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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 29, 1979

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #524

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WESTVACO CORPORATION

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chariman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of May 11, 1979, is currently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

Hearing Officer Shapiro recommended a dismissal of the citation and penalty in this case, finding that the citation as alleged was inapplicable to the facts of this case. We reverse.

The citation alleged a violation of 29 CFR 1910.23(c)(3) (as adopted by 803 KAR 2:020), (hereinafter 1910.23(c)(3)), in that "a platform approximately 154 feet in length, 18 inches wide and 11 feet, 9 inches in height installed on the tending side of the dryer rolls in the Respondent's papermill was not equipped with standard railings on the side nearest the dryer rolls." The citation included crossover platforms as well.

1910.23(c)(3) requires "open-sided floors, walkways, platforms or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks . . . and similar hazards," regardless of their height, to be equipped with standard railings and toeboards.

The catwalk in question is used by employees to gain access to areas in the dryer section of the mill when they become cluttered or clogged with "broke." "Broke" is merely paper scraps which result from the paper making process when for any reason the long continuous roll of paper being processed through the dryer rollers breaks into shorter pieces or sections.

The broke must be removed from the dryer roller section at some point, or it will further clog the machine, making full stoppage of the operation inevitable. The breaks which produce the paper scraps may occur as infrequently as once or twice a week or as often as several times a shift, depending upon the grade and thickness of the paper being processed through the machine.

The broke is removed either by hand or by air hose. Regardless of which method of removal is used, the employee responsible for broke removal usually must stand on the catwalk in order to remove the broke from the dryer roller area. The rollers are generally in operation during the removal process unless a "bad break" occurs. In the event of a "bad break" in the paper, the rollers are halted, and spears and hooks are then used to chop up the paper.

Hearing Officer Shapiro found that broke removal is not integral to the paper making process, but rather is strictly the performance of maintenance upon the machine. Relying upon the reasoning used in General Electric Company v. Occupational Safety and Health Review Commission 583 F.2d 61(2d Cir. 1978), Hearing Officer Shapiro found that 29 CFR 1910.21(a)(4) (as adopted by 803 KAR 2:020), (hereinafter 1910.21(a)(4)), which defines the word "platform" as it is to be used in 29 CFR 1910.23, excludes work areas used for maintenance purposes only. 1910.21(a)(4) defines "platform" as: "A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." The Hearing Officer concluded that the words "such as a balcony or platform for the operation of machinery and equipment" limits the definition of platform to areas used for the operation of machinery and excludes areas used to perform maintenance on machinery.

We find that the Hearing Officer erred in his conclusion that broke removal is strictly a maintenance function. The Respondent, in Respondent's Exhibit #8, which is intra-company correspondence endorsed by Westvaco management personnel, states that:

"(1) The job to remove broke from and around all dryers is necessary to minimize additional paper breaks and reduce crew exposure to heat and excessive job hardship.

(2) It is a crew duty to insure removal of broke from dryers, preferably before rethreading tail when time is available to stop dryers as needed.

(3) If broke gets into top dryer on rethreading or left on the break, this broke can be safely removed on-the-run."

We find this statement to be an admission by the Respondent that broke removal is integral to the paper making process and is therefore a function of the day-to-day operation of the machinery.


The catwalk in question is therefore a platform within the meaning of 1910.21(a)(4) and is not excluded from the requirements of 1910.23(c)(3).

The next question to be addressed is whether the Commissioner of Labor in fact proved a violation of 1910.23(c)(3).

We find that the Commissioner did in fact prove a violation of 1910.23(c)(3), as the record clearly indicates that platforms next to dangerous equipment were not provided with standard railings and toeboards as required by the standard.

We find that the severity of the hazard to which employees were exposed herein justifies reinstatement of the entire penalty assessment.

Accordingly, it is ORDERED by this Commission that the Recommended Order vacating a serious violation of 29 CFR 1910.23(c)(3) (as adopted by 803 KAR 2:020) is hereby REVERSED and the violation is hereby SUSTAINED. The \$800 proposed penalty is hereby REINSTATED. Abatement shall be accomplished within thirty (30) days from the date of this Order. 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: August 29, 1979
Frankfort, Kentucky

DECISION NO. 758

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

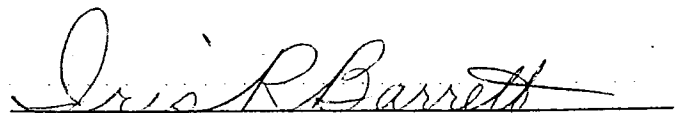
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Cathy Cravens Snell (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Honorable Henry Whitlow (Cert. Mail #P10 9897927)
Whitlow, Roberts, Houston and Russell
Citizens Bank Building
Paducah, Kentucky 42001

Honorable Richard Schamalz (Cert. Mail #P10 9897928)
Westvaco Corporation
229 Park Avenue
New York, N. Y. 10017

This 29th day of August, 1979.


Iris R. Barrett
Executive Director

Wayne

524



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

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MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

May 11, 1979

KOSHRC # 524

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WESTVACO 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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Cathy Cravens (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Honorable Henry Whitlow (Certified Mail #678422)
Whitlow, Roberts, Houston and Russell
Citizens Bank Bldg.
Paducah, Kentucky 42001

Honorable Richard Schamalz (Certified Mail #678423)
Westvaco Corporation
229 Park Avenue
New York, N. Y. 10017

This 11th day of May, 1979.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #524

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

WESTVACO CORPORATION

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of a citation issued against Westvaco Corporation, hereinafter referred to as "Westvaco", 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 July 14, 1978, a Compliance Officer for the Commissioner made an inspection of Westvaco's manufacturing plant in Wickliffe. As a result of that inspection, the Commissioner issued a citation on July 24, 1978, charging Westvaco with a serious violation of the Act and proposing a penalty therefor of \$800.00.

On August 14, 1976, and within 15 days from receipt of the citation, Westvaco sent a notice to the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on August 22, 1978, and notice of receipt of the contest was sent by the Review Commission to Westvaco on August 24, 1978. Thereafter, on September 1, 1978, the Commissioner filed its Complaint and on September 13, 1978, Westvaco filed its Answer. On September 18, 1978, this matter was assigned to a Hearing Officer and scheduled for hearing on October 11, 1978. On motion of the Commissioner, by Order dated September 27, 1978, the hearing was continued to November 2, 1978.

The hearing was held in Paducah on November 2, 1978, pursuant to KRS 378.070(4). That section of the statutes 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 discretionary review by the Review Commission on appeal timely filed by either party, or upon its own motion.

The standard allegedly violated (as adopted by 803 KAR 2:020) the description of the alleged violation and the penalty proposed for same are as follows:

29 CFR 1910.23 (c)(3)	Platforms adjacent to and above dangerous equipment were not guarded by standard railings (One platform approximately 154 feet in length, 18 inches wide, and 11 feet 9 inches in height, installed on the tending side of the dryer rolls and the crossover platforms were not equipped with standard railings on the sides nearest the dryer rolls thereby exposing employees to the hazard of falling into the rolls when performing work from the platforms)	\$800.00
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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

Westvaco operates a paper mill at its plant in Wickliffe. The mill can be said to consist of one machine which converts the raw materials used to make paper into the finished product. This machine has been in operation since 1970. The raw materials are sent through a series of processes in this machine which first reduce them to a pulp. This pulp is then fed onto felt belts which wind the pulp through a dryer from which paper emerges.

The dryer consists of 50 heated rollers divided into eight sections. The rollers are approximately 24 feet in length and five feet in diameter

and each section of rollers has two felt belts. The entire dryer itself is 154 feet long and there is a raised catwalk 18 inches wide and 11 feet 9 inches above the ground running along its entire length on one side. At various intervals along this catwalk are other catwalks which cross-over the dryer to the other side of the machine. At the time of the inspection, the catwalk running the length of the dryer had a standard railing on its exterior side. There was no railing on the side next to the machine. The cross-over catwalks were also equipped with a standard railing on one side. All the catwalks were equipped with brackets to accommodate a standard railing on both sides.

During the drying operation a great deal of heat is generated. To contain this heat, the dryer is equipped with a hood that is lowered over the dryer during the processing operations. When lowered, the hood also covers the catwalk running along side the dryer.

When the rollers are turning they are lubricated by an oil spray. Some of the oil also sprays onto the catwalks causing them to be slippery.

During the manufacturing process, pieces of paper known as "brokes" will accumulate in the dryer. The size and number of the brokes will vary, depending on the type of paper being produced. These brokes interfere with the manufacturing process and must be removed periodically. To do so, the machine is stopped and the dryer turned off. Westvaco employees then remove the brokes which they can reach from the ground or the catwalks by hand, and use an air hose to remove the rest. The catwalks are also used to make repairs and perform routine maintenance.

Although, there was no record of injuries resulting from the absence of guardrails on both sides of the catwalks, the Compliance Officer was of the opinion that the failure to install such guardrails exposed the employees using the catwalks to the hazard of falling into the dryer, while they were removing brokes or performing other task around the dryer. He concluded that such a hazard would probably result in death or serious physical injury. He therefore, cited Westvaco for a serious violation of the Act. 5

Since the enactment of the Act, the plant has been inspected on occasions prior to July 14, 1978. Although, the catwalks were substantially the same on those occasions, as they were on the occasion of this inspection, Westvaco was not cited for being in violation of the Act until after the July 14th inspection. However, the catwalks are completely enclosed during the operation of the machine and the absence of standard guardrails around them would not be observable while the machine was in operation.

In citing Westvaco, the Commissioner proposed a penalty of \$800.00. The penalty was proposed in accordance with the Commissioner's guidelines then in effect for assessing penalties. Under these guidelines, all serious penalties carried an unadjusted penalty of \$1000.00. The penalty could then be reduced or "adjusted" by up to 50% based on three factors.

The first factor applied under the guidelines is the "good faith" shown by the company in their willingness to comply with the Act. The Commissioner's guidelines allowed a maximum of 20% for this factor. However, because it had been inspected on prior occasions, Westvaco was only allowed 10% for good faith.

The second factor applied is "size". This factor is based on the number of persons employed by the employers and intended to help the small employer. Employers with more than 100 employees are allowed no adjustment for size. Since Westvaco had 500 employees it did not qualify for a reduction based on size.

The last factor applied is the "history" of the company in complying with the Act. Here again the maximum allowed under the the guidelines was 20%. Since Westvaco had been inspected and cited on prior occasions the Compliance Officer only allowed 10% for history.

Applying these factors the Compliance Officer reduced the unadjusted penalty by 20% to \$800.00 the amount proposed in the citation.

CONCLUSIONS OF LAW

29 CFR 1910.23(c)(3) provides:

Guarding floor and wall openings and holes.
Protection of open-sided floors, platforms and runwaysRegardless of height, open-sided floors, walkways, platforms or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units and similar hazards shall be guarded with a standard railing and toeboard.

29 CFR 1910.21(a)(4) defines a "Platform" as:

A working space for persons elevated above the surrounding floor or ground, such as a balcony for the operation of machinery and equipment.

The central issue raised is whether the catwalks in question are "platforms" within the meaning of the standards. If they are not platforms, the citation is defective and should be vacated. The Commissioner contends that they are platforms, Westvaco contends they are not.

Both parties rely on General Electric Company vs. Occupational Safety and Health Review Commission, 583 F.2nd 61 (C.A. 2d; 1978). In that case the Review Commission held that the top of an oven was a "platform" within the meaning of the standard since employees were required to perform occasional maintenance on the oven from there. On appeal the Court noted that the Administrative Law Judge, who made the initial decision also made the following observation regarding the interpretation of the standard:

It reasonably may be argued that 1910.23(c)(1) should be interpreted to apply only to elevated working spaces, 4 feet or (more) above ground level, which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable or regular basis and not to spaces where only occasional maintenance or repair work is performed.

The Administrative Law Judge then rejected this interpretation on the grounds that the Review Commission in other cases had broadly construed a "platform" to be any elevated area where work was performed. The Review Commission then affirmed the Administrative Law Judge. On appeal, the 2nd Circuit Court of Appeals reversed. It held that the Review Commission's broad

interpretation was unreasonable. The Court then went on to adopt the observation of the Administrative Law Judge as the correct interpretation of the standard.

The decision in General Electric thus makes it clear that infrequent and occasional maintenance performed on a flat surface does not make that surface a platform within the meaning of the standard. What the Court does not directly address is whether "predictable and regular" maintenance from such a surface makes it a working space within the meaning of the standards.

In its decision, the Court in General Electric cited 2A Sutherland Statutory Construction §§ 47.16, 47.17 (4th Ed. 1973) as support for the following statement which it used as the basis for its interpretation of the standard:

The meaning of one term may be determined by reference to the terms it is associated with, and where specific words follow a general word, the specific words restrict application of the general term to things that are similar to those enumerated.

In other words, in interpreting a statute (or a standard), where the statute contains broad general language followed by a specific example, the broad general language must be restricted in its application to situations similar to the specific example. Applying this rule to the definition of a platform set out in 1910.21(a)(4), the language "such as a balcony for the operation of machinery and equipment", limits the term to surfaces used to operate machinery and excludes flat surfaces used for maintenance.

In the instant case, although the catwalks cited as being in violation of the standard were used on a regular and predictable basis they were used for maintenance and not for operation. Therefore, they were not "platforms" within the meaning of 1910.21(a)(4), and the citation is defective.

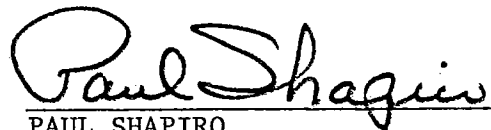
In reaching this conclusion, it was not meant to suggest that the conditions observed were not a violation of the Act. However, KRS 338.141 imposes

strict requirements upon the Commissioner in issuing citations to accurately describe the conditions upon which the citation is based and any failure to do so will be fatal to the citation.

RECOMMENDED DECISION

NOW, THEREFORE, upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, the following recommended decision is hereby made.

That the citation issued July 14, 1978, charging the serious violation of 29 CFR 1910.23(c)(3) (as adopted by 803 KAR 2:020) and proposing a penalty therefor of \$800.00 be and is hereby dismissed.


PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: May 11, 1979
Frankfort, Kentucky

DECISION NO. 713