



JOHN Y. BROWN, Jr.
GOVERNOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
AIRPORT BLDG., LOUISVILLE RD., (U.S. 60-WEST)
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

September 15, 1981

KOSHRC #409 & #433

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JONES-TEER CONSTRUCTION COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before, ROBERTS, Chairman; RUH and BRADEN, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of July 5, 1978, is presently before this Commission for review, pursuant to Order of the Franklin Circuit Court.

At issue in this case are alleged violations of the following standards:

29 CFR 1926.601(b)(14) requiring that vehicles be checked at the beginning of each shift to assure that parts, equipment and accessories as named in the standard are in safe operating condition and free of apparent damage which could cause failure while in use (pay-haulers) (proposed penalty, \$70);

29 CFR 1910.309(a) adopting National Electrical Code Article 110-17(a), requiring face plates or coverings over live parts of electrical equipment operating at fifty (50) volts or over where an electrical wall switch in the foreman's office and a transformer in the mechanic shed had no covers (proposed penalty, \$80);

29 CFR 1926.28(a) requiring personal protective equipment where necessary, where eye goggles were not provided for employees handling air chip guns (proposed penalty, \$80); and

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29 CFR 1926.601(b)(2)(i), requiring that tail lights be in operable condition on vehicles used after daylight hours, where four (4) Ford concrete trucks allegedly were not so equipped (proposed penalty, \$80);

(All standards as adopted by 803 KAR 2:020 and 2:030.)

Hearing Officer Shapiro has recommended dismissal of the citation of 29 CFR 1926.601(b)(2)(i) and the proposed penalty of \$80. All other citations were sustained by the Hearing Officer, as were their concomitant penalties.

We find the Hearing Officer's findings of fact and conclusions of law regarding the violations to be supported by the record and we sustain his findings. We find, however, that the circumstances of this case justify the deletion of the penalties assessed for the nonserious violations cited.

Accordingly, it is hereby ORDERED that the Hearing Officer's Recommended Order is AFFIRMED insofar as it has sustained the nonserious violations of 29 CFR 1926.601(b)(14), 29 CFR 1910.309(a), and 29 CFR 1926.28(a) (all as adopted by 803 KAR 2:020 and 2:030).

IT IS FURTHER ORDERED that the Hearing Officer's Order affirming the penalties assessed for those violations is hereby REVERSED and the penalties assessed for violation of 29 CFR 1926.601(b)(14), 29 CFR 1910.309(a) and 29 CFR 1926.28(a) are hereby DELETED.

All findings and conclusions of the Hearing Officer not inconsistent with this Order are hereby SUSTAINED.


John C. Roberts, Chairman

s/Carl J. Ruh
Carl J. Ruh, Commissioner

s/Charles E. Braden
Charles E. Braden, Commissioner

DATED: September 15, 1981
Frankfort, Kentucky

DECISION NO. 1047

Copy of this Decision and Order has been served by mailing or personal delivery on the following parties:

Commissioner of Labor
Commonwealth of Kentucky
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

(Messenger Mail)

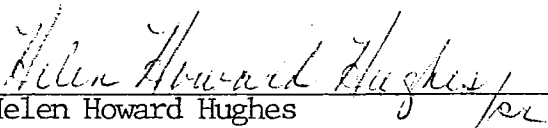
Hon. Bruce F. Clark
500 McClure Building
Frankfort, Kentucky 40601

(Cert. Mail #P32 1860968)

Hon. Kenneth J. Costelle
Assistant Counsel
Department of Labor
620 South Third Street
Louisville, Kentucky 40202

(First Class Mail)

This 15th day of September, 1981.



Helen Howard Hughes
Executive Director

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JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 585*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

July 5, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #409 & #433

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JONES-TEER CONSTRUCTION COMPANY

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

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

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Honorable Frederick G. Huggins
Assistant Counsel

Mr. Ronald F. Sullivan (Certified Mail #457582)
Corporate Safety Supervisor
Jones-Teer Construction Co.
c/o J. A. Jones Construction Co.
Post Office Box 966
Charlotte, North Carolina 28231

Mr. W. E. Haynes, Project Manager (First Class Mail)
Jones-Teer Company
P. O. Box 337
Smithland, Kentucky 42081

Mr. Walter L. McDaniel, Safety Engr. (First Class Mail)
Jones-Teer Company
Post Office Box 337
Smithland, Kentucky 42081

This 5th day of July, 1978.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #409 & #433

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

JONES-TEER CONSTRUCTION COMPANY

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of five citations issued against Jones-Teer Construction Company, hereinafter referred to as "Jones-Teer", 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 August 10, 1977, a Compliance Officer for the Commissioner made an inspection of a construction site at the Smithland Dam, 2-1/2 miles northeast of Smithland. As a result of that inspection, the Commissioner issued a citation on August 15, 1977, charging Jones-Teer with 10 nonserious violations of the Act, and proposing a penalty therefor of \$70.00.

On August 29, 1977, and within 15 working days from receipt of the contest, Jones-Teer filed a notice with the Commissioner contesting Item 9 of the citation. Notice of the contest was transmitted to this Review Commission on August 31, 1977, and notice of receipt of the contest was sent by the Reveiw Commission to Jones-Teer on the same date. Thereafter, on September 20, 1977, the Commissioner filed its Complaint and on October 7, 1977, the matter was assigned to a Hearing Officer and scheduled for hearing.

Meanwhile, on October 3, 1977, the same Compliance Officer made another inspection of the construction site. As a result of that inspection,

four citations were issued on October 12, 1977 charging Jones-Teer with four nonserious violations and three repeated nonserious violations of the Act. The Commissioner proposed a fine of \$80.00 for each repeat violation.

On November 2, 1977, and within 15 working days from receipt of the citations, Jones-Teer filed a notice with the Commissioner contesting the repeat citations. Notice of the contest was transmitted to this Review Commission on November 3, 1977, and notice of receipt of the contest was sent by this Review Commission to Jones-Teer on November 4, 1977. Thereafter on November 11, 1977, the Commissioner filed its Complaint and on November 29, 1977, the matter was assigned to a Hearing Officer.

On December 6, 1977, by order of this Review Commission these contests were consolidated and scheduled for hearing. The hearing was held in Benton on January 4, 1977, pursuant to KRS 378.070(4). That section of the statute 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 378.081 further authorizes this Review Commission to appoint Hearing Officers to conduct its hearings and represent it in this manner. The decisions of Hearing Officers are subject to review by the Review Commission on appeal timely filed by either party, or upon its own motion.

The standards allegedly violated (as adopted by 803 KAR 2:020 and 803 KAR 2:030) the description of the alleged violations, and the penalties proposed for same are as follows:

1926.601	Vehicles in use were not checked at	\$ 70.00
(b)(14)	the beginning of each shift to assure that the following parts, equipment, and accessories are in safe operating condition and free of apparent damage that could cause failure while in use;	

service brakes, parking system (hand brake), horn, steering mechanism, coupling devices, seat belts, operating controls and safety devices (Pay-haulers)

National	Live parts of electrical equipment,	\$ 80.00
Electrical	operating at fifty (50) volts or more were	
Code Article	not guarded against accidental employee	
110-17(a)(as	contact by approved face plates or covers.	
adopted by	(a) electrical wall switch; Operator	
1910.309(a))	Foreman's Office	
	(b) transformer 110/220 volts; No. 1	
	Mechanic shed	

Cited as a repeat of an earlier violation cited August 15, 1977.

1926.28(a) An employee was not required to wear personal protective equipment (eye protection) when using an air chip gun where there was an exposure to a hazardous condition.

Cited as a repeat of an earlier violation cited October 15, 1977.

1926.601 Ford concrete trucks, Nos. 3819, 4217,
(b)(2) 4219 and 4218, used after daylight hours, were not equipped with taillights in operable condition.

Cited as a repeat of an earlier violation cited August 15, 1977.

Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law and Recommended Decision are hereby made.

FINDINGS OF FACT

Jones-Teer is a general contractor constructing a coffer dam on the Ohio River near Smithland. A portion of the work, such as fabrication and maintenance, is done on the river bank adjacent to the dam while the actual construction is in the river on the dam itself. Payhaulers, which are large trucks used to haul dirt, are used on the river bank. These payhaulers are used around the clock on a 24 hour basis so that as each operator completes his shift, another operator takes his place.

Jones-Teer employs 50 mechanics to work on its heavy equipment, including its payhaulers. These mechanics perform not only repairs, but

preventive maintenance as well. If a truck becomes disabled or has a malfunction, the operator reports it to the mechanics who are responsible for fixing it.

The trucks are also checked periodically by safety personnel of the U. S. Corps of Engineers for whom the dam is being constructed. However, there is no policy with respect to daily safety inspections at the beginning of each shift to ensure that the trucks, or any of its parts, are in working order.

Although, the Compliance Officer in interviews with employees, received some complaints concerning the company's failure to maintain the trucks in a safe condition, he apparently found nothing wrong with them. Nor did he find any accidents which had resulted from defective equipment on the trucks. He did find that an employee working on a Payhauler had been injured, but this injury resulted from driver error according to a finding by the U. S. Corps of Engineers.

The failure to make daily inspections was deemed a nonserious violation of the Act by the Commissioner and in connection therewith, the Commissioner proposed a penalty of \$70.00. The penalty was proposed in accordance with guidelines established by the Commissioner to achieve uniformity in the assessment of penalties throughout the state.

Under these guidelines, the Commissioner first measures the violation in terms of the hazard it presents. Three factors are used, namely: likelihood, severity and system and each factor is assigned a rating of one to nine. The higher the rating, the more severe the penalty.

"Likelihood" refers to the probability of injury occurring from the hazard, and is measured in terms of low, moderate or high probability. Taken into consideration is the past injury record of the employer, the number of employees exposed and the amount of exposure. In the instant case, the Commissioner found there was a moderate likelihood of injury resulting from the accident.

"Severity" refers to the type of injury which might result from the accident. Taken into consideration here is whether the injury will require medical treatment, and if so, the type of treatment that may be required. Injuries requiring first aid treatment alone are judged to be of low severity, those requiring doctors treatment are judged to be of moderate severity and those requiring hospitalization for 24 hours or more are judged to be of high severity. Here, the Commissioner was of the opinion that an injury resulting from a defect in a payhauler could result in hospitalization and was, therefore, of high severity.

"System" refers to the extent to which a standard is violated. Ratings of this factor are based on whether the violation is an isolated case, whether it is found in 16% to 50% of similar equipment or similar conditions, or whether it is found more than 50%. In this case, all of the payhaulers used by Jones-Teer were involved and it was given a high rating.

Based on these factors, the Commissioner fixed an unadjusted penalty of \$175.00. The Commissioner then adjusted the penalty, again in accordance with its guidelines, using three adjustment factors of history, good faith and size.

The "history" factor is based on the history of the company in complying with the Act. Taken into consideration are previous inspections of the company. Under this adjustment factor the Commissioner may reduce the penalty by 20% or by 10%. In this case, the Commissioner allowed an adjustment of 10% because the company had been inspected on previous occasions.

"Good faith" is similar to history in that it also provides for a reduction of either 20% or 10%. "Good faith" refers to the employers awareness of the law and his demonstrated desire to comply with it. Here again, the Commissioner allowed only 10% for this factor. The maximum

was not allowed because the Commissioner was of the opinion that the employer should have been aware of the safety standards from past inspections.

"Size" is an automatic adjustment of 5% or 10% based on the number of employees a company has. Where that number exceeds 100, as is the case here, no adjustment is allowed for size.

Applying the total adjustment allowed of 20%, the unadjusted penalty was reduced to \$140.00.

The Commissioner also permits an abatement credit of 50% for each nonserious violation, on the assumption that the employer will abate the violation within the time prescribed by the citation. This further reduced the penalty to \$70.00, the amount proposed in the citation.

Included among the facilities on the coffer dam is a small shack that serves as an office for the Operators Foremen, and a mechanics shop shed which is used to repair equipment. In addition to serving as an office for the Operators Foreman, the small shack is also used by employees to eat their lunch. The shack is equipped with electricity and just inside the entrance door is a small light switch, approximately 3 feet above the floor. At the time of the inspection, this switch was not covered by a faceplate so that there was a possibility of employees reaching into it and receiving an electrical shock. However, the switch itself had a cover which shielded the electrical connections so that in order to receive such a shock an employee would have had to deliberately insert his fingers or an object into the outlet. Thus, there was only a remote possibility of an accident resulting from the missing faceplate.

The mechanics shed was also equipped with electricity which was used to power the electric tools used by the mechanics. A transformer in the shed converted the electricity coming into the shed from 220 volts to 110 volts for that purpose. At the time of the inspection, a plate

on the front of the transformer was missing exposing the live contact leads to which wires leading to and from the transformer were attached. These exposed contact leads presented a hazard of electrical shock to employees working in the shed.

Jones-Teer also used four concrete trucks on the coffer dam to haul concrete from its concrete plant on the dam to areas where it was being poured. The U. S. Corps of Engineers required that a signalman ride with each truck and the trucks were equipped with back-up alarms. These trucks were used only at night and were not equipped with taillights. However, the area in which they worked, as well as the entire coffer dam area, was lighted in the same manner as a football field is lighted at night, by a system of light poles, each pole consisting of a series of three rows of six lights in each row.

In the course of his inspection, the Compliance Officer found one employee using a pneumatic chip gun who was not wearing any safety equipment to protect his eyes. This was contrary to the written policy of the company requiring all employees to use eye protection equipment whenever the machinery they are using presents a potential danger to their eyes. The company further furnished safety goggles to each of its employees doing such work. When interviewed by the Compliance Officer, however, the employee found without eye protection appeared unaware of the company's policy requiring their use.

These last three violations were cited as repeats of earlier violations for which the company had been cited. The first citation, relating to the missing faceplate on the light and the plate on the transformer, was cited as being a repeat of a violation cited on August 15, 1977. That citation also involved a missing faceplate on a light switch located in the Ironworkers Foreman's Office.

The second citation, relating to the concrete trucks, was cited as being a repeat of an earlier violation also cited on August 15, 1977.

That citation involved the failure to equip a payhauler with two tail-lights in operable condition.

The third citation, relating to the air chip gun, was cited as being a repeat of an earlier violation cited on October 15, 1977. There the employer was cited for failure to provide eye protection equipment to employees using a jackhammer.

The Commissioner did not consider any of the last three violations hazardous enough to justify a penalty based on the risk of injury they presented. Because they were repeat violations, however, the Commissioner under its guidelines for penalties, proposed an unadjusted penalty of \$100.00 for each. Allowing the same adjustment of 10% for good faith and 10% for history as allowed in the citation issued on August 15, 1977, the penalty for each was reduced to \$80.00.

CONCLUSIONS OF LAW

The initial question presented involves the validity of the inspection on October 10, 1977. Jones-Teer contends that the Commissioner may not inspect an employer while that employer has a contest pending of an earlier citation. Therefore, since Jones-Teer had contested a portion of the citation issued against it on August 15, 1977, Jones-Teer maintains that the inspection of October 10, 1977 was improper.

KRS 338.101(a) confers on the Commissioner the right to inspect any place of employment during regular working hours and at other reasonable times. This right is not restricted by the contest of a citation against the employer. Such a restriction would negate in part one of the purposes of the Act. Thus, the second inspection was not improper under the Act and the motion to dismiss the citation on those grounds was properly overruled.

29 CFR 1926.601(b)(14) provides in part:

Motor vehicles General requirements All vehicles in use shall be checked at the beginning of each shift to assure that the following parts, equipment and accessories are in safe operating condition and free of apparent damage that could cause failure while in use: service brakes, including trailer brake connections; parking system (hand brake); emergency stopping system (brakes); tires, horn, steering mechanism; coupling devices; seat belts; operating controls; and safety devices

Jones-Teer maintains that in effect its driver and mechanics maintain a "constant surveillance" on all its equipment, including the payhaulers cited as being in violation of this standard. This surveillance the company contends meets the requirements of the standard. Furthermore, in using the trucks, the operators are, in effect, checking the various equipment on the truck required by the standard.

A somewhat analagous situation was found in Utility Builders, Inc., CCH-OSHD ¶22,249 (1977). There the employer was cited for violating the same standard by failing to inspect the brakes on a truck before the beginning of a workshift. The employer contended that the use of the brake in starting the truck amounted to an inspection within the meaning of the standard. In that case the Review Commission rejected the arguments of the employer and sustained the citation.

Jones-Teer contends that the standard does not define what it means by the phrase "beginning of each shift" and is, therefore, too vague to be enforceable. A standard to be enforceable, must afford employers "a reasonable warning of the proscribed conduct in light of common understanding and practices" Ryder Truck Lines, Inc. v. Brennan 497 SW2d 230 (CA-5, 1974).

The conduct required by the standard seems clear. It requires an inspection of each item enumerated in the standard at the beginning of each shift before the vehicle is used to assure that it is in working order. The evidence establishes that such inspections were not made by

Jones-Teer and the citation was proper. Further, in view of the hazard presented, the penalty was reasonable under the circumstances.

29 CFR 1910.309(a) adopts the requirements of Section 110-117(a) of the National Electrical Code. That section provides in part:

Except as elsewhere required or permitted by this Code, live parts of electrical or electrical equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures

Two separate conditions were found by the Commissioner to violate this section. The first involved a light switch from which the cover plate was missing. Although, it was possible by reason of the missing plate, to insert a finger into the switch, because of the way in which the switch was constructed, such an insertion would almost have to be intentional. Therefore, the failure to provide a face cover over the switch did not violate the standard. Pratt & Whitney Aircraft, Division of United Technology Corp., CCH-OSHD ¶20,906 (1976).

The transformer, however, presents a different situation. There the contacts were exposed sufficiently to present a risk of accidental contact. Thus, the standard was violated and the citation should be sustained. Braswell Motor Freight Lines, Inc., CCH-OSHD #19,348 (1975).

Further, in view of the repeat nature of the violation the penalty proposed is reasonable under the circumstances.

29 CFR 1926.601(b)(2)(i) provides:

Motor vehicles General requirements Whenever visibility conditions warrant additional light, all vehicles, or combination of vehicles, in use shall be equipped with at least two headlights and two taillights in operable condition.

The key phrase, insofar as the instant case is concerned, is "whenever visibility conditions warrant". The fact is that although used only at night, the trucks found in violation of this standard by the Commissioner were only used in an extremely well lighted area where visibility was no problem. Thus, the standard was not violated by the absence of taillights and that portion of the citation should be dismissed.

29 CFR 1926.28(a) provides:

Personal protective equipment The employer is responsible for requiring the wearing of appropriate personal protective equipment where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to employees.

Jones-Teer does not contend that the employee operating the air chip gun was not in violation of this standard when he failed to wear goggles to protect his eyes. However, Jones-Teer in effect contends that it should not be held in violation of the Act since it provided such equipment for its employees and its written policy required its use.

Although, this may have been the written policy of the company, it does not appear to have been effectively enforced. This was evidenced by the employees apparent lack of knowledge of the requirement. Thus, the standard was violated and the citation was proper. Durrant Foundry and Machine Co., CCH-OSHD #18,361 (1974). Further, in view of the repeat nature of the violation, the penalty proposed was appropriate under the circumstances.

RECOMMENDED DECISION

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

IT IS HEREBY ORDERED

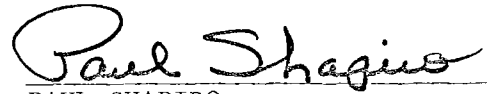
That the citation issued August 15, 1977, charging a nonserious violation of 29 CFR 1926.601(b)(14) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of \$70.00 is hereby sustained.

That the citation issued October 12, 1977, charging a repeated nonserious violation of 29 CFR 1910.309(a), (as adopted by 803 KAR 2:020) and proposing a penalty therefor of \$80.00, is hereby sustained.

That the citation issued October 12, 1977, charging a repeated nonserious violation of 29 CFR 1926.601(b)(2)(i) (as adopted by 803 KAR 2:030) is hereby dismissed.

That the citation issued October 12, 1977, charging a nonserious violation of 29 CFR 1926.28(a)(as adopted by 803 KAR 2:030) and proposing a penalty therefor of \$80.00 is hereby sustained.

FURTHER, that the Citations sustained must be abated and the penalties paid without delay, but no later than 30 days from the date hereof.



PAUL SHAPIRO
HEARING OFFICER
KOSHR

Dated: July 5, 1978
Frankfort, Kentucky

DECISION NO. 585