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634

John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

January 2, 1980

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #634

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

BROWN-FORMAN DISTILLERS CORPORATION

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of 18 September 1979, is presently before this Commission for review pursuant to a Direction for Review issued by Chairman Merle H. Stanton.

The Brown-Forman Distillers Corporation was cited on 22 June 1979 by the Kentucky Department of Labor for a serious violation of 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) (hereinafter, 1910.132(a)). A penalty of \$630 was proposed by the Labor Department.

A Letter of Contest was received by the Commissioner of Labor on 17 July 1979, in which the Respondent stated an intention to contest the \$630 proposed penalty.

After negotiations between the parties a Stipulation and Settlement Agreement and a Joint Notice and Motion to Withdraw Contest were filed with the Hearing Officer on 11 September 1979.

Hearing Officer Fowler then issued a Recommended Order of Settlement incorporating the Stipulation and Settlement Agreement in its entirety and granting the Respondent's Motion to Withdraw the Notice of Contest.

In the Stipulation and Settlement Agreement, the parties agreed to delete both the \$630 penalty and the citation for which the \$630 was assessed.

Chairman Stanton directed review of the Recommended Order specifically in order to determine whether a citation may be deleted by a settlement agreement where the Respondent's Letter of Contest indicates that only the penalty was in contest.

We find as a matter of law that this Commission has no jurisdiction to approve an agreement between the parties deleting a citation where the Letter of Contest or timely correspondence does not designate that the Respondent intended to contest the citation as well as the penalty.

We base our decision on the statutory language in KRS Chapter 338.141(1) which specifies that "If within fifteen (15) working days from the receipt of the citation an employer, employee or representative does not notify the Commissioner that he intends to contest the citation, the citation shall be deemed a final order of the Commission and not subject to review by any court or agency." (Emphasis added).

This Commission has previously ruled that where a case proceeds to hearing, a Hearing Officer is without jurisdiction to hear and consider evidence on the merits of a citation where the Letter of Contest indicates that the Respondent intended to contest only the penalty. Any evidence presented by the Complainant at the hearing concerning the existence of the violation is considered by the Hearing Officer and this Commission solely for the purpose of determining whether or not the penalty assessment was in fact appropriate under the circumstances. M. C. Webb, Incorporated, KOSHRC #465; Edwards and Webb Construction Company, KOSHRC #284.

Thus, where the Respondent contests only the penalty, and where the case proceeds to hearing, KRS 338.141(1) requires that the issue at hearing be limited solely to the appropriateness of the penalty.

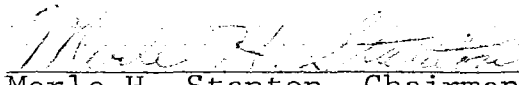
In such an instance, this Commission therefore has no authority under the law to rule on the merits of the citation; that is, we have no jurisdiction to vacate a cited standard on the basis that the Commissioner failed to establish the existence of a violation of that standard. In such a case, however, we do have the authority to vacate the penalty in its entirety; indeed, we must do so if the Commissioner cannot establish a basis in fact for the penalty assessment. KRS 338.141(1); Edwards and Webb Construction Company, supra.

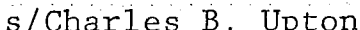
We now turn to the specific issue at hand--that is, whether a citation may be deleted by agreement of the parties when only the penalty for that citation was contested by the Respondent.

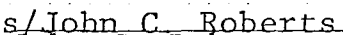
We find no language in KRS Chapter 338.141(1), nor in any other section of the Act or our Rules, which permits us to distinguish settlement agreements between the parties which purport to delete a citation not contested within the fifteen working day period from formal hearings in which the Hearing Officer has purported to so delete a citation not contested within the fifteen working day requirement.

Settlement agreements are reviewed by this Commission solely for the purpose of determining whether such agreements comply with the provisions of the KOSH Act and our own KOSHRC Rules of Procedure. Because the parties have agreed to delete a citation which has become a final order of the Review Commission not subject to review by any court or agency, the language in the Stipulation and Settlement Agreement which purports to delete the citation of 1910.132(a) simply does not comply with the statutory requirements of KRS Chapter 338.141(1).

Accordingly, it is the ORDER of this Commission that any language in the Stipulation and Settlement Agreement and incorporated into the Recommended Order which purports to delete the citation of 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) is hereby declared null and void by operation of KRS 338.141(1). 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. 806

Decision and Order
January 2, 1980
KOSHRC #634
(2)

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
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. Lomer C. Johnson, Director (Cert. Mail #PO4 3613852)
Safety, Security & Training
Brown-Forman Distillers Corporation
Early Times Plant
P. O. Box 1080
Louisville, Kentucky 40201

This 2nd day of January, 1980.


Iris R. Barrett
Executive Director