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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

January 2, 1980

John Y. Brown, Jr.  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHR #622

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINNEY MANUFACTURING COMPANY

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro issued under date of November 6, 1979, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

We reverse the Hearing Officer's Recommended Order to the extent that it is inconsistent with this Decision and Order and accept the original agreement of the parties as the final order of this Commission.

Without proof in the record which unequivocally establishes that the penalty assessment agreed upon by the parties is repugnant to the purposes and policies of the Kentucky Occupational Safety and Health Act (hereinafter, the "KOSH Act" or the "Act"), this Commission will not reject an agreement by the parties and assess a de novo penalty. To do so would be in contravention of our own Rules of Procedure, Section 51, which encourages settlements which are "consistent with the provisions and objectives of the Act."

We find no proof in the record of this case which establishes that the parties herein have made an agreement repugnant to the purposes and policies of the Act.

The parties agreed that the Respondent will pay a penalty in the amount of \$3.00 for the serious violations alleged in Citation No. 3. While the amount may be nominal, it nevertheless complies with the statutory requirement that a penalty of some amount be assessed for a serious violation of the KOSH Act. KRS 338.991(2).

There is no factual basis in the record for a finding by this Commission that even though the statutory requirements of KRS 338.991(2) were met, the penalty assessment was nevertheless repugnant to the purposes and policies of the Act.

We note that the stated basis in the Stipulation and Settlement Agreement for the agreed penalty reduction was that "the Respondent, on previous inspections made by the same Compliance Officer under similar conditions, was not made aware of the violations, even though with reasonable diligence he could have known." As we cannot determine with specificity what this language means, any attempt to draw conclusions therefrom would be mere speculation on our part. We hope that more clarity in the future from the parties in documenting their agreements will prevent a recurrence of the unnecessary legal muddle which unfortunately has occurred in this case.

Finally, we reject any reference or inference made by the Hearing Officer in the Recommended Order that the Compliance Manual issued by the Department of Labor is in any way binding upon the actions taken by the parties or by this Commission once this Commission has jurisdiction of the contest.

The Compliance Manual has not the force of law; the Hearing Officer therefore cannot take judicial notice of such material as the law of the Commonwealth.

On the contrary, the limiting of the penalty adjustment in this case by taking "judicial notice of the policy of the Commissioner" (Recommended Order, p. 5), is in direct conflict with KRS Chapter 338.081(3) which states that "after hearing an appeal, the review commission may sustain, modify or dismiss an appeal," and KRS Chapter 338.991(6), which states that "The review commission shall have the authority to modify all civil penalties and fines provided for in this chapter." Ultimately the adoption of the Compliance Manual guidelines as a legal basis for penalty modifications by this Commission limits the statutory powers of the KOSH Review Commission under KRS Chapter 338.991(6), and is therefore without the scope of the Hearing Officer's power as an agent of this Commission. (See KRS 338.081(1)).

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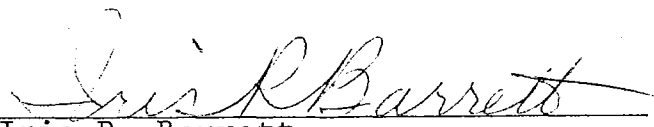
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Department of Labor  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Hon. Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Hon. Larry D. Hamfeldt (First Class Mail)  
Assistant General Counsel  
Department of Labor  
801 West Jefferson Street  
Louisville, Kentucky 40202

Mr. Ed Nemeth, Vice President (Cert. Mail #P04 3613854)  
The Finney Company  
34 West Interstate Street  
Bedford, Ohio 44146

The Finney Manufacturing Co. (Cert. Mail #P04 3613855)  
South Washington Street  
Clinton, Kentucky 42031

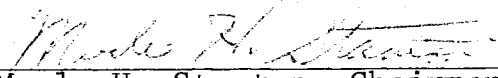
This 2nd day of January, 1980.

  
Iris R. Barrett  
Executive Director

We therefore find that the Hearing Officer exceeded the scope of his statutory authority in citing the Compliance Manual as a legal basis for his Recommended Order.

We find that the parties herein have complied with all conditions for settlement required by Rule 51 of the KOSHRC Rules of Procedure.

Accordingly, it is ORDERED by this Commission that the Hearing Officer's Recommended Order be and it is hereby REVERSED insofar as it is inconsistent with the Stipulation and Settlement Agreement submitted by the parties herein, and insofar as it is inconsistent with the findings of fact and conclusions of law herein stated by Decision and Order of this Commission. The Respondent's Notice and Motion to Withdraw Contest is hereby GRANTED, and the Stipulation and Settlement Agreement submitted by the parties herein is hereby ACCEPTED and incorporated into this Decision and Order as if copied at length herein. 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: January 2, 1980  
Frankfort, Kentucky

DECISION NO. 808