



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

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GOVERNOR

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REVIEW COMMISSION

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CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

June 16, 1980

KOSHRC #672

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

PADGETT WELDING COMPANY, INC.

RESPONDENT

DECISION AND ORDER  
OF REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.  
ROBERTS, Commissioner, FOR THE MAJORITY:

A Recommended Order of Hearing Officer John T. Fowler, Sr. issued under date of March 26, 1980, is presently before this Commission for review pursuant to an order of direction for review by the Commission.

Summary of the Case

The case below involved alleged nonserious violations of 29 CFR 1926.350(a)(9) and 1926.50(c), an alleged regulatory violation of 803 KAR 2:060 Section 2(1) and an alleged serious violation of KRS Chapter 338.031(1)(a). The proposed penalties of \$50 for the regulatory violation and \$480 for the serious violation were also at issue.

Hearing Officer Fowler's Recommended Decision initially addresses two procedural issues which arose during the course of the hearing and were subsequently posed in the Complainant's brief.

The Complainant presented a motion to dismiss the Respondent's notice of contest for failure to file an answer. The Complainant also objected to the Respondent's presentation of evidence which allegedly constituted an affirmative defense which was not specifically raised prior to the hearing.

Citing decisions of this Commission and its hearing officers in Tarlton's One-Hour Martinizing KOSHRC 496, Simpson Construction Co. KOSHRC 523, Active Constructors KOSHRC 486, Western Drywall Inc. KOSHRC 521, and B. G. Danis Company KOSHRC 557, Mr. Fowler finds no authority supporting dismissal for failure to file an answer to the complaint. He further concludes, from the reasoning of the cited cases, that the Respondent can rely on affirmative defenses not raised prior to the hearing unless the Complainant has requested some relief to adequately meet the issue or prejudice is revealed.

The alleged nonserious violation of 29 CFR 1926.350(a)(9) is dismissed based on the finding that the compressed gas cylinders were not in use.

The alleged nonserious violation of 29 CFR 1926.50(c) is also dismissed upon proof that the Henry Vogt Company had a first aid station on hand for the use of subcontractors.

Hearing Officer Fowler finds that the prime contractor provided the notice informing employees of the protections of the Act, thereby relieving the Respondent subcontractor and mandating dismissal of the alleged regulatory violation and proposed penalty of \$50.

The fundamental issue in the case concerns the alleged violation of the "general duty clause," KRS 338.031(1)(a).

This citation is dismissed along with the proposed penalty of \$480 by the Hearing Officer's conclusion that the proof is insufficient to establish the criteria or elements necessary to sustain a general duty violation.

#### Decision of the Commission Majority

After careful and thorough review of the Recommended Decision, the record below and the briefs filed with the Commission, we find no error in the findings of fact, conclusions of law and recommended order, and we hereby AFFIRM the Hearing Officer's dismissal of all citations and penalties.

  
John C. Roberts, Commissioner

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

STANTON, Chairman, dissenting:

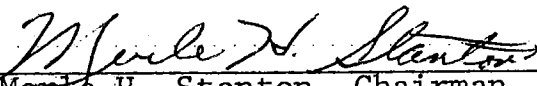
I dissent from that portion of the majority opinion which affirms the dismissal of the regulatory violation and penalty proposal of \$50.

The cited regulation, 803 KAR 2:060 Section 2(1), requires that the Notice to Employees be posted in each establishment. Section 2(2) of the regulation explains and interprets "establishment" and makes clear that employers engaged in construction must post the notice "at the location to which employees report each day." The record (p. 42) reveals that Padgett employees report to their shop, where notice is posted, on a weekly basis.

While there is testimony by the Complainant's witness that posting by the prime contractor on the job site will alleviate the subcontractor's responsibility to provide notice, there is no clear evidence that the prime contractor in this instance did in fact provide and post the notice.

It is not the responsibility of the Complainant to establish that the prime contractor did not post such notice but is rather the Respondent's defense to establish that the prime contractor did post and thereby satisfy the regulatory requirement.

I would affirm a violation of 803 KAR 2:060 Section 2(1) along with a penalty of \$50.

  
Merle H. Stanton, Chairman

DATED: June 16, 1980  
Frankfort, Kentucky

DECISION NO. 879

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  
Frankfort, Kentucky 40601  
Attention: Hon. Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Hon. Frederick G. Huggins (First Class Mail)  
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801 West Jefferson Street  
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Mr. James R. Padgett, Pres. (First Class Mail)  
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421 West Main Street  
New Albany, Indiana 47150

This 16th day of June, 1980.

  
Iris R. Barrett  
Executive Director