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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

104 BRIDGE ST.  
FRANKFORT, KENTUCKY 40601  
PHONE (502) 564-6892

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

May 15, 1979

KOSHRC #499

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THE TRANE COMPANY

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 8 January 1979, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

We reverse the Recommended Order insofar as it holds that we are bound in this case to follow the holdings of the Sixth Circuit Court of Appeals in Diebold, Inc., v. Marshall & OSHRC, 585 F2d 1327 (6th Cir. 1978).

The decisions of the Sixth Circuit Court of Appeals are not binding on this Commission unless and until adopted as the law of Kentucky by the state courts of Kentucky in a case on appeal from this Commission. There is no such Kentucky decision which adopts the Sixth Circuit decision in Diebold, Inc., supra.

KOSHRC #499  
Decision and Order  
of Review Commission

This Commission nevertheless is of the opinion that to hold the Trane Company in violation of 29 CFR 1910.212 (a)(3)(ii) (as adopted by 803 KAR 2:020) under the circumstances herein would deny the Respondent due process of law as required of the states by the Fourteenth Amendment of the Constitution of the United States.

On 18 February 1976 the Director of Compliance of the Kentucky Occupational Safety and Health Administration stated in a letter to the Respondent that the safety program implemented by Trane at that time was sufficient, and that enforcement of the press brake guarding requirements under 29 CFR 1910.212 (a)(3)(ii) was therefore waived by the Commissioner of Labor.

The Department of Labor produced no evidence herein which would contradict Respondent's proof concerning the Department's waiver of the enforcement of guarding requirements under 1910.212 (a)(3)(ii).

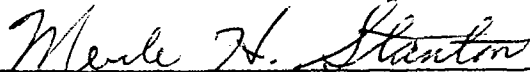
We find that as a result of the representations made by the Department of Labor to the Respondent in the 18 February 1976 letter, the Trane Company had reasonable grounds to believe that it was not in violation of 1910.212 (a)(3)(ii).

Prior to the issuance of the citation herein, this Commission handed down a decision in The Marley Cooling Tower Company, KOSHRC #347, which adopted the reasoning of the Federal Review Commission in Irvington-Moore, Division of Natural Resources, 1974-1975 CCH OSHD Para. 19,523 (1975), which requires guarding of press brakes under 1910.212 (a)(3)(ii). We hold, however, that under the circumstances of this case, to apply the Marley Cooling Tower holding to the facts herein would be tantamount to a retroactive application of that holding and thus would be a denial of due process of law.

We therefore uphold the Hearing Officer's dismissal of the citation herein. We explicitly note that this Decision and Order will constitute notice to the Respondent that we have interpreted 29 CFR 1910.212 (a)(3)(ii) to require press brake guarding.

KOSHRC #499  
Decision and Order  
of Review Commission

Accordingly, we REVERSE the Recommended Order herein insofar as it holds that the outcome of this case is controlled by the holding in the case of Diebold, Inc., v. Marshall & OSHRC, 585 F2d 1327 (6th Cir. 1978). For the reasons set forth herein, however, we AFFIRM the Recommended Order insofar as it vacates the alleged violation of 29 CFR 1910.212 (a)(3)(ii) (as adopted by 803 KAR 2:020). All findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.

  
Merle H. Stanton, Chairman

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

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

DATED: May 15, 1979  
Frankfort, Kentucky

DECISION NO. 721

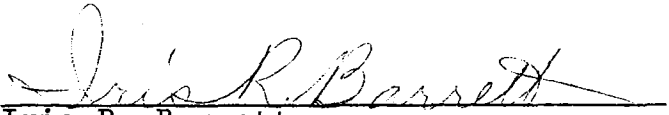
Copy of this Decision and Order has been served by mailing or personal delivery on the following:

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Hon. Frederick Huggins  
Deputy General Counsel

Mr. Jim Gullette, Safety Supervisor (Certified Mail #678444)  
The Trane Company  
1500 Mercer Road  
Lexington, Kentucky 40511

Mr. T. H. Gibbons (Certified Mail #678445)  
Corporate Safety & Health Manager  
The Trane Company  
La Crosse, Wisconsin 54601  
Attention: Mr. Jay Eaton  
Assistant General Counsel

This 15th day of May, 1979.

  
Iris R. Barrett  
Executive Director

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*Rose - pol granted*



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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
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EXECUTIVE DIRECTOR

104 BRIDGE ST.

CHARLES B. UPTON  
MEMBER

FRANKFORT, KENTUCKY 40601

JOHN C. ROBERTS  
MEMBER

PHONE (502) 564-6892

January 8, 1979

*Decision*  
*Order No 660*

KOSHRC # 499

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THE TRANE 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:

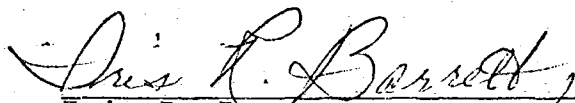
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Hon. Frederick G. Huggins,  
Deputy General Counsel

Mr. Jim Gullette, Safety Supervisor (Certified Mail #988961)  
The Trane Company  
1500 Mercer Road  
Lexington, Kentucky 40511

Mr. T. H. Gibbons (Certified Mail #988962)  
Corporate Safety & Health Manager  
The Trane Company  
La Crosse, Wisconsin 54601  
Attention: Mr. Jay Eaton,  
Assistant General Counsel

This 8th day of January, 1979.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director *IR*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION.

KOSHRC No. 499.

COMMISSIONER OF LABOR,  
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,

VS: : : :

FINDINGS OF FACT, RULINGS OF LAW,  
AND RECOMMENDED ORDER.

THE TRANE COMPANY,

RESPONDENT.

An inspection of The Trane Company plant in Lexington, Kentucky, was conducted on May 15 and May 16, 1978, by a Compliance Officer of the Department of Labor. As a result of this inspection, Respondent was issued a citation alleging one (1) non-serious violation of the Act and Standards (other items cited are not in contest), as follows:

(a) Violation of 1910.212(a)(3)(ii) in that:

The point-of-operation on the following equipment located in Department 513 was not properly guarded:

- (a) One (1) Pacific press brake (#K-10),
- (b) Three (3) Cincinnati press brakes (#K-633, #K-90 and #K-11),  
and
- (c) One (1) Chicago press brake (#K-128).

No penalty was proposed for this alleged violation.

The pertinent procedural information is as follows:

- (1) Inspection was conducted on or about May 16 and May 17, 1978, by the Commissioner at the above location.
- ) One citation was issued as above-mentioned on June 7, 1978.
- (3) Notice of contest was received on June 19, 1978.
- (4) Notice of Receipt of contest was mailed on June 26, 1978, and Certification of

Employer form was received on June 29, 1978.

- (5) Complaint was filed on July 10, 1978, and Answer was filed on July 25, 1978.
- (6) Notice of Hearing was mailed on July 31, 1978.
- (7) Hearing was cancelled by order dated August 30, 1978, and Revised Notice of hearing was mailed on September 5, 1978.
- (8) Hearing was held as re-scheduled on September 26, 1978, at the Offices of KOSH Review Commission in Frankfort, Kentucky.
- (9) Transcript was received on October 11, 1978, and Notice of Receipt of Transcript and Briefing Order was issued on that date.
- (10) Respondent's Brief was received on December 18, 1978, and the case stood submitted as of that date.

#### DISCUSSION OF THE CASE.

The Compliance Officer observed the five machines in question in Respondent's plant. None of the machines was in operation and the Compliance Officer admitted that he saw no employees of the Respondent exposed to the alleged hazard. The Compliance Officer further testified that if he saw a press brake without a guard on it he had no discretion but to write it up as a violation. It is the Respondent's contention that Complainant has failed in its burden of proof because the cited regulation requires that not only must the point of operation be unguarded to cause a violation, but there must be a showing that the lack of guarding exposes employees to injury. Respondent contends that the manner in which the cited machines are used does not expose the Respondent's employees to injury.

The Respondent introduced testimony of an expert who discussed the various



types of machine guarding devices and the various reasons why he said these guards or devices could not be used on the particular machines in question.

The Hearing Officer believes it is unnecessary to go into more detail in the facts of this case because he believes that this case is controlled by the recent decision of the 6th. Circuit Court of Appeals in the case of Diebold, Inc. vs: Secretary of Labor, et al. (1978) \_\_\_\_\_ F. Supp. \_\_\_\_\_.

In a recent case (KOSHRC #458), Commissioner of Labor vs: American Sign and Advertising Services, Inc., heard by this Hearing Officer, the parties stipulated that the ultimate decision in Diebold would control the outcome of that case. The facts in that case are very similar to the facts in this case except that The Trane Company has obviously made more effort toward adequately guarding their machines. In any event, the Diebold decision held that 29 CFR 1910-212(a)(3)(ii) did not give Diebold adequate warning of its requirements and, therefore, to enforce that regulation against Diebold would violate the due process clause of the Fifth Amendment to the United States Constitution.

The Diebold court focused on three factors in determining that Regulation #212 did not give constitutionally sufficient warning of its requirements. First was the ambiguity of the general guarding Standard which is caused by the "inartful drafting" of Regulation 217 and the different reasonable interpretations which could be made of the requirements of Regulations 212 and 217. Second was the undisputed common understanding and commercial practice relative to press brake guarding which compelled the conclusion that the average employer has been unaware that the regulations required point-of-operation guarding in operations like Diebold's. Third was the confirmation of industry practice which arose out of the pattern of administrative enforcement under which a clear majority of Administrative Law Judges

had held that Regulation 212 was not applicable to press brakes.

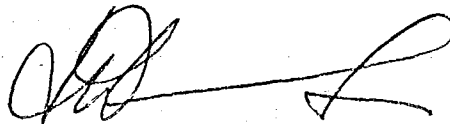
Since the Courts of Kentucky are bound by decisions of the U. S. 6th. Circuit, it must be held that to enforce 29 CFR 1910.212(a)(3)(ii) against the Respondent would violate Respondent's rights under the United States Constitution.

FINDING OF FACT AND CONCLUSION OF LAW.

The facts are as stated. The proposed enforcement of 29 CFR 1910.212(a)(3)(ii) is invalid for the reasons set forth hereinabove.

RECOMMENDED ORDER.

IT IS ORDERED AND ADJUDGED that the alleged violation of 29 CFR 1910.212(a)(3)(ii) is hereby vacated.



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

41144

HEARING OFFICER.

Dated: January 8, 1979  
Frankfort, Kentucky

DECISION NO. 660