



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 9, 1978

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #470

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

vs.

KEN-WOOD PALLET CORPORATION

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer J. D. Atkinson, Jr., issued under date of July 13, 1978, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

At issue are four alleged non-serious violations of the standards and a proposed penalty. The Hearing Officer, in his Recommended Order, has affirmed one violation. The other three items and the proposed penalty have been vacated.

The first item at issue concerns protective eye equipment for the employees exposed to the hazard of flying wood chips. Some question has been raised regarding an employer's duty and obligation under the cited standard, 1910.133 (a)(1) (as adopted by 803 KAR 2:020). This Commission interprets the standard to require that an employer "make conveniently available", or provide, a suitable protection where there is a reasonable probability of an injury that can be prevented by eye and face equipment. Further, the words "no unprotected person shall knowingly be subjected to a hazardous environmental condition", impose upon the employer a duty to supervise and enforce employee use of the equipment provided.

The Hearing Officer has dismissed this item and the proposed penalty finding that the Complainant did not show what the company could do to comply. We disagree with and reverse the recommended decision on this issue.

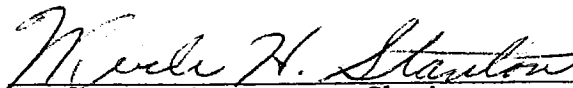
The Company provided the necessary eye protection but did not meet their duty to supervise and enforce its use. We realize that this particular Respondent faces difficulty in assuring employee use of the necessary equipment. Compliance with this standard, however, is not technically involved or of such a nature that the Department of Labor must detail means of compliance to prove its case. The difficulties raised by the Respondent do not reach the level of proof necessary to establish impossibility of compliance and further there was no showing of the company applying or attempting sanctions to enforce employee use of the equipment. The violation of 1910.133 (a)(1) (as adopted by 803 KAR 2:020) and the penalty of \$47.00 are affirmed.

The Hearing Officer has dismissed the alleged violation of 1910.213 (b)(7) (as adopted by 803 KAR 2:020). We agree with his disposition of this item for the reasons outlined in the Recommended Order.

The alleged violation of 1910.213 (f)(1) (as adopted by 803 KAR 2:020) has been affirmed by Mr. Atkinson. His decision on this item is sustained.

There was some confusion created regarding the final item, an alleged violation of 1910.213 (f)(2) (as adopted by 803 KAR 2:020). The Hearing Officer has dismissed this item. We disagree and reverse. The saws involved are covered by the cited standard and must be equipped with the non kickback protection.

IT IS THEREFORE ORDERED by this Commission that: a violation of 1910.133 (a)(1) (as adopted by 803 KAR 2:020) and the \$47.00 penalty therefor are SUSTAINED. The Hearing Officer's decision is REVERSED. The alleged violation of 1910.213 (b)(7) (as adopted by 803 KAR 2:020) is DISMISSED. A violation of 1910.213 (f)(1) (as adopted by 803 KAR 2:020) is SUSTAINED. The violation of 1910.213 (f)(2) (as adopted by 803 KAR 2:020) is SUSTAINED. The Hearing Officer's decision on this point is REVERSED.


Merle H. Stanton, Chairman

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

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

DATED: October 9, 1978
Frankfort, Ky.

DECISION NO. 621

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

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

Honorable Kenneth E. Hollis (Messenger Mail)
General Counsel
Department of Labor
U. S. 127 - South
Frankfort, Kentucky 40601
Attention: Hon. Larry D. Hamfeldt
Assistant Counsel

Mr. Jack Coffey, President (Certified Mail #458391)
Ken-Wood Pallet Corporation
Helechawa, Kentucky 41334

This 9th day of October, 1978


Wayne A. Waddell, Counsel

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

July 13, 1978

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 589*

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #470

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KEN-WOOD PALLET CORPORATION

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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Larry D. Hamfeldt
Assistant Counsel

Mr. Jack Coffey, President (Certified Mail #457608)
Ken-Wood Pallet Corporation
Helechawa, Kentucky 41334

This 13th day of July, 1978.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION.

KOSHRC # 470.

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,

VS: : : :

FINDING OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

KEN-WOOD PALLET CORPORATION,

RESPONDENT.

FOR COMPLAINANT: Hon. Larry D. Hamfeldt,
Assistant Counsel,
Department of Labor,
U. S. 127 South,
Frankfort, Kentucky 40601.

FOR RESPONDENT: Mr. Jack L. Coffey, President,
Ken-wood Pallet Corporation,
Helechawa, Kentucky 41834.

An inspection was made on March 9, 1978, of the Ken-wood Pallet Corporation plant in Helechawa, Kentucky. As a result of this inspection a citation was issued that alleged 12 non-serious violations of the Act and Standards and Respondent has contested six of these items and the proposed penalty of \$47.00. The Department of Labor thereafter deleted two items, leaving four contested items and the proposed penalty of \$47.00. The four items in contention are as follows:

(a) Alleged violation of 1910.133 (a)(1), in that:

Protective eye equipment was not being worn by all employees who operate the wood saws and pneumatic staple guns inside the pallet mill where there are reasonable probabilities of injury from the hazards of flying wood and metal chips.

(b) Alleged violation of 1910.213(b)(7) in that:

The feeder attachment on the "Alden" saw in the pallet mill did not have the feed rolls and other moving parts so covered or guarded as to protect the operator from hazardous points.

(C) Alleged violation of 1910.213(f)(1), in that:

Feed rolls and saws on self-feed circular saws were not protected by a hood or guard to prevent the hands of the operator from coming in contact with the in-running rolls.

(d) Alleged violation of 1910.213 (f)(2) in that:

Self-feed circular rip saws were not provided with sectional non-kickback fingers for the full width of the feed rolls.

A penalty of \$47.00 was proposed for item (a) above, with no penalties proposed for the remaining items.

The pertinent procedural information is as follows:

- (1) Inspection was conducted on March 9, 1978, by the Commissioner at the above-mentioned place of business.
- (2) Citation was issued on March 21, 1978, containing a total of twelve non-serious violations, with the only penalty proposed being that of \$47.00 for the violation relating to eye protection as set out above.
- (3) Notice of contest was received on April 5, 1978, contesting six items, including the four set out hereinabove.
- (4) Notice of receipt of contest was mailed on April 10, 1978, and Certification of Employer form was dated April 20, 1978.
- (5) Complaint was filed on April 25, 1978/ and no formal answer is in the record.
- ~~(6) The case was assigned to a Hearing Officer on May 11, 1978, and Notice of Hearing was issued on that date.~~
- (7) Revised Notice of Hearing was issued on June 2, 1978.
- (8) The Hearing was held as scheduled on June 29, 1978, at One O'clock P. M., at Natural Bridge State Park, Slade, Kentucky.
- (9) Transcript was received on July 7, 1978, and Notice of Receipt of Transcript was issued on the same date.

(10) Neither of the parties requested the opportunity to file Briefs, and the matter stood submitted upon the receipt of the Transcript.

DISCUSSION OF THE CASE.

On the first point in contention, the Compliance Officer stated:

"On the walk around inspection, I didn't see any employees wearing any eye or face protection whatsoever. The employer had provided this protection but was not enforcing the use of it." (Tr. p. 11)

In response, the Respondent stated:

"Okay, I think it would be best there if I started with the protective eye equipment. This is the one that I am concerned about. It is not the proposed penalty that bothers me, but I do, I tell the men they must wear the glasses. I have begged, I have pleaded. I know they do have the glasses. They are required to have them before they can go to work. I believe even the way your book reads, as far as me being negligent, I will contend that his word is not right. I do and you can talk to any of the men, have I bawled them out, outside of firing them for not wearing them. I feel that as an employer, it is my right, according to your own regulation, is as far as I can go." (TR. page 31).

Respondent filed as an exhibit (Respondent's Exhibit No. 1) a petition signed by 45 of Respondent's employees which stated as follows:

"We, the undersigned, who are employees of Ken-wood Pallet Corporation, do by our signature on this document state our belief that we have a freedom of choice in deciding when, if and where we wear safety glasses while working for the above stated Company. We, therefore, feel it is our right and do not hold said employer, Ken-wood Pallet Corporation responsible for failing to meet O. S. H. A.'s requirements."

Respondent further stated that his plant was in an area where it was extremely difficult to get employees to work, that many quit to go on welfare, and that the rate of absenteeism was high.

The standard set out in 1910.133(a)(1) states: "In such cases employers shall make conveniently available a type of protector suitable for the work to be performed. An employee shall use such protector."

The standard fails to set out in detail the means an employer is required to use to see that protective equipment is used. No suggestions were offered by the Complainant as to what the Respondent could do that he was not already doing to cause the employees to use the equipment. It is conceded that the equipment is provided and readily available.

In the case of General Electric Co. vs. Occupational Safety and Health Review Commission et al., in the United States Court of Appeals for the Second Circuit, No. 75-4116, dated August 17, 1976, the Court reversed a decision of a Review Commission finding a violation of the Standard in question where eye protection was provided, although it was not used. The Court of Appeals ruled that the violation could not stand upon unsupported generalizations that an employer's efforts to ensure employee use of equipment had not gone "far enough" and that such non-use is "preventable", without evidence of what more the employer could have done and some basis to conclude that further efforts would have been feasible and successful.

CCH - OCCUPATIONAL SAFETY & HEALTH DECISIONS
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In this case, Complainant was at a loss to make any suggestions as to what more Respondent could do, thus Complainant has failed to support a case of violation of the Standard.

On the question of the alleged violation of 1910.213(b)(7) regarding feeder attachments on the "Alden" saw, the Compliance Officer stated there were exposed and unguarded rolls on this saw. The saw was not in operation at the time the Compliance Officer made this inspection.

The Respondent testified that the Alden saw had guards on it, but that they had been removed for saw changing and was not in operation in the unguarded condition. The proof fails to sustain a violation in this instance.

As to the alleged violation of 1910.213(f)(1) affecting certain other saws that were in operation, the Compliance Officer stated that guards were installed, but that the bottoms of the guards did not come down to within the required distance of 3/8", or 3/4" provided the lead edge of the hood is extended to be not less than five and one-half inches in front of the nip point. On this alleged violation Respondent stated he had felt the saw was properly guarded, but that he would correct the situation to meet the Standard.

On the last point in contention, 1910.213(f)(2), the alleged violation is failure to provide each self-fed circular rip saw with sectional non-kickback fingers for the full width of the feed rolls. The Compliance Officer stated that several of the saws he observed in operation did not have these safety devices.

In response, the Respondent stated that the Alden saw was a circular rip saw, and that it was equipped with non-kickback fingers, but that the other saws not so equipped were different types of saws, not circular ripsaws, and that so far as he knew no such non-kickback fingers were available for these saws, which were referred to as straight line saws.

The evidence produced concerning this particular alleged violation was not extensive, and the entire matter of definition of the various types of saws in Respondent's mill became quite confusing. In view of the confusion over the designation of the saws, it cannot be said that the Complainant proved that the straight line saws in question met the definition of "circular ripsaws" involved in this Standard. Complainant failed to meet the burden of proof on this Standard.

FINDING OF FACT AND CONCLUSION OF LAW.

The Hearing Officer finds that the Complainant failed to prove violations in the cases of 1910.133(a)(1); 1910.213(b)(7); and 1910.213(f)(2). The Hearing Officer finds that violation of 1910.213(f)(1) was sufficiently established. No penalty was proposed for this violation.

RECOMMENDED ORDER.

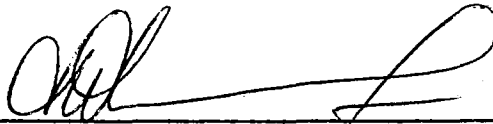
(1) IT IS ORDERED AND ADJUDGED: That the alleged violation of 29 CFR 1910.133(a)(1) is ordered vacated and the proposed penalty of \$47.00 therefore is likewise vacated.

(2) That the alleged violation of 29 CFR 1910.213(b)(7) is ordered vacated.

(3) That the alleged violation of 29 CFR 1910.213(f)(2) is ordered vacated.

(4) That the alleged violation of 29 CFR 1910.213(f)(1) is hereby affirmed.

(5) IT IS FURTHER ORDERED that the abatement of said violation shall be accomplished within Thirty (30) days from the effective date of this order.



J. D. ATKINSON, JR., Greenup, Kentucky 41144

HEARING OFFICER.

DATED: July 13, 1978
Frankfort, Kentucky

DECISION NO. 589