COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4226-05

COMMISSIONER,
DEPARTMENT OF LABOR,
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET — COMPLAINANT

v

WINSTON PRODUCTS COMPANY, LLC — RESPONDENT

* * * * * * * * * *

John D. Parsons for the commissioner. Stephen Brooks for the respondent.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on petitions for discretionary review filed by both parties. We called this case for review and asked for briefs. In addition to their briefs, we asked the parties to answer the following questions: whether attorney fees may be authorized in Kentucky for occupational safety and health cases, whether the department of labor violated the closing conference regulation and, if the closing conference regulation was violated, what would be the remedy?

Following a trial on the merits, the hearing officer affirmed serious items 1, 2, 5 and 7; reduced serious items 3 and 4 to nonserious; affirmed nonserious items 1 and 2[1] and dismissed serious items 6, 8, 9 and 10. Hearing Officer Hellmann, on account of the items he reduced in characterization or dismissed, reduced the proposed penalty of $22,400 to $10,000.

[1] Winston did not contest the nonserious citations and so our hearing officer sustained them. Recommended order, page 21 (RO 21). We affirm our hearing officer's decision to sustain nonserious items 1 and 2. KRS 338.081 (3).

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass,[2] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 833 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299.

In addition to the 10 serious citations on review, this case presents the review commission with two motions to strike and a number of legal issues raised by the parties which must be addressed before resolving questions about the citations themselves. We will take labor's two motions first and then seriatim the issues as the parties presented

[2] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

them in their petitions for review and briefs. While some issues raised by the parties are supported by authority, many are not.

I

Motions

Labor's motion to strike
certain exhibits
attached to Winston's brief

In his reply brief to this review commission, the commissioner of the department of labor moved to strike certain exhibits from the respondent's brief. As the commissioner pointed out, none of these numbered exhibits to respondent's brief were admitted into evidence during the hearing.

Labor's motion to strike is well taken. The time to enter exhibits into the record is during the hearing and that time has passed. 803 KAR 50:010, section 36 (4). We sustain labor's motion to strike exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 35 which are attached to respondent's brief to the commission. While the struck exhibits will remain within the record, they shall not be considered by this commission.

Labor's motion to strike
Miami Industries
from respondent's brief

Labor in its reply brief also moves to strike respondent's citation to Martin v Miami Industries, Inc, a sixth circuit court of appeals unpublished opinion, 1992 WL 393590, CCH OSHD 29,922, BNA 15 OSHC 2025 and 15 OSHC 2199. In addition to the citations to this case in Westlaw, CCH and BNA, references to Miami Industries are found in Mark Rothstein's 2007 edition of Occupational Safety and Health Law, page 224, and Randy Rabinowitz's second edition of Occupational Safety and Health Law,

pages 148 and 160. While Miami Industries cannot be cited at the sixth circuit, the case has found its place within the occupational safety and health community and is easily researched. Labor's motion to strike Miami Industries is denied.

II

Legal Issues

Whether the department of labor violated its closing conference regulation?

When a compliance officer conducts an inspection of an employer's place of business, a department of labor regulation sets out how he is to proceed. 803 KAR 2:070, Section 4, conduct of inspections (1), says the compliance officer first presents his credentials and explains the purpose and scope of the inspection; in the trade this is known as the opening conference. Sections (2), (3) and (4) then outline in general terms what tasks the CO might elect to perform, depending on the circumstances, during the walk around inspection. Of course, the details of the walk around are controlled by what the CO finds at the inspection site and the regulations which apply. Then section (5) says "At the conclusion of an inspection, the compliance...officer shall confer with the employer or his representative and informally advise him of any apparent safety and health violations disclosed by the inspection." (emphasis added) This portion of the inspection is known as the closing conference. Respondent in its petition for discretionary review and then in its brief to us argues its closing conference rights were violated.

We know from the facts of this case the division of compliance employs safety officers as well as health officers who are otherwise known as industrial hygienists.

Transcript of the evidence, volume II, pages 76-77 (TE II 76-77). CO Wendy Oser, a safety officer, conducted the inspection in the instant matter. TE I 18. Ms. Oser's inspection took place from April 7 through April 26, 2005. Respondent in its brief to us refers to a previous inspection of Winston Products by an industrial hygienist (IH) which started on March 2nd and ended on March 31, 2005. Respondent brief, p. 11, and exhibit 13. According to Winston Products, the department of labor violated the closing conference regulation when the IH did not "advise" respondent of safety violations which, Winston claims, became the subject of the citations written by Ms. Oser. Winston did not call the IH as a witness.

Compliance officer Oser's inspection came about because the previous officer had made a referral from health to safety. As Ms. Oser testified, her inspection was in part a referral as well as a TOPS inspection, a special emphasis program which focuses on an employer's unusually high accident and illness rates. TE II 72. When CO Oser began her inspection, she discovered Winston had been misreporting injuries. Exhibit 7 is a copy of CO Oser's report of the inspection. On page 11 of the report Ms. Oser explained the company had put non recordable first aid injuries on the injury and illness log, causing it to over report injuries. If, perhaps, the TOPS inspection was not necessary, what remained was the referral from health to safety.

On cross examination, Ms. Oser said she had seen the page of the prior compliance officer's report which made the referral to safety. TE II 73. She said she did not recall whether she looked at the IH's photographs taken during the previous inspection. TE II 74. CO Oser did take her own photographs during her inspection. They are entered into evidence as exhibit 3.

Winston Products said Ms. Oser should have abandoned her inspection when she discovered the company was not a proper subject for a TOPS inspection. This argument ignores the referral from health to safety. In Donovan v Metal Bank of America, Inc, 516 F Supp 674 (ED Pa 1981), BNA 9 OSHC 1972, 1974, the US district court said a magistrate (a federal court officer who can issue OSHA inspection search warrants) could consider referrals when deciding if sufficient probable cause existed for the issuance of a civil search warrant. An unnamed physician called OSHA to report he had treated a Metal Bank employee for lead poisoning. An anonymous employee had also reported Metal Bank employees were exposed to lead and copper fumes. Metal Bank stands for the proposition a referral, in our case a referral from an IH to a safety compliance officer within Kentucky's division of compliance, is a reasonable method for determining whether an entity should be inspected. In Metal Bank, the district court said the informants provided the "reasonable grounds to believe that hazardous and unhealthful working conditions exist at Metal Bank." At 9 OSHC 1974. For the purposes of our case the industrial hygienist, a trained compliance officer whose job it is to conduct inspections, provided the reasonable grounds for the safety inspection by CO Oser.

Winston argues it was harmed when the industrial hygienist did not "informally advise" it of conditions which, it said, lead to Ms. Oser's citations; Winston says its remedy is for the instant citations to be dismissed.

It seems to us Winston wanted the IH to informally advise it about hazards which it says led to CO Oser's safety citations so the company could correct the violations, thereby avoiding citations and penalties. That, under the law, would not be possible. Had the IH concluded the company had safety violations, had she found violations, the

law would have compelled her to issue citations. KRS 338.141 (1) says in part: "If upon inspection the authorized representative of the executive director [the CO] finds that an employer has violated any requirement of this chapter, a citation shall be issued." (emphasis added) If the IH found safety violations during her inspection, Winston Products would have been cited; the statute provides for no exceptions. What happened instead was the health CO saw a potential for safety hazards which resulted in the referral to the safety specialist. A referral from an IH to a safety officer is a reasonable method for the division of compliance to conclude an inspection is necessary. Metal Bank.

Winston apparently takes the position it would be under no duty to comply with the occupational safety and health standards[3] unless a compliance officer told it to. This is not the law.

An employer, here Winston, is under a continuing duty to comply with Kentucky's occupational safety and health law. "Each employer...Shall comply with occupational safety and health standards..." KRS 338.031 (1) (b). That means Winston, any employer for that matter, has a duty to comply with the law whether it has been inspected or not. As the tenth circuit phrased it, "One purpose of the Act is to prevent the first accident." Lee Way Motor Freight, Inc v Secretary of Labor, 511 F2d 864, 870 (CA 10 1975), CCH OSHC 19,320, BNA 2 OSHC 1609, 1613.

When the IH finished her closing conference, we infer she had not found violations; otherwise she would have been required by law to issue citations. KRS 338.141 (1). The statute does not permit a compliance officer at the closing conference to tell an employer about apparent violations and then depart the premises with the fond hope the hazard will be abated.

[3] In this decision we will use the words regulation and standard interchangeably.

When a compliance officer conducts a closing conference, she discusses apparent violations she has found as a result of her inspection, violations which she believes will lead to citations. This, then, gives the employer an opportunity to present its case that no violations exist. After the inspection is concluded, the compliance officer, as the representative of the executive director, is under a statutory duty to issue citations when she finds violations exist. KRS 338.141 (1). If, however, the compliance officer is not, because of specialization, in a position to find that violations exist, then a referral is appropriate. Metal Bank, supra.

We hold the department of labor did not violate its closing conference regulation in this case. Because of our ruling, we do not reach the issue of a remedy.

Whether an award of attorney's fees is permitted for occupational safety and health cases in Kentucky?

In its petition for discretionary review Winston Products says it is entitled to attorney's fees because of the "Department's improper conduct."[4] Labor, in its brief, says the review commission has no jurisdiction to award attorney fees.

In Kentucky no statute or regulation permits the award of attorney's fees in an administrative case. Similarly, there is no case law in Kentucky which permits attorney fees in an administrative case. Winston cites to KRS 453.260 which is of no assistance since it applies to costs which "a court shall award.." Section (1). In Vessels v Brown-Forman Distillers Corporation, Ky, 793 SW2d 795 (1990), the Kentucky supreme court made it clear that administrative agencies are not courts.

[4] We find no improper conduct.

Section (3), KRS 453.260, says a party may apply for attorney fees through the rules of civil procedure. CR 54.04 (1) says costs shall be awarded "unless the court otherwise directs..." This commission is not a court. See Vessels.

Winston argues the Kentucky supreme court in Parks Depot v Beiswenger, Ky, 170 SW3d 354, 361 (2005), said courts and administrative agencies were the same when reading KRS 453.260. Beiswenger said no such thing; in fact the case said a wage claimant could go directly to court in a wage and hour case and avoid going to an administrative agency first, thereby distinguishing the two. Beiswenger does not say an administrative agency is a court for the purposes of KRS 453.260. See Vessels, supra.

Winston then says Kentucky State Bank v AG Services, Ky App, 663 SW2d 754, 755 (1984) authorizes attorney fees. Yes, it does, but only where there is a fund available from which to take the attorney fees. The fund might be a bank account or a parcel of land. There are no funds or assets available for attorney fees in OSHA cases. In any event, the commission is not a court but is instead an adjudicative agency empowered to try disputes about citations issued by the department of labor. KRS 338.071, KRS 338.081 and 803 KAR 50:010.

While it is true the Equal Access to Justice Act says attorney fees may be recovered from the federal government in certain instances, including federal occupational safety and health cases, that statute does not apply to Kentucky's occupational safety and health act. See 5 USC 504. Kentucky has its own state plan and so the federal statues do not apply. See KRS chapter 338 and 29 USC 667 (b).

Winston's RICO allegation

Winston's lawyer would have the commission believe labor's collective decision to inspect based on the referral from the health CO and the TOPS program constituted a criminal conspiracy. As everyone knows, a conspiracy is an agreement by two or more people to accomplish a criminal act. Occupational safety and health inspections are authorized by our statutes and regulations; they are not criminal acts. See KRS chapter 338 and 803 KAR chapter 2.

Winston says the department of
labor relied on unadopted standards.

Winston says the department of labor used unadopted standards; then respondent said CO Oser was trained to these same standards. Regardless what training the division of compliance provides for its compliance officers, and we commend the department of labor for its efforts to make sure its COs are well versed in the standards they enforce as well as recent developments in occupational safety and health, the department has the burden of proof in these cases. 803 KAR 50:010, section 43 (1). To meet that burden, the department must prove, for each citation, the following elements:

> 1) the standard applies to the cited condition,
> 2) the terms of the standard were violated,
> 3) one or more of the employer's employees had access to the cited conditions and
> 4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions.
>
> Ormet Corporation, a federal review commission decision, CCH OSHD 29,254, page 39,199, 14 OSHC 2134, 2135.

When this commission and its hearing officers review a citation, we look to see whether the department of labor has proved each element of its case, including the terms of the

promulgated standard. If the department cannot prove each element of the cited standard, the employer is entitled to a dismissal.

Winston says once it has
raised the defense of infeasibility,
the burden to prove feasibility of
guarding falls on the department
of labor.

In Brock v Dun-Par Engineered Form Co, 843 F2d 1135 (CA8 1988), CCH OSHD 28,178, BNA 13 OSHC 1652., the review commission had said once the employer demonstrated compliance with the standard was not feasible, the burden shifted to the secretary of labor to prove that alternative means of protection were available and the employer failed to use them. In its decision, the eighth circuit held the burden of proving the existence of a feasible alternative to a standard does not shift to the secretary but remains with the employer. To reach this conclusion, the eighth circuit said the occupational safety and health act[5]placed final responsibility on the employer for compliance with the act. The employer has the "affirmative duty under the Act to take all available measures to protect its employees..." F2d at 1138, 13 OSHC 1655.

Then in Seibel Modern Manufacturing and Welding Corporation, CCH OSHD 29,442, 15 OSHC 1218, the federal commission said the employer has the burden of proving that alternative means of protecting employees were unavailable.

When an employer in its answer raises the defense of infeasibility, the burden of persuasion shifts to the employer to prove the defense. Of course, the burden of proof, that is the burden of proving the elements of the violations, remains with the department of labor. Ormet, supra. As Professor Lawson put it in The Kentucky Evidence Law

[5] 29 USC 651 et seq.

Handbook, fourth edition, section 9.00 [2][f], page 747, "the burden of going forward with evidence may shift back and forth during the course of a trial."

Winston argues this review commission
must draw an adverse inference from
labor's failure to call its own expert
as a witness at the trial.

The department of labor did not call its expert as a witness even though he was on labor's witness list. Winston now asks the commission to draw what it calls an "adverse opinion" from labor's failure to call its own expert witness. Elsewhere in its brief Winston says the commission should infer labor's expert would not support its citations. See Winston brief, p. 24.

In evidence law, an inference is "a fact...deduced as a logical consequence of other facts...already proved or admitted" into evidence.[6] The US supreme court in Universal Camera Corporation v National Labor Relations Board, 340 US 474, 487, 71 SCt 456, 95 LEd 456, says inferences are derived from evidence found in the record. The opinion puts it thus: "evidence from which conflicting inferences could be drawn..." Testimonial facts give rise to inferences. In our case, there are no facts about what labor's expert might have said on the stand, only the tactical decision of the lawyer not to call an opinion witness. This case contains no facts which might be used to draw the inferences urged by Winston in its brief to the commission.

In this case labor called only its compliance officer as a witness; frequently the department of labor will need no other witnesses to prove its case since the compliance officer by virtue of the inspection has personal knowledge of the violations observed. Lawyers regularly put names of people on their witness lists who might not be called.

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[6] Blacks Law Dictionary, revised fourth edition, page 917.

This is especially so in OSHA cases where discovery is not encouraged. 803 KAR 50:010, section 27 (1). Or a trial lawyer may decide after listening to other witnesses that he needs no more proof for his case and will make the decision on the spot not to call a particular witness or any further witnesses. Trial lawyers regularly make such tactical decisions.

Respondent asks the commission to draw an adverse inference from labor's decision not to call its own expert witness; the adverse inference rule is also known as the missing witness rule or the uncalled witness rule. In Graves v United States, 150 US 118, 121, 14 SCt 40, 37 LEd 1021, the US supreme court said "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

In Whitcomb v Whitcomb,[7] Ky, 267 SW2d 400, 402 (1954), the appellants sought to invoke the rule where appellees did not use a handwriting expert they had employed. The old court of appeals said:

> We are not aware that this rule has ever been applied to an expert witness whose testimony would be merely an opinion. In addition, the witness was available to the appellant and his testimony therefore was not within the possession and under the control of the appellees, within the meaning of the rule.

The old court of appeals in Whitcomb laid out rules which apply to our case. First of all Winston Products wants to extend the rule to apply to an expert, not a fact witness; this the court in Whitcomb would not do. Second, Winston has made no

[7] Cited in Welsh v US, 844 F2d 1239, 1245 (CA6 1988).

showing labor's witness was not available to it. Third, Winston has not told us what labor's witness would have said if called. Winston has not made any of these arguments.

Labor's expert is listed in its witness and exhibit list filed on April 3, 2006; he is Troy Crawford, an electrical inspection supervisor with the Department of Inspections, Permits and Licenses, Metro Development Center, Louisville. While labor's witness list refers to the topics about which Mr. Crawford might speak, it does not give any specifics. Mr. Crawford is not employed by the Kentucky department of labor and so labor has no special claim which would prevent him from being called as respondent's witness. And yet Winston did not call Mr. Crawford as a witness.

In Ho, Eric, K,[8] CCH OSHD 32,692, page 51,587 footnote 28, BNA 20 OSHC 1361, 1378 footnote 28, the federal commission rejected the secretary's argument that Mr. Ho's failure to testify, he was the owner of the company, could be used to draw an adverse inference. In that case the commission said:

> "Adverse inferences may be drawn *with respect to factual matters addressed in the record* where a party does not testify...In the absence of any affirmative evidence as to Ho's state of mind, we cannot merely infer, as the Secretary contends, that Ho was actually aware that opening the unlabeled valve would be hazardous.

The national labor relations board repeatedly faces questions about the applicability of the adverse inference rule. In JHP and Associates, LLC, dba Metta Electric v National Labor Relations Board, 360 F3d 904, 910 (CA8 2004), the eighth circuit said "...the adverse inference rule is generally permissive...The Board, as the factfinder, was free to reject the adverse inference rule if the facts warranted such a

[8] In Chao v Occupational Safety and Health Review Commission, 401 F3d 355 (CA5 2005), CCH OSHD 32,746, page 51,993, the fifth circuit upheld the commission's decision not to find "plain indifference" to a hazard from Mr. Ho's state of mind.

rejection." If an administrative law judge makes an adverse inference, the board is not required to follow that inference to a decision but may find other facts more credible.

We will not employ the adverse inference rule in this case; we hold it does not apply because Mr. Crawford was an expert, not a fact witness, because we do not know what Mr. Crawford would have said if called and because nothing would have prevented Winston from calling him as its own witness. Winston Products made no attempt to call Mr. Crawford as its witness or demonstrate he was not available to the company.

Winston cited several cases to support its argument for an adverse inference. See tab 82 to Winston's brief. None of these cases are of any assistance to Winston Products and we so conclude. See Whitcomb, supra, and Ho, Eric, K, supra.

In United States v Blakemore, 489 F2d 193, 195 (CA6 1973), the court in this criminal case said "An adverse inference is permitted from the failure of a defendant to call witnesses if they are 'peculiarly within (his) power to produce' and if their testimony would 'elucidate the transaction.'" In Blakemore the prosecutor commented during his closing argument about the defendant's failure to call four witnesses. The appeals court in Blakemore reversed the conviction because the four witnesses were in the courtroom during trial (they were available to be called and could have been called by the prosecution) and because the trial judge did not inquire about the testimony these witnesses would have given if called (neither the court nor the jury knew what the four people knew about the transaction).

Blakemore is of no help to respondent Winston Products for three reasons: one, it is a criminal case and not an OSHA case, two, Winston could have called labor's expert

as its own witness and, three, there is nothing in the record about what labor's expert might have said on the witness stand.

Then in MacNaughton v United States, 888 F2d 418, 423 (CA 6 1989), an income tax case, the court stated the Blakemore rule: "a party, without prior court approval, may make an adverse inference from the other party's failure to call witnesses if the witnesses are peculiarly within the other party's power to produce and if their testimony would elucidate the events at issue." Dr. MacNaughton filed suit to recover back taxes; the doctor claimed corporate stock certificates which he received in exchange for stock certificates in his personal corporation did not contain restrictions on their sale, a point critical to whether there was a tax due on the transaction. In their closing argument the US government said to the jury "so where are the stock certificates?" The appeals court ruled the government's remarks were permissible because the certificates were under the control of Dr. MacNaughton's lawyer and because the lawyer would thus know whether the certificates had restrictions on their sale or not.

But the MacNaughton case is not helpful to Winston Products. The court of appeals' decision assumed the US government could not get to the certificates because of Dr. MacNaughton's attorney client relationship with his lawyer. An attorney client relationship is under the control of the client, here Dr. MacNaughton. For the Winston Products case, however, there is no relationship between the department of labor and the expert witness which would create an evidentiary privilege - if Winston called the expert as its witness, labor could not have prevented it. Dr. MacNaughton on the other hand could have prevented the government from calling his lawyer as a witness against him. From the standpoint of creating a privilege, the department of labor and its witness are

strangers to one another; this would even be so if the expert were a full time employee of the department of labor. It was Winston Products' choice not to call labor's expert as its own witness. In other words, there was no showing in the Winston case that the expert witness was solely within the department of labor's power to produce at the trial.

Next, the court of appeals in MacNaughton concluded the question about the stock certificates could be cleared up by the testimony of Dr. MacNaughton's lawyer whose firm had the certificates in its office. In Winston there is no proof about what the department of labor's expert witness might say about the citations.

Finally, in Steiner v Commissioner of Internal Revenue, 350 F2d 217, 222-223 (CA7 1965), Mr. Steiner was accused of tax fraud - concealing income. Steiner testified the money the IRS treated as income was actually a gift from a friend. Steiner testified he had told his wife about what he said was a gift. Mr. Steiner did not call his wife as a witness to corroborate his testimony about the gift. The court of appeals said where the IRS made out a case for fraud, the tax court as fact finder could draw adverse inferences from Steiner's failure to call his wife as a witness.

In Steiner we have a husband and wife relationship. Although the case does not say it, we can assume the IRS could not call Mrs. Steiner because of the husband-wife privilege - one spouse preventing the other from testifying.

Steiner does not help Winston. In the Steiner case, the IRS could not call Mrs. Steiner as a witness because of the privilege. But in the Winston case there was no relationship between the department of labor and its expert witness and so Winston could have called the expert as its own witness; in fact, Winston did not attempt to call labor's expert. Applying the logic of Blakemore, the tax court could infer Mrs. Steiner was not

called as a witness by her husband because she would not have supported his testimony. We have no such assurances in the Winston case because we do not know what Mr. Crawford would have said if called by either side.

III

Citations

Winston Products, a Louisville company, makes machinery for the food processing industry; it uses powerful presses to shape and cut metal for its products. Compliance officer Oser's inspection began on April 7, 2005 and ended April 26th.

Serious item 1

Serious item 1 said "The company did not have available for review written energy control procedures for employees to refer to when performing maintenance work...for machinery such as...the Amada Press brakes...and the Amada CNC machines..." Item 1 carried a proposed penalty of $2,000.[9] Our hearing officer sustained this item as a serious violation with a penalty of $2,000.

The cited standard, 29 CFR 1910.147 (c) (4) (i),[10] says:

> *Energy control procedure.* **(i)** Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section. (emphasis added)

[9] An unadjusted penalty of $2,500 was derived from a high serious classification (high, medium, low being the possibilities) because of the potential amputations (permanent disability) and lesser probability (greater or lesser) because only three employees did the maintenance work and they did not do it every day. TE I 28-30. The company got a size credit of 20% because it had 165 employees. TE I 32. The CO gave no good faith credit (25, 15 or 0% being the possibilities) because the company could find neither the electrical nor the mechanical (item 1) procedures and the CO observed machine guarding violations during her inspection. TE I 32-33. She also gave no history credit because the company had been cited for serious violations within the three preceding years. TE I 33. $2,500 with a 20 percent credit is $2,000.

[10] Incorporated by reference in 803 KAR 2:309, section 1.

"This section" means 1910.147, the control of hazardous energy, which in paragraph (a) (1) (i) says the standard covers the "servicing and maintenance of machines...in which the *unexpected* energization or startup of the machines...could cause injury to employees." TE I 25. According to its terms, the cited regulation requires an employer to create on paper a set of procedures for control of the hazardous energy which is to be used, utilized, by employees doing the maintenance work. CO Oser said she asked for the "company's written energy control procedures" on April 7, the first day of the inspection, but the employer could not find it. She said she then asked again on April 26 but the company still did not have the procedures. TE I 26.

Since the written program was not available for employees to refer to while doing maintenance work, the company could not produce it, the standard is violated. Then the question is whether the violation is serious or nonserious? Winston says, at the very least, the citation should have been nonserious; we agree. In Topco, Inc, a federal administrative law judge decision, CCH OSHD 31,731, BNA 18 OSHC 1746, 1750, the US department of labor issued a serious citation for a lock out tag out violation because the company had no written program; the compliance officer's report indicated the company's maintenance man knew how to lock out the machinery he worked on. Topco at CCH page 46,299. In Topco, the ALJ reduced the serious citation to nonserious.

In our case the CO said the company's maintenance man knew how to lock out the machinery he worked on. TE I 30. On cross examination the CO said two employees were "familiar with the process," meaning energy control. TE II 65.

We sustain citation 1, item 1, but reduce its characterization to nonserious with no penalty. Topco. We find nothing in the record upon which to base a nonserious penalty.

While Winston did not have the written procedure, its employees were familiar with the lock out process.

Winston in its brief argued the citation should be dismissed because the company eventually produced the written program. The department of labor must issue citations when it finds violations. KRS 338.141 (1). Because the standard required the company to have the written program available for its employees to use while working, an after the fact discovery of the program will not excuse the violation.

Winston also says item 1 or item 7 should be dismissed because both items concern the control of energy; Winston argues items 1 and 7 are duplicative. However, item 1 is about the control of mechanical energy while item 7 is about electrical energy. One standard requires a program for mechanical energy and the other for electrical energy.

> violations are considered duplicative only where they require the same abatement conduct.
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> J. A. Jones Construction Co, a federal review commission decision, CCH OSHD 29,964, page 41,027, BNA 15 OSHC 2201, 2207.

To abate item 1, the company had to produce a written procedure for controlling mechanical energy; for item 7 Winston had to write a program about how to control electrical energy.

By statute the commissioner of labor shall issue a citation for each violation. KRS 338.141 (1).

Serious item 7

We take up serious item 7 next because Winston says either item 1 or 7 should be dismissed because they are duplicative; as we have already ruled there is no duplication

because item 1 required a written program to be available when employees worked on mechanical equipment while item 7 required a written program for electrical work.

Item 7 says the company "did not maintain a written copy of the procedures" for performing deenergized electrical work, a violation of 1910.333 (b) (2) (i).[11] Our hearing officer sustained the citation as serious with a penalty of $2,000.[12]; here is the regulation:

> *Procedures*. The employer shall maintain a written copy of the procedures outlined in paragraph (b)(2) and shall make it available for inspection by employees...

Winston did not have the program for the CO on her second visit to the plant but ultimately did find the LOTO program. TE I 26. That program, however, did not cover procedures for electrical hazards. TE II 111. By not having a set of procedures for doing electrical work, and thereby not having it "available for inspection by employees," the company violated the standard.

In his recommended order our hearing officer found Tom Gutgsell, Winston's maintenance manager, was "a highly trained, experienced, and qualified electrician." The hearing officer concluded Mr. Gutgsell "was not exposed to electrical hazards while he performed work during [CO] Oser's inspection." RO 31.

As for item 1, the question for item 7 is whether the company's failure to produce a set of written procedures for doing electrical work was serious, or was nonserious as the company suggests. Serious items 6, 7, 8, 9 and 10 charge the company with permitting unsafe electrical practices. Had we found the company violated any of those items charging unsafe electrical work, then item 7 would be serious because then labor had proved Winston employees were not following proper procedures. As we shall explain,

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[11] 803 KAR 2:318, section 2 (1) (a).

[12] See footnote 9 for a description how the $2,000 penalty for item 7 was determined. See TE I 82-83.

however, we affirm our hearing officer's decision to dismiss serious items 6 through 10. Because we find Mr. Gutgsell to be a qualified electrician working in a safe manner, we reduce serious item 7 to nonserious with no penalty. Topco, supra. We find nothing in the record to suggest a basis for a nonserious penalty.

Serious item 2

The department of labor cited the company for not providing machine guarding for hydraulic press brakes and a press which unguarded could cause injury to employees. The standard, 1910.212 (a) (1)[13] says:

> One or more methods of machine guarding shall be provided to protect the operator and other employees...from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are - barrier guards, two-hand tripping devices, electronic safety devices, etc.

Our hearing officer sustained item 2 and the $4,000[14] penalty. Item 2 has three parts; parts a and b involve the same press brakes. Part a says the company did not have side guards to prevent employees other than the operator from being injured. Part b says operators were not protected. Then part c says a 150 ton press was not guarded to protect both operators and other employees. None of these presses had guards. See RO 7 and 8. See the photographic exhibits which depict some of Winston's unguarded presses: 3 A, B, C, D, I, J, K, L, M, N, O, P, Q, R, S, T and U. Several photographs show operators standing next to the presses with their hands exposed to the "point of operation." TE I 42.

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[13] Incorporated by reference in 803 KAR 2:314, section 5 (1) (a).

[14] The unadjusted penalty was $5,000: high serious due to very serious potential injuries and greater probability because the operators worked at the point of operation. Then the company got the 20% credit for size. The applied credit reduced the penalty to $4,000. RO 10.

Our hearing officer found for item 2a that Winston did not have side guards for "at least five Amada presses to prevent employees other than the machine operator from reaching into the point of operation from the sides..." He also found the same presses, 2b, did not have guards protecting the operators. RO 7. Then for 2c, the hearing officer found the 150 ton hydraulic press in the bending department was not guarded to protect operators or other employees from injury. RO 8.

Because the press brakes and press were not guarded and because employees used these unguarded presses, Hearing Officer Hellmann made the correct decision; we affirm Mr. Hellmann's recommended order which sustained serious item 2 and the $4,000 penalty.

Winston claimed at least one machine was guarded by a yellow line painted on the floor around it. But the machine guarding standard requires actual guards, not lines on the floor. Our hearing officer found the yellow lines painted on the floor around the machines were not guards. RO 8. In IBP, Inc, a federal ALJ decision, CCH OSHD 31,718, the judge said 1910.212 requires physical guards, not training. George C Christopher and Son, Inc, a federal review commission decision, CCH OSHD 25,956, said an employer may not rely on color coding of moving parts as a substitute for guarding. These two cases persuasively demonstrate a yellow line is not a substitute for a guard. A machine guard prevents an employee from reaching into the "point of operation." The standard lists several types of guards as examples. It is not an exhaustive list. A guard may be a physical barrier, an electric light curtain or a device which keeps the operator's hands busy during the machine's operation. Training is not a guard and neither is a line on the floor.

Winston said labor had the burden of proving the machine guards were feasible for use on the various machines cited. As we have already discussed, the burden is on the employer to prove machine guarding was not feasible and we so hold. See Brock v Dun-Par Engineered Form Co and Seibel Modern Manufacturing and Welding Corporation, supra.

Winston also argued that since previous inspections did not cite the machines for guarding violations, labor cannot do so now. That is not the law. In Seibel Modern Manufacturing and Welding Corp, CCH OSHD 29,442, pages 39,679-681, BNA 15 OSHC 1218, 1223-1224, the federal review commission said "the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation" At CCH page 39,681 and BNA 15 OSHC 1224. Unless labor had specifically told Winston its machine guarding in the past complied with the standard, prior inspections are no defense. Winston had never been previously told by OSHA that its machines were in compliance. In fact Bobby Mefford, a Winston employee, testified the company had never considered guards for the presses meaning, we infer, the company had no independent thoughts about guards and had never had guards urged upon them. TE III 74.

In its brief to us Winston argues it is immune to citations for failure to guard its press brakes and press because it has had several inspections in the past where it had not been cited. To that effect Winston cites us to Martin v Miami Industries, Inc, supra. In Miami Industries the federal department of labor had inspected and found steel rollers, the kind used to shape steel, were not guarded. These rollers acquired dust and metal

particles which impaired the quality of the steel. The cleaning process had to be performed some 50 times a day while the rollers continued to move. Compliance officer Barrett issued a citation for a machine guarding violation. Miami devised a guard to protect passersby from the hazard of the moving rollers but not the operator employee doing the cleaning. CO Barrett "indicated that Miami was in compliance, requesting the blue prints of the newly designed guards to share with other companies." At 15 OSHC 2026 and CCH OSHD 29,465, page 39,737. Then OSHA area director Ronald J. McCann wrote an abatement extension letter[15] to Miami which indicated these movable guards needed either to be securely fastened or used along with electrically interlocking devices which would shut down the rollers if the guards were removed.

Based on the representations by CO Barrett and Mr. McCann's abatement letter reinforcing the type of abatement which would suffice for the guard protecting employees other than the operator, Miami concluded the guard protecting passersby but not the operator was in compliance. Thereafter, Miami was subject to seven inspections by OSHA, none of which resulted in citations to the guarding of the steel roller.

Then some ten years later a CO, not Mr. Barrett, inspected Miami and issued a citation for the guard which protected passersby but not the operator, the same guard CO Barrett and area director McCann had approved.

In its decision the sixth circuit said Miami did not have fair notice of a violation and affirmed the commission's dismissal of the citation.

Winston Products's situation is very different than that of Miami Industries. Prior to the instant inspection, Winston had no discussions with the Kentucky division of

[15] The underlying decision by the review commission makes it clear this abatement information was actually a letter which came from Mr. McCann. Miami Industries, a federal review commission decision, CCH OSHD 29,465, page 39,737 and BNA 15 OSHC 1258, 1259.

compliance about whether its press brakes and press, the subject of serious item 2, violated the standard. Neither did Winston receive any letters from Kentucky OSHA about its presses or press brakes. Winston did have prior inspections with no press brake or press citations but that is all that happened; this is no defense to the instant citation. Seibel Modern Manufacturing and Welding Corp, supra.

Thus, Winston has no prior notice argument. As the federal commission said in Seibel: "Further, because compliance with the Act is a continuing obligation, an employer cannot deny the existence of or its knowledge of a cited hazard by relying on the Secretary's earlier failure to cite the conditions. Seibel, supra at CCH page 39,681 and BNA 15 OSHC 1224, 2026.

Serious items 3 and 4

Winston had a Dayton bench grinder; it is shown in photographic exhibit 3 W. Serious item 3 said the work rests on both sides of the machine, it had two wheels, were improperly adjusted. Serious item 4 said the same grinder had tongue guards which were improperly adjusted. Labor said the work rests were not adjusted so that the metal being ground was no more than 1/8th inch from the wheel - proper adjustment keeps the metal being ground from catching on the rotating grinding wheel. Labor also said the guard on the outside diameter of the grinding wheel was not adjusted to within 1/4 inch as required.

These two serious items carried penalties of $1,200[16] each. Our hearing officer affirmed both citations but reduced them to nonserious with no penalty. Mr. Hellmann

[16] CO Oser said low severity because of the potential injury was no greater than lacerations, abrasions and contusions. TE I 53. She gave lesser probability of an injury because the grinder was only used several times a day for only a minute or two at a time. Low serious and lesser probability produced a gravity based penalty of $1,500, reduced to $1,200 with the 20% credit.

said the CO's lack of knowledge about the grinder and the fact no one had ever been injured by the grinder led him to the reduction. RO 13.

Here is the cited standard for item 3:

> *Work rests.* On offhand grinding machines, work rests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. Work rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage.
> 1910.215 (a) (4)[17] (emphasis added)

Item 3 said the work rests were adjusted to 7/8 inch; the standard requires the rests be adjusted with a maximum opening of 1/8th inch.

Then item 4 said the distance between the wheel and the adjustable tongue at the top of the wheel measured 1 inch on the left and 1 and 1/4 inch on the right grinder wheel. The standard says:

> *Exposure adjustment.* Safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening, shall be constructed so the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b) (3) and (4) of this section shall never be exceeded, and the distance between the wheel periphery and the adjustable tongue...shall never exceed one-fourth inch.
> 1910.215 (b) (9) (emphasis added)

The hearing officer found the grinder had two work rests (the Dayton grinder had two wheels), both adjusted to 7/8th of an inch rather than the required 1/8th inch. RO 10. He also found the safety guards at the top were adjusted to one inch on the left side

[17] The standards for serious items 3 and 4 are Incorporated by reference in 803 KAR 314, section 5 (1) (a) and (b).

and one and 1/4 inches on the right. RO 13. The standard requires these safety guards to be adjusted to within 1/4 inch of the wheel.

Winston used the grinders to sharpen the tips of tungsten welding rods, so very little pressure was applied by the rod to the wheel. TE III 46-47. Hearing officer Hellmann reduced items 3 and 4 to nonserious because he said there had never been any wheel breakage in the company's thirty year history. He also said the CO had not seen any grinding performed and so could not comment about the use of the Dayton grinder. RO 13.

Labor said the two standards on grinder adjustment, the work rest and the circumference guards, are mandatory and the standards presume the possibility the wheels could break apart and cause serious injury. And if a wheel were to break, as contemplated by the safety standards for grinders, serious injury is a real probability.

In L. T. Precision Heat Treating dba Precision Metal, a federal decision, CCH OSHD 30,065, BNA 16 OSHC 1238, the ALJ affirmed both 1910.215 (a) (4) and (b) (9) charges. The ALJ said the standards applied even though the grinder was only used for "spark testing" which meant an employee lightly placed a piece of metal on the grinding wheel to produce sparks which then indicated the type of metal being tested. Using the grinder for any kind of work subjects the operator to hazards such as flying chips, sparks and shattering of the wheel. For the Precision Metal case, the ALJ affirmed the citations as serious.

The possibility of a grinder wheel shattering is covered in the definitions section which defines a safety guard:

> *Safety guard* means an enclosure designed to restrain the pieces of the grinding wheel and furnish all possible protection

in the event that the wheel is broken in operation. 1910.211 (b) (12) (emphasis added)

When asked why items 3 and 4 were serious, CO Oser said "Because of the potential of the wheel breaking." TE I 51. Our hearing officer ignored the rule which says the hazards presented to employees are contemplated by the standards themselves. In other words, the hazard is found in the standard. Vecco Concrete Construction, Inc, CCH OSHD 22,247, page 26,777, BNA 5 OSHC 1960, 1961. As we can see from the definitions section, the standards contemplate the possibility a grinding wheel may break during use. According to the standard and the definition, the wheel on a grinder must have guards which, when properly adjusted, protect an employee from wheel breakage. This is confirmed by the CO's testimony. We affirm citation 1, items 3 and 4, as serious violations with penalties of $1,200 for each. L. T. Precision Heat Treating, supra.

Serious item 5

Labor issued this serious citation because two 110 volt electrical outlets had reverse polarity, meaning the electrical wires were attached to the wrong screws on electrical plugs. The cited standard says:

> 1910.304 (a) (2)[18] *Polarity of connections*. No ground conductor may be attached to any terminal or lead so as to reverse designated polarity.

Metal Shredders, Inc, a federal ALJ decision, CCH OSHD 29,642, BNA 15 OSHC 1554, 1556, defines reverse polarity as reversing the hot and ground wires. Our hearing officer affirmed this serious citation with a penalty of $2,000; he believed labor's compliance officer about the seriousness rather than Winston's expert. We agree. The CO said with reverse polarity, a machine could be plugged into a receptacle and would

[18] Incorporated by reference in 803 KAR 2:318, section 2 (1).

continue to run even if the switch were thrown to the off position. TE I 59. She also said if for example a bench grinder had reverse polarity, the grinder's metal housing could be energized. TE I 60.

Tom Gutgsell[19], Winston's maintenance worker who holds a master electrician's license (TE IV 7), said reverse polarity was not a problem because he was not aware of anyone at Winston who was ever injured by the hazard created. Mr. Gutgsell's efforts to minimize the seriousness of a reverse polarity violation are not very credible; while it may be true no one at Winston had ever been so injured, that does not diminish the seriousness.

In Trinity Marine Nashville, Inc, a federal ALJ decision, CCH OSHD 31,763, page 46,449, a worker died after he plugged a light into a portable electrical receptacle which it was discovered had reverse polarity. In the Trinity Marine case, the ground wire was connected to the hot wire and so the metal box enclosing the receptacle was live.[20] Trinity Marine says a reverse polarity violation is serious.

A federal administrative law judge in Oberdorfer Industries, Inc, CCH OSHD 31,626, pages 45,579 to 45,581, sustained twelve instances of serious polarity violations.

We affirm our hearing officer's decision to sustain serious item 5 and the penalty of $2,000.[21]

Serious item 6

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[19] He said his name was pronounced by ignoring the second g. Ie, Gutsell.

[20] One purpose of a ground wire is to keep electricity from getting to the outside of an electrical fixture where people can touch it; when the ground wire in a receptacle is incorrectly attached to a hot wire, then the outside of a metal receptacle is an electrical hazard.

[21] A gravity based penalty of $2,500: high serious because of the possibility of shocks and burns and lesser probability because of "infrequent use of the equipment attached to the outlets with reversed polarity." TE I 60-61. Then the CO applied the 20% for size, the number of employees, to get to the $2,000 penalty.

Compliance Officer Oser found employee Tom Gutgsell working on the control panel for an Amada hydraulic press brake. The panel said it was wired for 460 volts. TE I 64. When the CO found Gutgsell at the panel, he had on metal glasses and belt buckle and carried non insulated tools: a metal flashlight and a screwdriver. CO Oser feared Gutgsell would hurt himself if any of these metal objects contacted live parts and asked him to close the panel door; she did not look inside but thought the interior was energized. Oser testified Gutgsell told her the panel was energized to 480 volts while he had the panel door open.

Gutgsell testified he only used a multi-meter, an electrical, insulated diagnostic tool, when working inside the cabinet while it was energized. TE IV 32-33. He said using the multi-meter which did not require hand contact with the parts was safe. He also said while working with the multi-meter, the live parts were protected with what he called arc shields which snap over the live parts, the terminal screws which hold the live wires in place in the box. TE IV 34. He said he used the screwdriver to tighten electrical connections while the panel was deenergized. TE IV 28, 29 and 36.

In Keco Industries, CCH OSHD 26,810, page 34,297, BNA 11 OSHC 1832, 1834, the federal review commission said "the Secretary's standards contemplate that 'qualified persons' have access to live parts."

For item 6a, the department of labor says the "company's designated qualified electrician was not trained in and familiar with the safety-related work practices required by 1910.331 through 335...when required to perform work that was deenergized...[and] live electrical work." (emphasis added) Item 6a was directed to Tom Gutgsell, the master electrician who worked for Winston (see item 5 above).

Item 6a listed things about which the designated qualified electrician should be trained: repairing deenergized light fixtures and live, energized work on the 480 volt control panel for the company's Amada hydraulic press brake located in the bending department.

29 CFR 1910.332 (b) (1),[22] the cited standard for 6a says:

> ***Content of training.*** (1) *Practices addressed in this standard.* Employees shall be trained in and familiar with the safety-related work practices required by sections 1910.331 through 1910.335 that pertain to their respective job assignments.

Then item 6b says a qualified employee (Gutgsell again) "was not trained in and familiar with the clearance distances specified in 1910.333(c)...since the employee was working within 1 foot of live electrical equipment" at the same Amada press brake control panel.

Item 6 carries a serious penalty of $2,000: high serious for the possibility of electrocution/lesser probability for infrequent use, for a gravity based penalty of $2,500 then reduced to $2,000 with the 20% credit.

Item 6b refers to "clearance distances specified in 1910.333(c)." But Table S-5 on clearance distances is found within the section on overhead power lines. The CO found Tom Gutgsell working on a 480 volt control panel to the Amada press, not an overhead power line. We dismiss item 6b because the complainant cited to a standard which does not apply to Mr. Gutgsell working indoors on the Amada press control panel. Ormet, supra.

Here is the definition of a qualified person:

> One familiar with the construction and operation of the equipment and the hazards involved.

[22] Incorporated by reference in 803 KAR 2:318, section 1 (2) (a) and (b).

> NOTE 1: Whether an employee is considered to be a 'qualified person' will depend upon various circumstances in the workplace. It is possible and, in fact, likely for an individual to be considered 'qualified' with regard to certain equipment in the workplace, but 'unqualified' as to other equipment. 29 CFR 1910.399

On direct examination by labor's lawyer, the CO said she asked Tom Gutgsell if he was trained by the company; he said he was not since he was a master electrician. TE IV 7. At this point the CO, should have inquired about what training a master electrician would have and specifically what training Gutgsell had received. Then she could have compared that training with the requirements of the cited standards which are minimal when compared with the training and experience required for a master electrician's license. TE IV 7-10.

According to Trinity Industries, Inc, and its successors, a federal administrative law judge decision, CCH OSHD 32,312, pages 49,440 to 49,441, "required [electrical] training may be either classroom training or on-the-job...the standard does not impose any requirements to document such training." The federal department of labor charged Trinity with a violation of 1910.332 (b) (1), the same standard cited against Winston in item 6a. A Trinity employee died while connecting electrical parts without testing to see whether one connection was live. The federal commission dismissed the citation which charged the employee had not been properly trained because the record established the employee had been trained, one, to determine whether a piece of equipment was live and, two, had been trained on the procedures for de-energizing live parts. In Trinity the CO was under the impression the company had to produce records of electrical training; but such records are required neither by the regulation nor by the Trinity decision.

Our hearing officer dismissed items 6a and 6b because Gutgsell was trained as a master electrician to recognize the electrical hazards found in the cited standards and because when Compliance Oser found him with the metal flashlight and uninsulated screw driver, he was in the process of tightening screws in the deenergized control panel. RO 31. In other words Gutgsell was trained, we so find, and he was not exposed to live electrical parts at the time the CO observed him at the panel, the two charges in the citations. To reach this conclusion Hearing Officer Hellmann credited Gutgsell's testimony over that of the CO who had said the panel was energized when she found him standing next to it with its door open. CO Oser did not test for live voltage. Neither did the CO look into the panel.

Mr. Gutgsell's testimony the control panel was not energized when the CO observed him applies to items 8, 9 and 10 which the hearing officer dismissed as well. Compliance officer Oser said "I did not look inside that cabinet." TE IV 162. Once the compliance officer said she did not see into the cabinet, then she cannot say whether the cabinet was energized or whether there was any exposure to live electric parts. At that point, the testimony of electrician Gutgsell the panel was deenergized when he used his screwdriver to tighten electrical connections is the only proof on the subject.

For a violation to be found, the department of labor must prove the employer violated the standard. Ormet, supra. Item 6 required, one, training for employees and, two, exposure to live parts. If we accept the testimony of Mr. Gutgsell over that of the CO as did our hearing officer, and we do, then the panel was not energized when the CO observed him at the panel and therefore the standards do not apply. "Section 1910.332(a)

Scope" says "this section applies to employee who face a risk of electric shock that is not reduced to a safe level..." If there is no electricity to the panel, there is no exposure.

We affirm our hearing officer's decision to dismiss serious items 6a and 6b and the proposed penalty. Labor did not prove exposure to electricity, a requirement for the cited standards to apply.

Serious items 8, 9 and 10

Serious items 6, 8, 9 and 10 assume Mr. Gutgsell was exposed to live electrical parts. They also assume the qualified employee, Mr. Gutgsell was not trained.

Our hearing officer found:

> Gutgsell was not exposed to an electrical hazard as he worked in front of the electrical control panel during his efforts to discover the cause of the problem with the Amada press machine.
> RO 19

His finding on this issue is supported by the record:

Labor, on rebuttal, asked the CO the following questions:

> Q Did you look into the panel?
> A No, I did not.
> TE IV 155

> Q Are you familiar with this - what they're calling arc shields?
> A I haven't heard of an arc shield. TE IV 156

Winston's lawyer asked Mr. Gutgsell the following questions:

> Q Now, when did you use the multi-meter?
> A Checking voltages and I was doing a - I checked voltages in an energized state and then after I was satisfied with the required voltage, I flipped the main breaker inside the control cabinet, de-energizing the control cabinet from load side of the main breaker and at that point I took the screw driver and was doing the - I was testing the terminal screws.
> Q After you had de-energized the cabinet.

A After I had de-energized it.

TE IV 31.

Because Mr. Gutgsell was a master electrician, we have found he was trained to that level required by 1910.331 through 1910.335. TE IV 7-10. For example, item 8a says Mr. Gutgsell did not utilize safe electrical practices; 8b said he was not familiar with insulated tools and equipment; 9a, 10a and 10b said the company did not provide Mr. Gutgsell with the proper equipment or tools when working on live parts. We find Mr. Gutgsell, as a master electrician, was trained far beyond the requirements of 1910.331 through 1910.335.

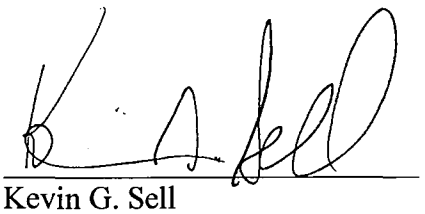
As the above testimony demonstrates, Mr. Gutgsell was not working on live electrical parts when observed by CO Oser and we so find. In order for labor to prevail on serious items 6, 8, 9 and 10, it must prove the parts were energized. Labor failed to do that. Ormet, supra.

Because Mr. Gutgsell was a trained master electrician and because when observed by CO Oser the electrical panel upon which he was working was not energized, we affirm our hearing officer's decision to dismiss serious items 8, 9 and 10 and the proposed penalties as well as serious item 6. KRS 338.081 (3).

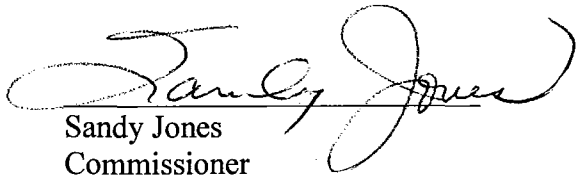
We adopt our hearing officer's recommended order to the extent it agrees with our decision in this case.

It is so ordered.

May 6, 2008.



Kevin G. Sell
Chairman



Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

Certificate of Service

This is to certify a copy of the decision and order of the commission was mailed to the parties on May 6, 2008 in the manner indicated:

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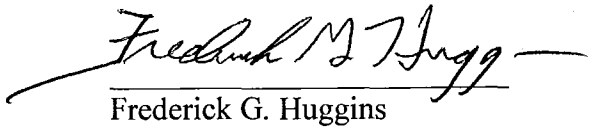

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