

# 73

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

December 19, 1974

WENDELL H. FORD  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision  
Order # 73*

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 61

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

vs.

PARR TRUCKING SERVICE, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,  
Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Lloyd Graper, dated November 7, 1974, is before this Commission for review upon unanimous direction of the Commissioners. By his decision, the Hearing Officer reduced proposed penalties for failure to abate violations of 29 CFR 1910.213 (h)(1) and (4) from a total of \$1200 to a total of \$200. In so doing, the Hearing Officer concluded that because of the Respondent's good faith demonstrated by promptly ordering the parts necessary to abate the hazards and because of the slight gravity resulting from minimal employee exposure, the purposes of the Occupational Safety and Health Act would best be served by substantially reducing the proposed penalty.

We agree with the aforementioned conclusions and considerations but we disagree with another related, conclusion of law dealing with employee exposure. In paragraph 3 of the Hearing Officer's Conclusions of Law, pp. 6-7, the Hearing Officer states, "Although the saw in question was energized, undisputed testimony indicated that it was not being used by Respondent's employees." That sentence shall be deleted and in its stead shall be added the following:

61

"Testimony indicated that employers had been ordered not to use the saw until abatement could be achieved. However, the saw was energized and no cover or sign had been placed on the saw, indicating that the employees of Respondent still had access to the hazards which the Respondent had earlier been ordered to abate."

Despite the good intentions of the employer in promptly ordering necessary guards and despite the fact that the employees were ordered not to use the unguarded saw; the Respondent in this case had a positive duty to make the unabated hazard inaccessible to its employees; otherwise, employee exposure exists and abatement has not been achieved.

In all other respects the decision of the Hearing Officer is affirmed.

  
\_\_\_\_\_  
H. L. Stowers, Chairman

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

/s/ Merle H. Stanton  
Merle H. Stanton, Commissioner

DATED: December 19, 1974  
Frankfort, Kentucky

DECISION NO. 78

CA  
12/19/74



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-8892

December 19, 1974

WENDELL H. FORD  
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KOSHRC # 61

COMMISSIONER OF LABOR  
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"Testimony indicated that employers had been ordered not to use the saw until abatement could be achieved. However, the saw was energized and no cover or sign had been placed on the saw, indicating that the employees of Respondent still had access to the hazards which the Respondent had earlier been ordered to abate."

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H. L. Stowers, Chairman

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

/s/ Merle H. Stanton  
Merle H. Stanton, Commissioner

DATED: December 19, 1974  
Frankfort, Kentucky

DECISION NO. 78

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  
Commonwealth of Kentucky  
Attention: Honorable Michael D. Ragland  
OSHA Coordinator

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

Honorable John W. Beard (Certified Mail #775136)  
Suite 318-Masonic Building  
Owensboro, Kentucky 42301

Parr Trucking Service, Inc. (Certified Mail #775137)  
Post Office Box 1308  
Owensboro, Kentucky 42301

This 19th day of December, 1974.

  
Iris R. Barrett, Executive Director



WENDELL H. FORD  
GOVERNOR  
IRIS R. BARRETT  
EXECUTIVE DIRECTOR

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

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

November 7, 1974

KOSHRC # 61

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

PARR TRUCKING SERVICE, 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  
Commonwealth of Kentucky  
Attention: Honorable Michael D. Ragland  
OSHA Coordinator

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

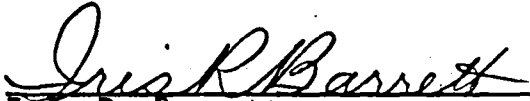
Honorable John W. Beard  
Suite 318-Masonic Building  
Owensboro, Kentucky 42301

(Certified Mail #775078)

Parr Trucking Service, Inc.  
Post Office Box 1308  
Owensboro, Kentucky 42301

(Certified Mail #775079)

This 7th day of November, 1974.

  
Iris R. Barrett  
Executive Director

COMMONWEALTH OF KENTUCKY  
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC DOCKET NO. 61

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

-v-

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

PARR TRUCKING SERVICE, INC.

RESPONDENT

\* \* \* \* \*

Hon. Peter J. Glauber, Assistant Counsel, Department of Labor,  
Frankfort, Kentucky, for Complainant.

Hon. John W. Beard, Jones, Beard, & Harrington, Owensboro, Kentucky,  
for Respondent.

GRAPER, Hearing Officer.

An inspection was made on March 28, 1974, by the  
Kentucky Department of Labor, Division of Occupational Safety and  
Health, of a place of employment located at 829 Alsop Lane, Owensboro,  
Kentucky, described as a trucking company. On the basis of such  
inspection, a Citation was issued on May 14, 1974, in which it was  
alleged that Respondent violated the provisions of KRS Chapter 338



(Kentucky Occupational Safety and Health Act of 1972) in the following respects: 19 separate nonserious violations were charged and a total of \$102.00 in penalties was proposed. The Citation was not contested, and within 15 working days after its receipt, it became a final order of the Kentucky Occupational Safety and Health Review Commission, and the penalties proposed were paid by Respondent.

On a form letter mailed it by the Complainant, Respondent replied on June 4, 1974, indicating that all but Items #12 and #13 had been abated by the scheduled date of June 7, 1974, and that as to these two Items, parts had been ordered. A reinspection made at the same place of employment on June 13, 1974, and as a result thereof, by Notification dated July 12, 1974, it was alleged that Respondent failed to correct or abate the following such violations within the times prescribed:

Item #12 under which the Standard 29 CFR 1910.213(h) (1) (as adopted by OSH 11) was violated, such violation being described as: "The sides of the lower exposed portion of the blade on a radial saw were not guarded (trailer repair shop)"; the date by which the violation must be corrected was June 7, 1974, and the penalty proposed for the original violation was none. For failure to correct the violation, a daily additional penalty of \$100.00 was proposed and for a six-day period, this amounted to a proposed total additional penalty for failure to correct of \$600.00.

Item #13 under which the Standard 29 CFR 1910.213(h) (4) (as adopted by OSH 11) was violated, such violation being described as: "Installation of a radial saw was not in such a manner so as to

cause the cutting head to return gently to the starting position when released (trailer repair shop)"; the date by which the violation must be corrected was June 7, 1974, and the penalty proposed for the original violation was none. For failure to correct the violation, a daily additional penalty of \$100.00 was proposed and for a six-day period, this amounted to a proposed total additional penalty for failure to correct of \$600.00.

As a result of such reinspection, a Citation and a Notification of Proposed Penalty were issued on July 12, 1974, in which it was alleged that Respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in the following respects: The standard, regulation or section of KRS Chapter 338 allegedly violated was 29 CFR 1910.252(a)(2)(iv)(c) (as adopted by OSH 11-2). The description of the alleged violation was: "Oxygen cylinders in storage were not separated from fuel gas (acetylene) a minimum distance of twenty (20) feet or by a non-combustible barrier at least five (5) feet high having a fire resistance rating of at least thirty (30) minutes." The date by which the alleged violation must be corrected was immediately. It was alleged that this was a repeat of Citation number one, Item #17, issued on May 16, 1974, which was described as a violation of Standard 29 CFR 1910.252 (a)(2)(iv)(c) (as adopted by OSH 11) and a description of that violation was: "Oxygen cylinders in storage were not separated from fuel-gas cylinders a minimum distance of twenty (20) feet or by a non-combustible barrier at least five (5) feet high having a fire resistance rating of at least one-half (1/2) hour (outside trailer repair shop)." The original violation carried no proposed penalty.

For the alleged repeat violation, a penalty of \$190.00 was proposed.

A Notice of Contest was received on July 19, 1974. A Complaint was filed on July 26, 1974. On the same date, a Certification of the Employer was received which, among other things, indicated that the name and address of the local union representing affected employees is Teamsters Union, Local 215, 215 North Fulton, Evansville, Indiana. An Answer was filed on August 6, 1974. The case was assigned to a Hearing Officer on August 7, 1974, and on the same date, a Notice of Hearing was mailed.

Pursuant to such notice, a hearing was held on Thursday, August 29, 1974, at 10:00 a.m. in the New State Office Building, 311 W. Second Street, Owensboro, Kentucky 42301, 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 such 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.

As to the failure to abate Items #12 and #13, Respondent admits the violation, but challenges the proposed penalties of \$600.00 each. As to the alleged repeat violation of Item #17, Respondent contests both the violation and the proposed penalty of \$190.00.

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 facts:

#### FINDINGS OF FACT

1. It is, upon the admission of the Respondent, found that Respondent failed to correct or abate the violations listed as Item #12 and Item #13 within the times prescribed.

2. It is found that oxygen cylinders in storage were not separated by fuel gas (acetylene) a minimum distance of twenty (20) feet or by noncombustible barrier at least five (5) feet high having a fire resistance rating of at least thirty (30) minutes.

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

#### CONCLUSIONS OF LAW

1. At the initial inspection, the Compliance Officer explained that if the time given in the Citation was too short to make corrections and if additional time was needed, an extension

to that time period was available. If they [Respondent] needed additional time, they would have to contact the Director of Compliance before the time given expired."

2. On the form letter mailed it by the Complainant, Respondent indicated, on June 4, 1974, that all but Items #12 and #13 had been abated by the scheduled June 7, 1974, date and, as to these two items, that parts had been ordered. Undisputed testimony indicated that such parts had been ordered on April 3, 1974, just a few days after the March 28, 1974, initial inspection and well before Respondent received the Citation issued on May 14, 1974. While not a requirement, the Director of Compliance indicated that where Respondent, on such form letter indicates that full abatement has not taken place, "normally our procedure on that is to contact the company, normally by phone and I have no records as to whether or not we actually contacted Parr Trucking Company in this particular case, to inform them that this does not constitute an abatement letter for Items #12 and #13 in this particular case when they have it on order, because they are not notifying us that it is fully abated the items. This was are not required to do by law, but we try to. Of course, we don't get it--you know, in all cases, but this is our normal procedure to contact them and tell them that they will have to send us a definite notification when it is completed."

3. It is obvious that the Respondent is not an indifferent employer who must be persuaded of the wisdom of complying with the Act. There was never the slightest intention of not correcting or

abating the condition. Although the saw in question was energized, undisputed testimony indicated that it was not being used by Respondent's employees.

4. In assessing a penalty, the Review Commission is not bound by the strict formulas prescribed by the Commissioner of Labor to obtain consistency in enforcement and it may, under appropriate circumstances, give different or greater weight to the criteria of the employer's history, the size of its business, its good faith, and the gravity of the violation. Recognizing that the purpose of civil penalties are to assure a safe workplace for employees by inducing employer compliance with the act and not to merely punish the employer financially, and giving consideration to the criteria outlined and the good faith of the employer and the low gravity in particular, the \$600.00 penalty proposed for each of Items #12 and #13 should be reduced to a penalty of \$100.00 for each of these items.

5. Limiting review solely to the amount of the penalties proposed appears appropriate under the circumstances since it does not appear that error would result from not reviewing the admitted violation.

6. As to the repeat violation, the Commissioner of Labor gave effect to the prescribed criteria and gave them proper weight under the circumstances in assessing the proposed penalty. 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 penalties proposed for the unabated Items #12 and #13 shall be and the same hereby are REDUCED to \$100.00 each, and IT IS FURTHER ORDERED that, as to the repeat violation, that the Citation, the proposed penalty of \$190.00 and the proposed immediate abatement date shall be and the same hereby are SUSTAINED.

  
\_\_\_\_\_  
LLOYD GRAPER  
HEARING OFFICER, KOSHRC

DATED: November 7, 1974  
Frankfort, Kentucky

Decision No. 67