent by this

Review Commission to Barmet on August 25, 1977. Thereafter, on September 9, 1977, the Commissioner filed its Complaint, together with a motion to consolidate this action with another contest now before this Review Commission styled: Commissioner of Labor, Commonwealth of Kentucky vs. Barmet of Kentucky, Inc., KOSHRC #403.

On September 23, 1977, Barmet filed its Answer and a motion for a Prehearing Conference in both actions. This matter was then assigned to a Hearing Officer on September 27, 1977, and by Order dated September 28, 1977, a Prehearing Conference was scheduled in both cases for October 21, 1977. At the Prehearing Conference several issues were raised including not only the matter of consolidation, but also the right of the estate of one of Barmet's deceased employees, James Ronald Sallee, hereinafter referred to as "Sallee", to intervene in this action, and the right of the estate of William Harold Clark, deceased, hereinafter referred to as "Clark", and Higdon Contracting Company, Inc., hereinafter referred to as "Higdon", for whom Mr. Clark had been employed, to intervene in KOSHRC 403. Due to the numerous issues raised, the Commissioner moved during the conference to withdraw its motion to consolidate the contests. By Order dated October 21, 1977, the Commissioner's motion to withdraw its motion to consolidate was sustained and both actions were set for hearing. No order was entered relative to the rights of parties to intervene, however, since no petition to that effect had been filed in either action.

On October 24, 1977, Edith Darlene Sallee, Administratrix of the Estate of James Ronald Sallee, moved to intervene in this action. On November 3, 1977, Barmet filed its objections to the motion and at the same time, also filed an objection to this Review Commission's order of October 21, 1977, on the grounds that representatives of the Sallee Estate, the Clark Estate and Higdon were permitted to participate in the



conference although not parties to either action. Barmet also moved that the Orders dated September 28, 1977, and October 21, 1977, be stricken from the record, and for a second Prehearing Conference.

On November 7, 1977, Barmet moved to file a Third Party Complaint herein against Osborn Manufacturing Corp., Westinghouse Electric Corp., and Allis-Chalmers Corporation. The Commissioner, on November 10, 1977, filed its response objecting to the motion and on November 19, 1977, Barmet filed a response to the Commissioner's objections. Barmet, on November 19, 1977, also moved to continue the hearing set for November 30, 1977 to permit the resolution of the several procedural issues raised both in this action and KOSHRC 403, since the Order of October 21, 1977. On November 23, 1977, this Review Commission issued an Order continuing the hearing set for November 30, 1977, and setting a Prehearing Conference for December 1, 1977 to resolve these issues.

The Prehearing Conference was held on December 1, 1977. On December 6, 1977, this Review Commission issued an order setting a time for the original parties, the parties seeking to intervene, and the parties named as third party defendants to file memorandum briefs' in support of their respective positions. The order further overruled Respondent's motion to strike the orders of September 28, 1977, and October 21, 1977; and set a new time for the hearing in this matter. On December 28, 1977, after the filing of such memorandums and before the hearing, this Review Commission issued an order which permitted the Estate of James Ronald Sallee to intervene in this action on a limited basis and which overruled the Respondent's motion to file a Third Party Complaint against Osborn Manufacturing Corporation, Westinghouse Electric Corporation and Allis-Chalmers Corporation.

The hearing of this matter was begun in Owensboro on January 11, 1978. Unable to complete it on that date, it was continued by Order of

the Review Commission to January 26, 1978, and then to February 28, 1978. The hearing was completed on February 29, 1978.

The hearing was held pursuant to KRS 338.070(4) which authorizes this Review Commission to rule on appeals from citations, notifications and variances to 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 this Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

The standards (as adopted by 803 KAR 2:020) and the section of KRS Chapter 338 allegedly violated, the description of the alleged violation, and the penalty proposed for same are as follows:

29 CFR 1910.22 (a)(2)	The floor of the electrical control room was not maintained, so far as possible in a dry condition.	\$ 0.00
KRS 338.031(1)(a)	The employer did not furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees in that an insulated tool (fuse-puller or equivalent protection was not used by employees for removal and replacement of fuses in electrical cabinets, in that lockout devices being used were not suitable to prevent energizing of electrical cabinets, and in that interlocks were not repaired or replaced to prevent the cabinets from being opened while energized (electrical control room)	\$750.00

#### SUMMARY OF TESTIMONY

The testimony in this case was presented over a period of several days and is contained in separate volumes. Therefore, the following summary of the testimony may be helpful in understanding the basis for this decision.

STEPHEN COOMES

Stephen Coomes testified that he was a Compliance Safety and Health Officer employed by the Commissioner and that he had held that position since the summer of 1973. He has a bachelor of science degree and has attended a three week course at the Federal OSHA Training Institute near Chicago, a Federal OSHA Training Seminar in Atlanta and several training sessions conducted by his department.

On June 29, 1977, and July 1, 1977, he made an inspection of Barmet's plant facilities in Livia. He was accompanied on that inspection by Bob Wade, a trainee in the department. On July 13, 1977, and July 25, 1977, he returned to the plant with Louis Davis in connection with this action and the conditions giving rise to KOSHRC 403.

The inspection was made as a result of a fatal accident suffered by James Ronald Sallee, an employee of Barmet. Sallee was found lying on the floor in the electrical control room in front of an electrical control cabinet for a machine known as the "exploder". Coomes stated that Barmet is engaged in the reclamation of aluminum waste. The waste is broken down at the plant and then shipped to another plant for further processing. The exploder is one of the machines used in the plant to break down the aluminum waste.

From his investigation, Coomes learned that the exploder had jammed during Sallee's shift. When that happened, it was normal for the fuses in the control cabinet to blow out. When Sallee was found, the door to the control cabinet was open and Coomes concluded that when the accident occurred, Sallee had apparently been changing the fuses inside the cabinet and had received an electrical shock.

Coomes described the control room as a separate room in the plant, approximately 18 feet wide by 35 feet with a concrete floor. The door into the room had a sign on it which restricted entrance to authorized

personnel. Coomes stated that when he inspected the room on June 29, and July 1, and again on July 13, and July 25, the floor of the room was in a damp condition.

In describing the electrical control cabinet for the exploder, Coomes stated that the cabinet was opened by a handle on its door. There was also a switch outside the cabinet which was used to turn the electricity to the exploder on and off. This switch was in turn connected to a switch inside the box. The switch outside the cabinet and the door handle were connected by an interlock device which was designed to prevent the cabinet door from being open while the electric switch inside the box was in the "on" position. However, on one occasion, Coomes observed one of Barmet's employees open the cabinet door while the switch inside the box remained on. This was done by turning the door handle and pulling the external switch on the door simultaneously.

In the course of his inspection, Coomes also observed a "lockout" device" attached to the external switch of the control cabinet. He stated that this was a scissors type device which, when fitted into the switch handle, was intended to keep the handle from being turned on. The lockout device was designed so that it could be locked in place on the handle by inserting one or more padlocks through holes in it. However, by turning the lockout device sideways in the switch handle, the switch could be turned on without unlocking or removing the lockout device from it.

As a result of his inspection, Coomes concluded that Barmet had not provided its employees with fuse pullers, or other equivalent safety protection, or enforced their use, in removing fuses from the control boxes. He further concluded that the interlock device and lockout device would not prevent the cabinet door from being opened while the control box was "on" or energized, and that the cement floor in the control room

was not maintained in a dry condition. In his opinion, these conditions constituted hazards to the employees of Barmet and were a violation of the Act. Furthermore, except for the failure to maintain the floor in a dry condition, in Coomes opinion, the hazards were all serious violations of the Act.

Coomes stated that a serious violation is defined by the Compliance Manual as one that is likely to cause death or serious physical harm to an employee. He further stated that it is the policy of his department to propose a minimum unadjusted penalty of \$1,000.00 for each serious violation. This unadjusted penalty is subject to adjustments or reductions of up to 20% for "good faith", 20% for "history" and 10% for "size". Coomes stated that in determining the amount allowed for "good faith", factors taken into consideration are the indications given by the employer that corrective action will be taken, the reception given by the employer to suggestions for improvements, and other factors of a similar nature. History is based upon whether the company has been inspected previously and cited for other violations. Size is based simply upon the number of employees employed by the company. Employees with less than 20 employees receive the full 10% adjustment for size, while those from 20 to 99 employees receive only 5%. Those with more than 99 employees receive no adjustment for size.

In this case, Coomes stated that because the company has been inspected on previous occasions and because he had some question concerning the company's willingness to abate the conditions cited, he allowed only 10% for history and 10% for good faith. Since the company had between 20 and 99 employees, he allowed only 5% for size. This reduced the penalty to \$750.00.

At the conclusion of the Complainant's proof, Coomes was recalled for examination by the Hearing Officer concerning the condition of the

floor in the control room. He stated that on all four occasions when he visited the plant, the floor was in essentially the same damp condition.

EDWARD D. SPARKS

Edward D. Sparks stated that he had been employed by Barmet for two years and that at the time of the hearing held the position of maintenance helper. Prior to that, in June, 1977, at the time of the accident he was a mill operator working the 12:00 midnight to 8:00 a.m. shift.

As a mill operator his duties included starting the mill machinery by turning on the power to the machinery in the control room. He also, on occasion, entered the control room to check the fuses in the control boxes after the exploder had jammed. In doing so he would of necessity open the door of the electrical cabinet. It was not clear from his testimony whether he performed this task in his present position or in the position he had as mill operator.

Sparks stated that the door to the control cabinet for the exploder and the door to an adjoining control cabinet which regulated the electricity to a dust collector, were opened in the same way; that is by first pushing the lever shutting off the power, and then turning the latch releasing the door. He further stated that on one occasion he observed the switch inside the cabinet for the dust collector remained in the "on" position after the door was open even though the switch outside the cabinet had been turned off. He never witnessed the same thing in the exploder control cabinet.

ROBERT LEE JOHNSON

Robert Lee Johnson stated that he had been employed by Barmet as a maintenance man since March, 1977 and on the day of the accident to Sallee, he was working the 12:00 midnight to 8:00 a.m. shift. Sallee was the night supervisor on the shift and was in charge of the plant that night.

On the night of the accident, Sallee assigned Johnson to operate a payloader and move some aluminum. While performing this task, he saw Sallee and was informed by him that the exploder had jammed. He asked Sallee if he needed help, but Sallee told him to continue moving the aluminum. When the exploder remained jammed, he went back to it and began to work clearing the machine. While he was working on the exploder, someone told him that something was the matter with Sallee. He then went to the control room and found Sallee lying in front of the electrical cabinet for the exploder. He examined Sallee and found no pulse. An ambulance was then called.

After discovering Sallee, Johnson stated that he examined the electrical cabinet. He observed that one of the fuses had been removed, that another was partially removed and that the switch inside the box was in the "on" position indicating that there was power flowing to the fuses. Later he, Orbie (Baize) and (John) Grunigen tried to open the box while the switch inside remained in the "on" position and they were able to do so. He also recalled that the floor of the electrical control room was damp.

Johnson admitted making a statement to the Compliance Officer that the "exploder control box switch had been bad at least a month". He stated that he did not know this prior to the accident and that he was not aware of this personally. He said he had been informed of it after the accident by another maintenance man, Chuck Majors. He further stated that he had known Majors about 5 or 6 years, and had found that he could rely upon what Majors told him in making judgments relative to the work he did. He also stated that as a maintenance man, it was his duty, and that of Majors, to report malfunctions of this nature to the electrician Cecil Eaden so that Eaden could repair it.

As a maintenance man, he stated that it would ordinarily be his job to check the fuses for any piece of equipment that stopped operating.

Otherwise, he would not normally go into the control room. On some occasions when he had changed fuses prior to the accident, he had been helped by Sallee and in Johnson's opinion Sallee also knew how to change the fuses. He stated that had he been changing the fuses in the control box at the time of the accident, he would have noticed the switch inside the box was in the "on" position and he would have turned it off before removing any of them.

Mr. Johnson also testified concerning the lockout devices and the fuse pullers. He stated that the lockout devices were used on the electrical cabinets to lock a cabinet out while someone was working on the machine, it controlled. This was to prevent the machine from being turned on accidentally. If he observed such a device on a cabinet he stated that it would tell him that someone was working on the machine controlled by that cabinet, and that the power to the machine should remain off.

Concerning the fuse pullers, Johnson stated that prior to the accident they "didn't have none at the time". Since the accident, fuse pullers are kept in the control room.

ORBIE BAIZE

Mr. Baize was originally called as a witness for the Commissioner. However, he also testified in behalf of Barmet and was clearly more sympathetic to the company than the Commission. He stated that he was Barmet's Maintenance Superintendent and was responsible for the maintenance of all of Barmet's automotive and plant equipment. He had been in that position since March, 1977, and usually worked the day shift from 8:00 a.m. to 4:00 p.m.

On the night of the accident to Sallee, he was called by Bob Johnson. When he arrived at the control room, Sallee had already been removed and the only one he remembers in the room was John Grunigen. However, there might have been others in the room as well. He did remember that the floor of the room was damp.



Baize stated that he has no formal electrical training. What he knows about electrical repairs he has learned on the job. His on the job training began at a textile mill in Cincinnati where he worked for an engineer. His present job seldom calls for him to change fuses, since he has maintenance men and an electrician who are responsible for that. However, he stated he is aware of the proper procedure to be used in changing fuses, and he followed that procedure whenever he is required to change fuses.

Baize described the proper procedure that is used in changing fuses in an electrical cabinet. He stated that after the cabinet door is opened, the switch inside the cabinet is checked to see if it is in the "off" position. Only when the switch is in the "off" position is it proper to remove the fuses. Fuses are often removed by hand and so far as he knew, that was a commonly accepted practice. At times when he removed fuses, he did so by hand, and at other times he used fuse pullers.

Baize stated that he was unaware of any problem with the door to the electrical cabinet until after the accident. Normally the door is opened by turning the electric switch handle slightly past the off position. This releases the lock in the door handle allowing the cabinet door to be opened. It also turns the switch inside the cabinet off, stopping the flow of electricity to the fuses.

On the night of the accident, Baize stated that he conducted tests on the cabinet door to see if it could be opened while the switch inside the cabinet remained in the "on" position. He tried to do this several times, and on one occasion he was able to do so by forcefully manipulating the door. Because of this malfunction, he ordered a new interlock device.

Baize stated that when he arrived at the electrical control room, there was a red lockout device attached to the cabinet door. He stated

that he removed it in order to conduct his tests. The lockout device was one of several that Barmet used to serve warning that a machine was being worked on. He described it as a scissor type device which when closed could be locked in place by one or more padlocks inserted through it. The lockout device was attached to the switch handle to serve as a warning that a machine was being worked on. Each employee working on the machine would insert his own padlock through the device, and the machine would not be turned on until after all the padlocks had been removed and the lockout device was taken from the handle.

Baize testified that the lockout devices in use at the time of Sallee's death had been purchased from the Safety Sign Company on December 8, 1975, out of catalog issued by that company. The catalog described the lockout device as designed to prevent accidental operation of equipment and for use on electrical switches, fuse boxes and controls. The catalog stated that the devices would give an "Effective Tamper Proof Lockout Program". The front of the catalog further stated that the devices were "(I)n compliance with the Occupational Safety and Health Act, 1970 (OSHA and ANSI)". Baize also stated that a catalog distributed by Emed Co., Inc. which purported to be a "complete reference guide" to signs required by OSHA listed a similar lockout device for sale.

Baize emphasized that he understood the purpose of these devices was not to completely lock the handle, but to serve primarily as a warning, not to turn the machine on. However, he was advised by Coomes that the devices were unsafe because, though locked onto the switch handle, by turning the device sideways, the switch could be moved to the "on" position without removing the device. When told they were unsafe by Coomes, Baize stated that he ordered different lockout devices which did in fact lock the handle in the "off" position.

Concerning the concrete floor, Baize testified that it was cleaned daily by a utility man, and that moisture on the floor was removed by

using an absorbent compound which was spread on the floor and then swept up. In addition, the air spaces into the room were locked off and heaters were used to removed the moisture. He admitted that there was a leak in the roof of the building which allowed a small amount of water into the room, but indicated that this small amount of water presented no real problem and was easily taken care of by the utility man.

LOUIS W. DAVIS

Mr. Davis testified that he was an Electrical Specialist in the Education and Training Division of the Department of Labor. His primary job is to train Compliance Officers in electrical safety and to advise private industry. He has had 43 years of experience in the electrical area, beginning with vocational school training. Prior to his employment with the Department of Labor, Mr. Davis stated he was employed in private industry and served as an electrician in the U. S. Navy. He is a licensed electrician and a certified electrical inspector.

In addition to his primary duties, Mr. Davis stated that he also acted as a technical advisor to the Compliance Officers in matters pertaining to electrical safety. It was in such a capacity that he accompanied Steve Coomes to Barmet's plant on July 13 and July 25, 1977. His purpose in going there was to investigate the accident in which Sallee was fatally injured. However, although the Commissioner's Compliance Officer may rely upon his advice from time to time in issuing citations, he stated that he took no formal part in their issuance nor in the proposal of penalties.

In the course of his investigation, Mr. Davis investigated the electrical control room. He stated that on both occasions while he was at the plant, the floor of the room was wet and he advised John Grunigen, one of the supervisory personnel, that a wet floor presented a hazard in an area where there was electrical equipment. He also stated that he

observed employees of Barmet using mops and buckets, and absorbent materials, to remove the water.

Mr. Davis stated that he observed rubber mats on the floor of the room. These appeared to be made from a rubber conveyor belt and were not of the type normally found in electrical control rooms. However, the electrical safety code does not require mats in such a room since all of the electrical equipment is enclosed.

Davis also commented upon the personnel who were qualified to handle the electrical equipment. He stated that the electrical safety code define a qualified person as one who is familiar with the installation and operation of the equipment and the hazards involved. It was Mr. Davis' opinion that at least 4 years experience with a use of equipment was required before a person was "qualified" to work on it.

Davis stated that he inspected the interlock device on the electrical control cabinet Sallee had been working on. He also tried to open it while the switch inside the cabinet remained in the "on" position, but he was unable to do so. It was his opinion, however, that if the internal switch remained on while the cabinet door was open, it presented a hazard of shock to the employees. In particular in the case of the electrical cabinet for the exploder, if it remained energized while opened it exposed live terminals which could deliver a shock of 277 or 480 volts, the difference depending on how the contact with the terminals was made. In either case, the shock would be substantial.

Davis did state that even though an electrical cabinet remained energized, a fuse could be removed by hand without shock, so long as only the fuse was touched. He stated, however, that the proper procedure in removing fuses was to first check the inside switch to be certain that it was in the "off" position. The next step would be check the

cabinet with a voltage meter to determine if the box was completely deenergized. He stated that even though the inside switch might be "off" there might be a feedback of current from another source that would keep the cabinet energized. Finally, in removing the fuses, a fuse puller should always be used. This is in accordance with the National Electrical Safety Code (ANSI-C2) which states that electrical parts should never be touched if approved devices are available. A fuse puller is an approved device for removing fuses. Davis was not able to say if fuse pullers are considered mandatory under the Code.

Davis also inspected the lockout device used on the electrical cabinet. He stated that the lockout device was of a type normally found on disconnect switches and not on motor control cabinets. Davis found that by manipulating the device while it was locked on the switch handle, the handle could be turned on activating the machinery. In his opinion, since the lockout device did not completely "lockout" or prevent the cabinet from being energized, the devices were not adequate. In reaching his opinion he relied upon 29 CFR 1910.145 which is concerned in part with warning tags and their use. He stated that this section permits such tags to be used only temporarily, until the equipment can be locked out. By implication he interpreted the standard as requiring a lockout device to completely lockout any piece of equipment it is attached to and not to merely serve as a warning.

Davis was recalled on rebuttal by the Complainant. He stated that the lockout device was intended to serve as more than a warning not to turn on an electrical motor. He stated that the purpose of a lockout device, as understood in the electrical industry, was to completely lock out an electrical cabinet or switch and prevent its being turned on until removed.

CHARLES MAJORS

Charles Majors testified that he was employed by Barmet in April, 1977, as a maintenance man. He described his duties as keeping the mill

running and performing general maintenance. As a part of his duties, he was on occasion required to work in the electrical control room and change the fuses in the electrical cabinets in the room. He has had no formal training in maintenance or electrical equipment, but has received instructions on how to perform his duties from Orbie Baize, the Supervisor of Maintenance for Barmet, and from other maintenance personnel, including plant electricians.

Majors described the electrical cabinets as simply large cabinets with fuses, starters and switches. He stated that he had been instructed on the procedure to follow in changing the fuses and he described that procedure. He stated that to change the fuses in an electrical cabinet, the switch is first pulled down turning off the machine. The cabinet door is then opened and a lockout device is affixed to the switch handle. The fuses are then removed with fuse pullers which are provided for that purpose. The fuse pullers are kept in a desk drawer in the production office or the control room. Majors estimated that in a years time he would remove and replace 200 fuses.

Majors also described the use and function of the lockout devices. He stated that each maintenance man had a padlock which he could insert into the lockout device so that the device could not be removed from the switch handle. The lockout device could accomodate six separate padlocks, so that up to six men could work on a machine and lock it out. All six men would have to remove their padlocks before the machine could be operated. He further stated that the lockout devices were red in color, plainly visible when attached to a handle, and were understood by all personnel at the plant to signify that a machine was being worked on and the power for the machine should not be turned on while a lockout device was attached to the switch handle.

In working on the exploders, Majors stated that when they got too much material in them they would blow their fuses. He would pull

the switch on the electrical cabinet, attach a lockout device to the handle, and then go to the machine and "clean it out". After removing the excess materials he would return to the electrical cabinet and change the fuse.

Majors was asked if he ever experienced any difficulty with the power in the exploder's electrical cabinet remaining on after he had pulled the switch and opened the cabinet door. He stated that he had not nor did he know of that ever happening to anyone else. He also denied making any statement to Robert Johnson that there had been such a problem with the cabinet for a period of time prior to Sallee's death.

JOHN A. GRUNIGEN, JR.

John A. Grunigen testified that he was the Plant Manager of Barmet's plant in Livia and had held that position since Barmet acquired the plant in February, 1977. Prior to that time, the plant was owned by Aluminum Service Company. Grunigen first came to work at the plant in 1974 as Production Superintendent. He was promoted to Plant Manager by Aluminum Service Co. in January, 1975, and continued in that position under Barmet's ownership.

Grunigen stated that he had a Bachelor of Science degree from New York University in Industrial Engineering. He obtained his degree after being discharged from the U. S. Marine Corps with the rank of Captain. Before entering the service he had also attended the Carnegie Institute of Technology, majoring in electrical engineering.

As an industrial engineer, Grunigen has been engaged in the installation and renovation of manufacturing production lines in various locations in the United States and in foreign nations. He has done this work as a member of a team and also in a supervisory position. In the course of his work he has worked with electricity and electrical equipment and has used the National Electrical Code and other such building and safety codes as a guide.

Grunigen described the processing operation at Barmet's plant in Livia as the reclamation of aluminum from dross. He defined "dross" as "an aluminum slag" which is shipped to the Livia plant from a related company. After being processed in the Livia plant, the product is then shipped to another plant for further processing. About 30 people are employed at the Livia plant.

Grunigen stated that Sallee was a foreman-supervisor in charge of the midnight to 8:00 a.m. shift on the night he was fatally injured. As a foreman-supervisor he was in charge of the operation of the entire plant during his shift and was responsible for the employees working during that shift. As a part of his duties, Sallee was required to hold monthly safety meetings for the employees working under his supervision.

Prior to being foreman supervisor, Sallee was employed at the plant as a Production Superintendent in Shipping and Receiving. He had no experience in maintenance and Grunigen stated that he did not know Sallee had changed fuses. He also stated that he was not surprised Sallee would do so, only surprised that he didn't use fuse pullers, since it had been reported to him that on an earlier occasion Sallee had severely reprimanded another employee for removing a fuse with a screw driver and not using the proper tools.

Grunigen also stated that it was contrary to company policy and the collective bargaining agreement for supervisors to do any bargaining unit work, except in emergencies. The jamming of the exploder is not considered such an emergency.

On the night of the accident, Grunigen stated that he arrived at the plant about 3:30 to 3:35 a.m., about a half hour after the accident. When he arrived he noticed that the floor was damp, but thought that might have been due to the fact that it had rained that evening and several people had been in and out of the room tracking in moisture. He



also noticed that the two electrical cabinets, one for each motor on the exploder, had lockout devices attached to their handles. He stated that this was not unusual because when the exploder jammed it would normally blow the fuses in both cabinets and the power would not be turned on in either cabinet until the fuses in both had been replaced and the machine was restored to operating condition.

When he inspected the cabinets, he found that in one all the fuses were operable, while in the other one fuse had been removed and one was partially removed. This indicated to him that Sallee had finished changing the fuses in one cabinet and was in the process of changing them in the other when he received his fatal shock. There were no fuse pullers in the room which indicated to him that Sallee was removing them by hand. He also noted that the internal switch in the electrical cabinet Sallee had been working on when he was shocked, was still "on", indicating that the cabinet was energized.

The electrical cabinet was manufactured by Allis-Chalmers Corporation and was equipped with an interlock device in the door handle manufactured by Westinghouse Electric Company. This device was designed to prevent the cabinet from being opened while the internal switch was on and the cabinet remained energized. Grunigen described in detail how the device worked and stated that on the night of the accident, he and Orbie Baize tried six or seven times to open the cabinet while leaving the internal switch on. He said that by forcing the door they were able to do so on one occasion. A few weeks later, one of the three maintenance men showed Grunigen a way in which the cabinet could be opened by simultaneously turning the handle and pulling the external switch. When the door was opened in this manner, the internal switch remained on, thereby defeating the interlock device. Grunigen admitted that it was possible an employee in a hurry to change fuses might accidentally open the door in this manner, and unintentionally defeat the interlock device.

Grunigen described the cabinet as a combination disconnect and multi-stage cabinet typical of those used in plants for electric motors. He stated that he had never experienced any similar problems with interlock devices on such cabinets, and was unaware of any problem with the one on which Sallee was working until after the accident. When he learned that the interlock device could be defeated, a new handle was ordered.

Grunigen also testified at length concerning the lockout device. He stated that they were used as a warning device to serve notice that a machine was being worked on. Prior to their use, the company had used warning tags, but found them unsatisfactory since they were never sure when all the work had been completed. With the lockout device, each man working on a machine could insert a padlock through the device and the machine could not be turned on until all the padlocks were removed.

Grunigen stated that the lockout devices were purchased from the Safety Sign Company and were similar to other devices he had used or seen used in other plants where he had worked. The devices used by Barmet at the time of the accident had been ordered from a catalog which stated that they complied with OSHA. The witness stated that this was one of the factors they considered in ordering them. The catalog also described the devices as safety devices not security locks. Nevertheless, when told by Louis Davis they did not meet OSHA requirements because they would not prevent a switch from being turned on, the company purchased new lockout devices which did prevent the switch from being turned on.

Grunigen also admitted that at the time of the accident, the plant had a leak in its roof which allowed water to drip into the control room. Oil Sorb, a chemical compound, was used to collect the water which was removed daily.

RALPH PINKSTON

Ralph Pinkston testified that he was the Supervisor of the 4:00 p.m. to Midnight shift, and had been in that position since February,

had seven people working under him including a maintenance man and a lead production man. In addition to himself, only the maintenance man and the lead production man would have any reason to go into the control room.

Pinkston stated that as Supervisor he had instructed the maintenance men working under him to use fuse pullers in removing fuses and he never saw any fuses removed without them. He said fuse pullers were kept for that purpose in a desk drawer in the control room. However, he could not say if there were some there all the time. If not in that drawer, however, some could be found in the supply room or the maintenance office.

With respect to the lockout devices, Pinkston stated that they were used to warn personnel not to turn on the electricity in a control cabinet to which they were attached. He stated that company personnel were instructed on their use and purpose.

Concerning the interlock device, Pinkston stated he was unaware that the device had malfunctioned before Sallee's accident. No malfunction of this device had ever been reported to him, and he was unaware prior to the accident of any means that could be used to defeat its purpose of preventing the cabinet from being opened while it remained energized.

Pinkston stated on the night of the accident to Sallee, the floor of the control room was damp. He attributed this condition to the wet weather at the time and people tracking in water. He stated that there was a small leak into the room about 6 feet from the door, and about 6 feet from the electrical cabinets. He stated that the leak introduced only a small amount of water into the room and that it was controlled by oil absorb, a chemical compound piled beneath the leak. He did not attribute the damp condition of the room to the leak.

CECIL D. EADEN

Cecil Eaden testified on rebuttal that he was the chief electrician for Barmet and had held that position since April, 1977. Although he

had no formal training as an electrician, he has worked in that position for several companies before joining Barmet.

Eaden testified about the use and availability of fuse pullers to remove fuses. He stated that they were kept in a desk in the control room and in the parts house and although he had been instructed to use them, he never did so. He was unable to say whether he had ever removed any fuses without fuse pullers in the presence of any of Barmet's management personnel.

#### FINDINGS OF FACT

Barmet is engaged in the reclamation of aluminum from aluminum dross or slag. The dross is shipped to its plant in Livia from a related company and after being processed at the Livia plant is shipped to another plant for further processing. About 30 people are employed at the Livia plant.

On June 29, 1977, and on July 1, 1977, Stephen Coomes, a Compliance Officer made an inspection of Barmet's plant in Livia. The inspection was made as the result of a fatality suffered apparently early in the morning of June 28 at approximately 3:00 A.M. The fatality occurred in the electrical control room and the Compliance Officer concentrated his investigation in that area.

In the course of his investigation, the Compliance Officer learned that the deceased employee was James Ronald Sallee. Sallee was the foreman-supervisor for the midnight to 8:00 A.M. shift and was in charge of the plant during his shift. At the time of the accident he was apparently changing the fuses on an electrical control cabinet for one of the machines used in the processing operations. This machine is known as an "Exploder", and materials to be processed are fed into it. The machine has two motors which are powered by electricity controlled from two electrical cabinets located in an electrical control room. If too much material is fed into the exploder the machine jams. When this happens the fuses in electrical control cabinets will normally blow out.

When Sallee was found he was in the electrical control room lying in front of the electrical cabinets for the exploder. One cabinet was closed and all the fuses in it were operable indicating that Sallee had completed changing the fuses within it. The other cabinet was open, one of the fuses had been removed, and another was partially removed.

The door of the cabinets each had a switch handle to turn the electricity in the cabinet on and off, and a door handle to open the cabinet door. The doors were also each equipped with an interlock device which were designed to prevent the doors from being open while the electricity in the boxes was on. Therefore, in order to open a door, it was necessary to first pull the switch handle into the "off" position. This in turn pulled an internal switch inside the box into the "off" position cutting off the flow of electricity to the fuses. When the internal switch was in the off position, the interlock device released door handle allowing the cabinet to be opened. However, at the time of the accident the interlock device on one of the cabinets could be defeated by simultaneously pulling the external switch to the off position and turning and pulling the door handle. Thus, an employee in a hurry to change the fuses inside a cabinet could accidentally open the cabinet while the power remained on. If this happened it would expose live terminals in the cabinet which if contacted would deliver a shock of 277 or 480 volts; the difference being the manner in which contact was made.

When Sallee was found the internal switch in the cabinet was in the "on" position, indicating that the cabinet was still energized. From the position of his body, the condition of the cabinet, and the absence of fuse pullers in the area, it was apparent that he had received a fatal shock while trying to remove one of the fuses from the cabinet by hand. It was also apparent that he had not followed the proper procedure to remove fuses. That procedure would have been to first check the internal

switch to be sure it was off. A volt meter should then have been applied to ensure that there was no feedback of electricity in the box from another source. Finally, the fuses should have been removed with a fuse puller and not by hand.

If the interlock device had been working properly, and could not have been defeated, it is unlikely that the accident would have occurred, even though Sallee had not followed the proper procedure. However, although it was known by some of the employees prior to the accident that the interlock device could be defeated, this defect apparently had never been reported to any of the supervisory personnel. Thus, the first notice they had of the defect was after the fatal accident to Sallee. When it was found to be defective, the interlock device was replaced.

When Sallee was found, the electrical cabinet on which he was working had an instrument known as a lockout device attached to the external switch handle. This was a small scissors type device which was equipped with six sets of holes to accommodate up to six padlocks. When a machine was being worked on a lockout device would be attached to the handle of the electrical cabinet for the machine. Each person working on the machine would then insert his own padlock in the device so that the machine would not be turned on until all the padlocks had been removed. The particular lockout device in use at the time of Sallee's death, although locked in place on the handle, if turned sideways would not prevent the handle from being pulled into the "on" position. However, Barmet's purpose in using the lockout device was not to completely lock out the machine, but to provide a warning that the machine was being worked on and should not be started until all the padlocks on the device had been removed. Nevertheless, when advised by the Compliance Officer that in his opinion the lockout devices were inadequate, a new lockout device was ordered which did effectively prevent the machines from being started until removed.

Had Sallee used fuse pullers in removing the fuses, the accident might also have been avoided. Barmet furnished fuse pullers which were kept in the supply room and the maintenance office and in a drawer in a desk in the control room. When Sallee was found, however, there were no fuse pullers in the room. Apparently, prior to the accident, although it was stated company policy that they be used, some employees used them and some did not and the policy was not strictly enforced. This was evident not only from the testimony of the chief electrician who admitted that he never used them, but also from the testimony of the Maintenance Superintendent who stated that on occasion he used them, and on other occasions he did not.

The Compliance Officer stated that he visited the plant on four separate occasions. On each occasion the concrete floor in the electrical control room was damp or wet. This damp condition was also present at the time of the accident and could be attributed in part to the weather, since it had rained that evening and many people had entered the room tracking in water. There was also a small leak in the roof, but this would not be sufficient to explain the wetness over the entire floor. In any event, Barmet's employees using mops, buckets and a chemical compound called "oil sorb" removed the water on a daily basis.

The Commissioner, on the recommendation of the Compliance Officer, proposed a penalty of \$750.00 for the serious violations alleged in the Complaint. The penalties were proposed in accordance with the Commissioner's compliance manual which defines a "serious violation" as one that is likely to cause death or serious physical harm. All serious penalties carry a minimum proposed unadjusted penalty of \$1000.00. This was reduced by 10% for good faith shown by the company in complying with the Act, an additional 10% for the history of the company in complying, and 5% for the size of the company. The maximum of 20% for good faith and

20% for history was not allowed because the Compliance Officer had some question concerning the company's willingness to abate the conditions cited, and because the company had been cited on previous occasions. The size adjustment is an automatic adjustment based on the number of employees. Companies, such as Barmet with between 20 and 99 employees, are allowed only 5% for size.

#### CONCLUSIONS OF LAW

Before discussing the substantive issues involved in these proceedings, there are two procedural matters which, although having been dealt with in prior orders, are of sufficient importance to discuss again here. These involve the right of the Estate of Sallee to intervene and the right of Barmet to file a Third Party Complaint against the manufacturers of the lockout device and the interlock device. As noted above, Sallee's estate was given the right to intervene in these proceedings on a limited basis, but Barmet was not permitted to file a Third Party Complaint.

#### SALLEE'S MOTION TO INTERVENE

The right to intervention in these proceedings is governed by Sections 13 and 14 of the Rules of Procedure of the Review Commission. Section 13 relates specifically to the rights of employees and employers, while Section 14 relates to the rights of interested parties generally.

Section 13 provides as follows:

Employer or Employee Contests. (1) Where a notice of contest is filed by an employer contesting a citation or notification issued pursuant to KRS 338.131, 338.141 or 338.153, an employee or an authorized employee representative may elect party status by a request for intervention at any time before commencement of the hearing or if no hearing is held, within the time period a motion for dismissal is required to be posted. (2) Where a notice of contest is filed by an employee or by an authorized employee representative contesting a citation or notification issued pursuant to KRS 338.131, 338.141 or 338.153, the employer may elect party status at any time before commencement of the hearing, or if no hearing is held, within the time period a motion for dismissal is required to be posted.



Section 13(1) gives an employee an absolute right to intervene in any contest proceeding filed by an employer. The same right to intervene is conferred on an employer under Section 13(2) in any contest proceeding filed by an employee. This is consistent with the stated purpose of the Act, as contained in KRS 338.011, which is to promote safe and healthy work places within the state. Since the employees and the employer will be directly affected by any decision in a contest proceeding insofar as the work place is concerned, it is only reasonable that they both be permitted to participate in any such proceeding.

The same right of intervention would not extend to former employees since the working conditions at the work place will no longer have a direct affect upon them. Thus, former employees would not have a right to intervene under Section 13, nor would to the estate of a dedeased employee.

In her petition to intervene, however, Edith Darlene Sallee, the widow of Sallee and the Administratrix of his estate, relied on Section 14. In support of her petition, she stated that "this action arises out of circumstances and events leading or contributing to (Sallee's) death" and that "it is essential that she intervene in order to protect the interest of the decedent."

Section 14 of the Rules provides:

Intervention. (1) A petition for leave to intervene may be filed at any stage of a proceeding before commencement of the hearing, or in the event of a settlement or dismissal before issuance of a recommended order.

(2) The petition shall set forth the interest of the petitioner in the proceeding and show that participation of the petitioner will assist in the determination of the issues in question and that the intervention will not unnecessarily delay the proceeding.

(3) The commission or the hearing officer may grant a petition for intervention to such an extent and upon such terms as the commission or the hearing officer shall determine.

(4) The caption of all cases where intervention is allowed shall reflect such intervention by adding to the caption after the name of the respondent the name of the intervenor, followed by designation "Intervenor".

The grounds for intervention are set forth in subsection (2) of this section. These are: that the intervenor must show an interest in the proceedings, that his participation will assist in the determination of the issues, and that his participation will not unnecessarily delay the proceedings. Under the rule, all three grounds must be met before a party may intervene.

Taking these grounds in inverse order, it is difficult to imagine how the estate's intervention would unduly delay the proceedings. Presumably, the interest of the estate would parallel the Commissioner's and proof presented by the Intervenor would more than likely supplement the Commissioner's proof. If the Intervenor sought to get into matters outside the scope of these proceedings, or sought to introduce evidence which was unnecessarily repetitious, upon proper motion by either party, or upon its own motion, the Hearing Officer could exclude such evidence. Thus, Sallée could not be denied the right to intervene on the ground that it would delay the proceeding.

In her brief filed in support of her petition to intervene, Intervenor implied that she had evidence obtained in collateral litigation arising out of her husband's death which would assist in the determination of the issues here. Thus, the second ground for intervention is also satisfied, namely that intervenors participation will assist in the determination of the issues.

It is the first ground, however, which gives the most trouble. This ground requires that the intervenor set forth an interest in the proceeding. In her brief, the Intervenor stated with respect to this ground, that the outcome of this contest would have an effect upon a Workmen's Compensation claim and a collateral action presently pending and arising out of the circumstances giving rise to the inspection and the citation. The question is whether this is an "interest" within the meaning of the

rule. To answer the question, it is necessary to first examine the purpose of the proceedings themselves.

These proceedings are to determine if Barmet violated the Act by failing to maintain a safe place of employment. If the failure to do so will have a direct effect upon a Third party for whatever reason, then that third party has an interest in the proceeding to protect. Therefore, the potential impact of a decision in these proceedings in collateral litigation before other tribunals is a sufficient "interest" to justify intervention. However, intervention in cases such as this, should be limited strictly to the issues involved in these proceedings, and the intervenor should not be permitted to use a contest as a substitute for discovery in the collateral proceedings, or for any other purpose not directly related to the contest.

BARMET'S MOTION TO FILE A THIRD  
PARTY COMPLAINT

The other procedural issue was raised by Barmet's motion to file a third party complaint against Westinghouse Electric Corporation and Allis-Chalmers Corporation, the manufacturers of the interlock device, and against Osborn Manufacturing Corporation, whom at the time the motion was made, Barmet believed manufactured the lockout devices<sup>1</sup> cited as being in violation of the Act. Barmet contended that only by bringing in these parties could the "true safeness of these products be determined.

Barmet relied upon Subsection (2) of Section 4 of the Rules of Procedure. That subsection provides:

In the absence of a specific provision a (in the Rules of Procedure adopted by this Review Commission) procedure shall be in accordance with the Kentucky Rules of Civil Procedure.

Since there is no specific provision in this Review Commission's rules for third party actions, Barmet contended that was entitled to file a Third Party Complaint under Civil Rule 14.01. However, when

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<sup>1</sup> Subsequently at the hearing it was learned that the lockout devices for which Barmet was cited were manufactured by another company.

the purpose of the Act and these proceedings are compared to the purpose of C R 14.01, it quickly becomes apparent that Third Party actions are not applicable to contest proceedings.

The resolution of any issue involving the safeness of the devices is not dependent upon the manufacturers being made parties to the action. Competent evidence in this regard was available to Barmet, either through its own employees, independent experts or from employees of the manufacturers, or all three. If necessary, reluctant witnesses could even be subpoenaed to testify. Third party complaints are not intended to be used for the purpose of obtaining evidence.

Civil Rule 14.01 provides in part:

A defendant may move for leave to file as a Third Party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted, summons and a copy of the third party complaint, with a copy of the original complaint attached as an exhibit, shall be served on such person, who shall be called the third party defendant.

The key phrase in this rule, relative to its intent, is: "to assert a claim against a person not a party to the action". The purpose of the rule is to avoid multiplicity and circuitry of actions by permitting the Court to dispose of the entire subject matter in one action. Clay, Ky. Prac., 3rd Ed. Civil Rule 14.01, Section 3, page 260. The object of the rule is to avoid a situation where a defendant is held liable to a plaintiff and then finds it necessary to bring an action against a third party who may be liable to the defendant for all or part of the plaintiffs claim. Where the rights of all three parties arise out of issues common to all three, the rule permits the issues to be resolved in a single action. Wright & Miller, Federal Practice and Procedure: Civil § 1442.

As is true of any complaint, third party complaints must satisfy the requirement that the Court or, as in this case, the Review Commission,

has jurisdiction over both the subject matter and the person. Here, the Review Commission has jurisdiction over neither.

The jurisdiction of the Review Commission is defined by KRS 338.071(3). As applicable here, it provides that the Review Commission shall hear and rule on appeals from citations under the Act. Thus, the purpose of this proceeding is to simply determine if Barmet violated the Act by failing to furnish its employees with a safe place to work free from recognized hazards and, if it did not whether the penalty proposed for the violation is appropriate under the circumstances. The Review Commission has no jurisdiction over anyone other than the employer, and it cannot order a third party to indemnify an employer under its jurisdiction for all or part of any penalty imposed on the employer under the Act.

Westinghouse, Allis-Chalmers and Osborn are, therefore, outside the jurisdiction of this Review Commission, at least insofar as this proceeding is concerned. This Review Commission cannot order them to pay all or any part of any penalty imposed for violation of the Act, nor can it require them to indemnify Barmet for all or any part of such penalty. Third party relief is, therefore, not available to Barmet in these proceedings, and the motion was properly overruled.

#### THE CITATION AND PROPOSED PENALTY

29 CFR 1910.22(a)(2) provides in part as follows:

The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats or other dry standing places should be provided where practicable.

There is no question that the floor of the electrical control room was generally in a damp or wet condition. Although, this may have been due in part to the weather when first inspected on June 29, and also in part to a small leak in the roof, the overall reason for this condition was never established and presumably neither party can explain the basic cause of the wetness.

Under the standard, however it is not whether the floor is damp but whether the employer maintains the floor in a dry condition "so far as possible".

This case is somewhat analagous to the situation in Dayton Tire and Rubber Co., CCH-OSHD # 21,850 (1977). There the employer was cited for violation of the same standard because of oil on its floors from oil leaks in its tire presses. The citation was vacated on the grounds that due to the numerous valves in the plant, such leaks were inevitable and the employer had done all it could do to contain them.

The evidence is that Barmet did everything it could to control the moisture. Employees were assigned to mop the room daily, chemicals were applied to absorb the moisture in the room, and heaters were employed to dry the room. When it is considered that the electrical control room was not one where there was heavy traffic of employees, these efforts on the part of Barmet seem more than adequate.

Therefore, the conditions cited did not violate the standard and the citation should be dismissed.

KRS 338.031(1)(a) provides:

Each employer. . . . (S)hall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

This provision of the Act is generally referred to as the "general duty clause". It is a catch-all provision designed to cover all hazardous conditions not otherwise covered by a specific standard. Whirlpool Corp., OSHD-CCH #21,654. This section cannot be used as the basis for any citation where a standard is applicable to the situation. Shipbuilding and Drydock Co., CCH-OSHD # 16,725, (1973).

The criteria for determining a general duty clause violation under the Act was established by this Review Commission in Commissioner of Labor vs. Range Manufacturing Department, General Electric Company

et al, KOSHRC 217 (1976). There it was held that "in order to sustain a general duty clause violation, the hazard must be (one of) common knowledge, detectable by the senses or usually recognizable. In addition, it must be recognized as hazardous by the industry of which the employer is a part, and must be discoverable under the usual inspection practice."

Three conditions were found during the inspection which were cited as being in violation of this section. These conditions were the use of a faulty interlock device, the use of "lockout" devices which did not completely lockout a machine, and the failure to use, or enforce the use of, fuse pullers in removing fuses from electrical control cabinets.

Of the three conditions cited, the one which presented the most serious hazard was the defective interlock device. This device, which is designed to prevent the electric cabinet from being opened until deenergized, could be defeated on one of the exploder cabinets by turning the door handle and pulling the external electrical switch simultaneously. Thus, when the door was opened the live terminals within the cabinet were exposed creating, as the death of Sallee demonstrates, a potentially lethal hazard.

This condition of the interlock device had apparently existed for at least a month prior to Sallee's accident. However, there was no evidence that it was ever reported to management and the defect was not of such a nature that it would ordinarily be discovered on inspection of the cabinet. In fact, repeated experiments with the cabinet on the night of the accident failed to disclose this precise defect, and although the device was defeated on that occasion, it was only by force.

One of the elements necessary to establish a violation of the Act under the general duty clause is the foreseeability of the hazard. Commissioner of Labor vs. Hutson Chemical Co., KOSHRC 366 (1977). Here the hazard presented by the interlock device could not have been foreseen by Barmet, and therefore did not constitute a violation of the Act.

The "lockout devices" present a somewhat different problem. The Commissioner contends that such devices are intended to completely lockout a machine or motor and that the ones in use by Barmet did not do so. Barmet admits that the lockout device did not completely lockout the machines to which they were attached, but that by twisting them in the switch handle, the handles could be moved to the on position. Barmet, however, denies that purpose of the device is to completely lockout the machine. Instead, Barmet contends that the primary purposes of the device is to serve as a warning tag, advising employees that a machine is being repaired and should not be activated.

From the evidence, it is clear that the failure to use a lockout device on an electrical cabinet to prevent activation of a machine being repaired would present a hazard protected against by the Act. Furthermore, since no standard has been shown to be applicable to this condition, the general duty clause would apply. What is not so clear, and what is in contention, is the extent to which the devices must provide protection.

When the devices are examined in light of the hazards they are designed to protect against, both parties agree that one of their chief functions is to provide a warning not to activate a machine until the lockout device attached to it is removed. But another function, of equal importance, is to physically prevent the machine from being activated inadvertently.

Here the devices in question performed both functions. They clearly gave warning not to activate the machines and they also physically prevented the machines from being activated by accident. It is true, the devices could be defeated by deliberately manipulating them in their locked position on the handle. However, such manipulation would, of necessity, be intentional and purposely done to cause harm or mischief. Since the Act is not intended to protect employees against such misconduct, the lockout devices did not violate the Act.



Finally, we come to the matter of the fuse pullers. It is established and both parties seem to agree, that fuse pullers should always be used to remove fuses from electrical cabinets. It was also established that although it may have been stated company policy that fuse pullers always be used, not all employees, including some in managerial positions adhered to this policy. This failure on the part of Barmet to at least effectively enforce the use of fuse pullers, was a violation of the general duty clause of the Act. The issue remains, though, whether it is a "serious violation".

KRS 338.991(12) defines a serious violations as follows:

. . . (A) serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such places of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Barmet's management was certainly aware of the failure of some of its employees to use fuse pullers in removing fuses. The question is, did this create a "substantial probability of death or serious physical harm". The evidence indicates that it did.

The test of a serious violation is not predicated on the likelihood of an accident occurring but whether it is substantially probable that the harm will be serious in the event an accident occurs. Thermo Tech. Inc., CCH OSHD ¶22,281 (1977). Here, any accident that did occur would, with substantial probability result in death or serious physical harm, Sallee's death bears this out. Thus the violation is serious in nature and the citation should be sustained.

The penalty proposed, however, using the Commissioner's guidelines seems slightly excessive. Under these guidelines, an unadjusted penalty of \$1000.00 is proposed for all serious penalties. This unadjusted

penalty can then be reduced by up to 50% by applying three adjustment factors, namely: good faith, size and history. As stated in the Findings of Fact, the "size" adjustment is applied solely on the number of employees a company has, while the "good faith" and "history" adjustments require some judgment on the part of the Compliance Officer.

In disallowing the maximum adjustment of 20% for "good faith" the Compliance Officer stated that he had some question concerning the company's willingness to abate the conditions cited. Although, based on the facts available to him at the time the citation was issued, this might have been a reasonable conclusion, the evidence is that Barmet acted immediately to implement his recommendations with respect to each condition cited. This was so, even though, with respect to the lockout devices, it strongly disagreed. Thus, there being no other evidence of a lack of "good faith", the maximum of 20% should have been allowed. This would have reduced the penalty to \$650.00.

RECOMMENDED DECISION

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

IT IS HEREBY ORDERED

That the citation charging a violation of 29 CFR 1910.22(a)(2) (as adopted by 803 KAR 2:020) is hereby dismissed.

That the citation charging a violation of KRS 338.031(1)(a) is hereby sustained and that the penalty proposed for said violation is reduced from \$750.00 to \$650.00.

IT IS FURTHER ORDERED, that the violations sustained must be abated immediately upon receipt of this order, and that the penalty must be paid without delay, but no later than 30 days from the date hereof.

DATED: August 28, 1978  
Frankfort, Kentucky  
DECISION NO. 599

  
PAUL SHAPIRO  
HEARING OFFICER  
KOSHR