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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
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WENDELL H. FORD
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IRIS R. BARRETT
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H. L. STOWERS
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MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

November 27, 1974

KOSHRC # 46

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

vs.

A & H TRUCK LINE, INC. — RESPONDENT

REVIEW COMMISSION DECISION AND ORDER

Before STOWERS, Chairman; STANTON and UPTON, Commissioners.

PER CURIAM.

This case is before this Commission on an agreed order of the Commission, dated November 8, 1974, calling for the Decision and Recommended Order to be reviewed, it appearing a further review and clarification of the decision would be in the best interest of the parties involved.

Under date of October 14, 1974, the Decision, Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer Lloyd Graper was issued, in which the facts were summarized, and in which the Hearing Officer, limiting review to the one contested item to be later discussed at length, made a finding of facts, conclusions of law and recommended order. The Hearing Officer found the Kentucky Department of Labor under the KOSH Act had jurisdiction, that the respondent was subject to 29 CFR 1910.178 (m) (7) (OSH 11); that respondent had violated that requirement, and that the proposed penalty of $45.00 and the proposed abatement date within 21 days were affirmed.

Respondent was charged under 29 CFR 1910.178 (m)(7) with:

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"Wheel blocks were not in place to prevent movement of trailers while loading or unloading with powered industrial trucks (distribution area)."

This subsection provides:

"Brakes shall be set and wheel blocks shall be in place to prevent movement of trucks, trailers, or railroad cars while loading or unloading. Fixed jacks may be necessary to support a semitrailer during loading or unloading when the trailer is not coupled to a tractor. The flooring of trucks, trailers, and railroad cars shall be checked for breaks and weakness before they are driven onto."

On November 7, 1974, this Commission received from Nelson J. Cooney, Assistant General Counsel of the American Trucking Associations, Inc. a petition seeking intervention and a petition for review.

Respondent also filed a petition for discretionary review, filing in support thereof copy of the petition for leave to intervene and petition for review filed by the American Trucking Association.

Respondent's contention is that since this was an over-the-road trailer that was being unloaded, and since the movement and the parking of that trailer is under the authority of the Motor Carrier Safety Regulations of the United States Department of Transportation that the exemption provided by Section 4 (b) (1) of the Federal Occupational Safety and Health Act of 1970 applies, and that the Kentucky Occupational Safety and Health Act and in particular this citation, under 29 CFR 1910.178 (m) (7) (as adopted by OSH 11) is inapplicable because of lack of jurisdiction of the working condition.

Respondent is relying on the Federal Occupational Safety and Health Review Commission's holding in the case of U. S. Department of Labor v. Mushroom Transportation Co. Inc., Docket No. 1588. In that case the respondent was cited under 29 CFR 1910.178 (k) (1) which reads:

"The brakes of highway trucks shall be set and wheel chocks placed under the rear wheels to prevent the trucks from rolling while they are boarded with powered industrial trucks."

It must be here noted that this section, while similar to subsection (m) (7) of the same section, specifically provides for highway trucks (emphasis supplied), the distinction being necessary, because the entire subject being here regulated by this standard in question is:

Subpart N - Materials Handling and Storage
1910.176 Handling Materials - general
1910.177 Indoor general storage
1910.178 Powered industrial trucks

The various subsections of 178 all relate to material handling and storage by powered industrial trucks.

The Motor Carrier Safety Regulations, under the U. S. Department of Transportation claims jurisdiction because this was a vehicle under Department of Transportation jurisdiction, and cites as the reason section 392.20. This section of the Act is:

Part 390 General
Part 391 Qualifications of Drivers
Part 392 Driving of Motor Vehicles
Subpart A General
Subpart B Driving of Vehicles
Subpart C - Stopped Vehicles
392.20 Unattended vehicles; precautions

"No motor vehicle shall be left unattended until the parking brake has been securely set and all reasonable precautions have been taken to prevent the movement of the vehicle."

392.21 relates to stopped vehicles not to interfere with other traffic,
392.22 Emergency signals; Stopped Vehicles. The remainder of this relates to emergency measures.

In the Mushroom case, it was stated the problem in this case reduces itself to the issue of whether 49 CFR 392.20 is applicable to the vehicles being loaded or unloaded by powered industrial trucks. In its petition for review, in trying to establish Department of Transportation jurisdiction, the respondent states "Motor Carrier Safety Regulations is a regulation which insures nonmovement of a truck and/or trailer ...." Respondent states that Section 392.1 applies to in-terminal movement of motor vehicles. We fail to see relevancy of this contention here, because it still applies to the vehicle's handling -- not the employee's safety that is performing the work. This does not provide how to load or unload and what the employee shall do -- only how to take care of an over-the-road vehicle, not how the safety and health of the employee shall be protected. In the quote from Joe D. Hughes, Inc., Contract

Carrier application 23 M.C.C. 563 by respondent it was stated: "our safety rules apply to vehicles operated..." (Emphasis ours.)

And from respondent's quote of Legislative History, page 997;

> "While this section does not forclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health ...."

In the instant matter, by their own admission, their control and concern is for vehicles, the traveling public, and cargo in transit, not the safety and health for employees.

No where in the entire Motor Carrier Safety Regulations are there requirements of how a person shall load or unload trucks of materials transported except as to the vehicle. In fact the only unloading or loading requirements in these regulations apply to buses and securing freight on the vehicle (See section 392.9). These regulations are for the protection of the traveling public, the cargo and for the equipment, but not the employees' safety. It seems an obvious conclusion the intent of these provisions was in vehicle traffic and public protection.

On the other hand, under KRS 338.011, the purpose of the Kentucky Occupational Safety and Health Act is to promote safety and health of employees by preventing any detriment by exposure to harmful conditions and practices at places of work; and under KRS 338.031 (1) (a) it is provided that each employer shall furnish to each of his employees a place of employment free from recognized hazards. Jurisdiction of this subject matter of safety and health is presumed to exist under KOSH, and must be rebutted by respondent showing similar regulation of the safety and health of its employees. In order to give such protection to powered industrial truck operators, standards have been set up. No other jurisdiction has been suggested or proven as to operations of powered industrial trucks. There are approximately 40 cases where Occupational Safety and Health Act jurisdiction of powered industrial truck operations has been approved. The standard itself specifically excludes over-the-highway trucks (See 29 CFR 1910.178). Therefore, no exemption of this operation in the instance case has been proven under KRS 338.021.

But it has been shown there is a positive duty of the employer to the powered industrial truck operator, before exposing him to the job of unloading a trailer, that the trailer is safe to enter with a powered industrial truck, as well as other safety precautions. These include under Subsection 178 (m), brakes set, wheel blocks in place, fixed jacks, if necessary, and flooring checked. Here, under this subsection, wheel blocks are

not required for the protection of the vehicle, but are required before entrance into the trailer by the powered industrial truck, for the safety of the employee. Possibly, a trailer could be safely parked under Department of Transportation regulations to prevent movement for some types of unloading; but driving a powered industrial truck on the trailer might cause movement. Therefore, provisions have been made in (m) (7) for a double check before entrance of the trailer by the powered industrial truck.

The purpose of a standard or regulation must be examined in arriving at the applicability of the Kentucky Occupational Safety and Health Act. Here, in this instance, the same employer and the same employee may be involved in the overall job performance. The driver of the over-the-road vehicle may be regulated as to driving and parking by Department of Transportation Motor Carrier Safety Act; but when he becomes the powered industrial truck operator, he is no longer operating under the same requirements. Mr. R. A. Young, Safety Director of respondent stated, (p. 18, Transcript of Evidence) "Now, I am talking about the tractor, the trailer--I am not talking about the work site. The work site, the terminal itself--there is no question about this, whether it is Federal OSHA or Kentucky OSHA, as far as I can see they have full jurisdiction." And the record shows the citation here involved a powered industrial truck or tow motor which was on the trailer loading or unloading, without the proper safety conditions being present as required by 178 (m) (7) to prevent exposure of the employee to working hazards.

In Safeway Stores, Inc., Docket Nos. 454, 723 and 1070, (Jan. 17, 1973), respondent was cited under the same 178 (m) (7) as here. A citation under (k) (1) was dismissed, but one under (m) (7) upheld and it was there stated:

> "The aforesaid violations of 29 CFR 1910.178 (m) (7), had a direct and immediate relationship to safety and health."

See also Westway Motor Freight, Inc., et al, Docket Nos. 849, 850 and 851, April 4, 1973.

In Lee Way Motor Freight, Inc., Docket No. 2696, Sept. 10, 1973, a freight company's contention that it did not fall under OSHA jurisdiction but Department of Transportation was rejected on the ground that the latter agency had not exercised authority over the working conditions at issue. The exemption from dual coverage is limited to specific working conditions over which another federal agency has in fact exercised its statutory authority to regulate safety and health. (Emphasis ours).

In Chief Freight Lines, Inc., Docket 6483, Sept. 16, 1974, respondent claimed jurisdiction was with Department of Transportation, not OSHA, but it was held there were no Department of Transportation regulations applicable and upheld OSH jurisdiction. See also McLean Trucking Co. v. Occupational Safety and Health Review Commission., United States Court of Appeals for the Fourth Circuit, No 73-2392, Sept. 4, 1974. In this case, the citation related to requiring dock employees to wear safety shoes while loading and unloading freight by hand, by dollies and forklift or powered industrial trucks, and was affirmed.

In Hartwell Excavating Co., Docket 1098, Aug. 30, 1973, it was held that regulation of explosives by other federal agencies had not deprived OSHA of jurisdiction since the Internal Revenue Service and Department of Transportation regulations did not have as their purpose the protection of the safety and health of employees.

Accordingly, this Commission finds:

1. That the petition for intervention by the American Trucking Association is hereby denied for the reason that leave to intervene was not filed in this action before the commencement of the hearing as required by Section 13 of Rules of Procedure of this Commission, and no purpose would be served to permit such intervention at this time.

2. That since this Commission, on its own order, called this case for review, it becomes a moot question of granting respondent's petition for discretionary review. All materials filed with such petition were considered and studied by the Commission, however.

3. That the employee exposure to the working condition, as cited under 29 CFR 1910.178 (m) (7) OSH 11, was within the jurisdiction of the Kentucky Occupational Safety and Health Act.

4. That the Decision, Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, issued on October 14, 1974, is hereby affirmed.

H. L. Stowers
H. L. Stowers, Chairman

Merle H. Stanton
Merle H. Stanton, Commissioner

C. B. Upton
C. B. Upton, Commissioner

DATED: November 26, 1974
Frankfort, Ky.

DECISION NO. 71

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

WENDELL H. FORD
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EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN
MERLE H. STANTON
MEMBER
CHARLES B. UPTON
MEMBER

October 14, 1974

KOSHRC # 46

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY — COMPLAINANT

vs.

A & H TRUCK LINE, INC. — RESPONDENT

NOTICE OF RECEIPT OF
DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
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 of our hearing officer, the Honorable Lloyd Graper, has been received and 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 submit a petition for discretionary review by this Commission.

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 by the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, 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 filed 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 of Kentucky
Attention: Michael D. Ragland
OSHA Coordinator

Honorable Earl M. Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber, Assistant Counsel

A & H Truck Line, Inc. (Certified Mail #423319)
309 Sutton Lane
Owensboro, Kentucky 42301
Attention: R. A. Young, Safety Director

A & H Truck Line, Inc. (Certified Mail #423328)
1111 E. Louisiana Street
Evansville, Indiana 47717
Attention: R. A. Young
Safety Director

This 14th day of October, 1974.

Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

KOSHRC DOCKET NO. 46

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

-vs-

DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

A & H TRUCK LINE, INC. — RESPONDENT

* * * * * * * * * * * * *

Hon. Peter Glauber and Hon. Robert D. Hawkins, Department of Labor, Frankfort, Kentucky, Attorney for Complainant.

Mr. Richard A. Young, Director of Safety, Evansville, Indiana, for Respondent.

GRAPER, Hearing Officer.

This hearing was held on August 7, 1974, at 10:00 a.m. at the State Office Building, 311 West Second Street, Owensboro, Kentucky, under the provisions of KRS 338.071(4), one of the provisions of Chapter 338 of the Kentucky Revised Statutes dealing with the safety and health of employees, which authorizes the Review Commission to hear and rule on appeals from citations,

notifications, and variances issued under the provisions of this Chapter and to adopt and promulgate rules and regulations with respect to the procedural aspect of its hearings. Under the provisions of KRS 338.081, hearing authorized by the provisions of this Chapter may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal, the Review Commission may sustain, modify or dismiss a citation or penalty.

On May 14, 1974, as a result of an inspection made on April 5, 1974, at respondent's place of employment located at 309 Sutton Lane, Owensboro, Kentucky, and described as a trucking terminal, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued a citation to the respondent charging seven (7) other than serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in that the following standards, regulations or sections of KRS Chapter 338 were violated:

Item 1, 29 CFR 1910.141(c)(1)(vi) (as adopted by OSH 11);
Item 2, 29 CFR 1910.157(a)(1) (as adopted by OSH 11);
Item 3, 29 CFR 1910.157(a)(5) (as adopted by OSH 11);
Item 4, 29 CFR 1910.157(d)(3)(i) (as adopted by OSH 11);
Item 6, 29 CFR 1910.219(e)(3) (as adopted by OSH 11);
Item 7, National Electrical Code, Article 110-17(a) (as adopted by 29 CFR 1910.309(a) and OSH 11).

No penalties were proposed for any of these violations, and none of these citations, or the abatement dates proposed in connection with them were challenged.

As to Item number 5, which is the subject of this review, the standard, regulation, or section of KRS Chapter 338

allegedly violated is 29 CFR 1910.178(m)(7) (as adopted by OSH 11), and a description of the alleged violation is:

> Wheel blocks were not in place to prevent movement of trailers while loading or unloading with powered industrial trucks (distribution area).

The date by which the alleged violation must be corrected was June 7, 1974, and the proposed penalty was $45.00.

On May 30, 1974, the Kentucky Occupational Safety and Health Review Commission received from the Kentucky Department of Labor, Occupational Safety and Health Compliance Division, a certification indicating that a citation was issued on May 14, 1974; that a notice of proposed penalty was sent on May 14, 1974; and that a notice of contest from the employer was received on May 28, 1974. Also included was a letter dated May 24, 1974, from the employer contesting the citation.

A notice of receipt of contest was furnished to all of the parties on June 6, 1974. A certification of the employer indicating that the employer certified that on June 11, 1974, the notice supplied by the Commission advising affected employees of this case and a copy of the employers notice of contest were posted at each place where the Kentucky Occupational Safety and Health Act citation is required to be posted, and that the name and address of each local union representing the affected employees is: Teamsters Union No. 215, 825 Walnut Street, Evansville, Indiana, was received by the Occupational Safety and Health Review Commission on June 13, 1974.

A Complaint was received by the Kentucky Occupational Safety and Health Review Commission on June 11, 1974.

A motion to dismiss, made by complainant based upon respondent's failure to file an answer, was received by the Occupational Safety and Health Review Commission on July 5, 1974. A letter, dated July 9, 1974, in this regard was mailed by the Executive Director of the Review Commission to respondent. On July 12, 1974, an answer was filed. On July 19, 1974, complainant's motion to dismiss was overruled. A notice of hearing and notice of assignment to hearing officer were mailed to the parties on July 24, 1974. After the hearing, both parties filed briefs.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits and the stipulations, and the representations of the parties, it is concluded, that the substantial evidence, on the record considered as a whole, supports the following findings of fact:

FINDINGS OF FACT

It is found that wheel blocks were not in place to prevent movement of trailers while loading or unloading with powered industrial trucks (distribution area).

Upon the basis of the foregoing, the Hearing Officer makes the following:

CONCLUSIONS OF LAW

1. Limiting the Review Commission's review to Item number 5, as agreed upon by the parties, appears appropriate under the circumstances since it does not appear that error would result from not reviewing the other Items contained in the citation.

2. Respondent takes the position that the Motor Carrier Safety Regulations of the United States Department of Transportation, to which it is subject, supersede and make inapplicable the provisions of 29 CFR 1910.178(m)(7) under which it was cited. In support thereof, Respondent relies upon the case of United States Department of Labor v. Mushroom Transportation Co., Inc., Docket No. 1588. In that case, the issue before the Federal Review Commission was whether the working conditions for which the respondent therein was cited were subject to the Federal Act because another Federal agency has taken action that is cognizable under section 4(b)(1) of the Act. Section 4(b)(1) is analagous to KRS 338.021(1)(b) which provides:

> Exclusions. (1) This chapter applies to all employers, employees, and places of employment throughout the commonwealth except the following:
>
> (b) Employers, employees and places of employment over which federal agencies other than the United States Department of Labor exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

The Federal Review Commission indicated that the section was intended to avoid a duplication in the enforcement efforts of

Federal agencies, the action of which provides job safety and health protection to employees. It also indicated that, by the same token, there is perforce an intent to have no hiatus in the protection of employees.

Although the Federal case deals with the standard, 29 CFR 1910.178(k)(1) and the instant case concerns itself with the standard 29 CFR 1910.178(m)(7), the arguments are identical. In short, Respondent argues that Motor Carrier Safety Regulations, 49 CFR 392.20; 49 CFR 392.40; and 49 CFR 392.41, are addressed to the specific working condition to which 29 CFR 1910.178(m)(7) is addressed and, as stated by the Federal Review Commission, once a Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. And further, that Section 4(b)(1) [KRS 338.021(1)(b)] does not require that another agency exercise its authority in the same manner or in an equally stringent manner.

In making its decision, the Federal Review Commission found that 49 CFR 392.20 was applicable to vehicles being loaded or unloaded by powered industrial trucks at respondent's terminal and held, therefore, that by virtue of section 4(b)(1), the provisions of the Federal Act and the OSHA regulations promulgated thereunder are not applicable to the specific working conditions for which respondent was cited.

The Hearing Officer disagrees with the Federal Review Commission decision in two respects. First, the cited Motor Carrier Safety Regulations, and in particular, 49 CFR 392.20, do not address

themselves to the specific working conditions to which 29 CFR 1910.178(m)(7) is addressed.

Part 392 of the Motor Carrier Safety Regulations is entitled, "Driving of Motor Vehicles". Under Subpart C, entitled "Stopped Vehicles", is found Section 392.20, entitled "Unattended Vehicles; Precautions", which reads as follows:

> No motor vehicle shall be left unattended until the parking brake has been securely set and all reasonable precautions have been taken to prevent the movement of such vehicle.

Under Subpart A of the same Regulations, entitled "Definitions", the term 'motor vehicle' is defined as follows under Section 390.1:

> The term 'motor vehicle' means any vehicle, machine, tractor, trailor, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Federal Highway Administration, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wife, furnishing local passenger transportation similar to street-railway service.

and 'vehicle' is defined under Section 390.2 as follows:

> The term 'vehicle' means any conveyance of any type whatsoever operating upon the highways.

Taking Section 392.20 together with Sections 390.1 and 390.2, it is clear that Section 392.20 is addressed to the working condition of trailers being operated upon the highways and not to their loading and unloading with powered industrial trucks.

The requirements of Section 1910.178, by the very terms of Subsection (a), apply to the fire protection for fork trucks, tractors, platform lift trucks, motorized hand trucks and other specialized industrial trucks powered by electric motors or internal combustion engines. These fire protection requirements do not apply to compressed air or nonflammable compressed gas-operated industrial trucks, nor to farm vehicles, nor automotive vehicles for highway use. Section 392.20, clearly applies to vehicles operating upon the highways and therefore does not bring the 4(b)(1) [KRS 338.021(1)(b)] exception into play. For this reason, 29 CFR 1910.178(m)(7), the standard under which Respondent was cited, should remain in full force and effect.

The Hearing Officer also disagrees with the Federal Review Commission's statement that Section 4(b)(1) [KRS 338.021(1)(b)] "does not require that another agency exercise its authority in the same manner or in an equally stringent manner." In its opinion, the Federal Review Commission indicated that Congress declared its purpose in enacting the Act in section 2(b) which provides:

> ...[T]o assure so far as possible every working man and woman in the Nation safe and healthful working conditions...

The Kentucky General Assembly declares its purpose in enacting KRS Chapter 338 in a statement of purpose and policy under KRS 338.011 which provides:

> The general assembly finds that occupational accidents and diseases produce personal injuries and illness including loss of life as well as

> economic loss. Therefore, the general assembly declares that it is the purpose and policy of the Commonwealth of Kentucky to promote the safety, health and general welfare of its people by preventing any detriment to the safety and health of all employees, both public and private, covered by this chapter, arising out of exposure to harmful conditions and practices at places of work and otherwise to preserve our human resources by providing for education and training, inspection of workplaces, consultation, services, research, reports and statistics, and other means of furthering progress in the field of occupational safety and health.
>
> Under KRS 338.021(1)(b), the key word is "exercise".

If a Federal agency does not exercise its authority in the same manner or in an equally stringent manner, very clearly, KOSHA should step in and its safety and health standards should apply to employers purportedly regulated by such federal agency. The mere existence of statutory authority in a federal agency other than OSHA to regulate employers does not exempt such employers and their employees from the protection of the KOSHA standards. It is only when the federal agency effectively exercises its authority that it preempts the enforcement of the KOSHA standards. We must look to the substance of the regulation and not at its form. The Federal agency must not only promulgate but must effectively enforce standards covering the particular peril of the workplace, i.e., the specific working condition, sought to be excluded. If it were otherwise, and the quality or effectiveness of the standards were premptorily disregarded, clearly the stated purposes of the Federal and State Acts would be thwarted.

For the foregoing reasons, the standard 29 CFR 1910.178 (m)(7) is applicable to the Respondent.

3. As to the other than serious violation, the Compliance Officer, as an agent of the Commissioner of Labor, in proposing the civil penalty gave due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. The Commissioner has met his burden of proof and the citation, the proposed penalty, and the proposed abatement date should stand.

RECOMMENDED ORDER

IT IS ORDERED that the citation charging an other than serious violation of standard 29 CFR 1910.178(m)(7) (as adopted by OSH 11), the proposed penalty of $45.00, and the proposed abatement date of 21 days by which the violation must be corrected shall be and the same are hereby SUSTAINED.

LLOYD GRAPER
HEARING OFFICER, KOSHRC

DATED: October 17, 1974
Frankfort, Kentucky

Decision No. 60