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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

September 8, 1980

KOSHRC #673

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

BROCK & BLEVINS COMPANY, INC.

RESPONDENT

DECISION AND ORDER
OF REVIEW COMMISSION

Before ROBERTS and UPTON, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of June 3, 1980, is currently before this Commission for review pursuant to an order of direction for review by the Commission.

Summary of the Case

The Respondent company, a mechanical contractor, was engaged in installation of certain equipment at the construction site of a Big Rivers Power Plant near Sebree, Kentucky.

The case below involved alleged repeated serious violations of 29 CFR 1926.500(d)(1) and 1926.500(b)(7) (as adopted by 803 KAR 2:030). The proposed penalties of \$1600 for each of these items were also contested.

Open plywood doors at the east end of the turbine building were observed by the Compliance Officer. This open area, 40 feet above the ground, was deemed a hazard and served as the basis for one of the cited items. This condition is depicted in the photograph, Complainant's exhibit #1.

The second contested item was cited due to an opening in the guard-rail enclosure around a low pressure cell. This condition, shown in Complainant's exhibit #2, allegedly exposed employees to a fall of 20 feet to the floor below.

Prior to the hearing, the parties stipulated and agreed that the Respondent had previously been cited for and found to be in serious violation of these same standards.

Hearing Officer Shapiro finds that 29 CFR 1926.500(c)(1)(i), the standard relating to guarding of wall openings, applies to the hazard at the east end of the turbine building. Further, he concludes that the failure to cite the proper standard was fatal to the citation. The alleged violation of 29 CFR 1926.500(d)(1) is dismissed along with the penalty proposed.

A violation of 29 CFR 1926.500(b)(7) is sustained by the Recommended Order. The proposed penalty for this item, however, is reduced from \$1600 to \$980 upon a finding that the reduced amount is more appropriate under the circumstances.

This Commission, by order dated July 3, 1980, directed review to consider the Hearing Officer's recommended dismissal of the first item and penalty proposal and the penalty reduction proposed for item two.

Decision of the Commission

After careful consideration of the record below as well as the authorities relevant to the alleged violation of 29 CFR 1926.500(d)(1), we disagree with the Hearing Officer's recommended dismissal of this item and its penalty proposal.

Considering the size and location of the unguarded area, the temporary nature of the plywood door panels and the fact that the doors remained in an open position for extended periods, we conclude that the cited standard relating to open-sided floors is applicable to the condition or hazard noted. We further conclude that the penalty proposed is appropriate in light of the serious and repeated nature of the violation.

Even if the provisions of 1926.500(c)(1)(i) are considered applicable to the noted conditions, the Hearing Officer's recommended dismissal is inappropriate.

Improper citation is essentially a substantive defense to be presented by the party respondent, not raised sua sponte by the Hearing Officer. Further, by interposing the improper citation claim after hearing and in the course of the decisional process, the Complainant was precluded from presenting a position or counter argument on the issue.

The Recommended Decision finds, in light of our decision in South Central Bell Telephone Company, KOSHRC #371 (1978), that failure to cite the correct standard is fatal to the citation unless amended prior to hearing. This finding is an overly broad reading of our decision in the aforementioned case.

In South Central, supra, the Complainant was on notice of improper citation prior to hearing and the Respondent raised a defense of improper citation. We agreed that the prejudice to the Respondent was ~~unusual~~ ^{MINIMAL} but disapproved of amendment due to the particular circumstances and the Complainant's action in the case.

A number of cases indicate that where no objection has been raised and the requirements of standards are sufficiently similar to obviate prejudice to the Respondent, the Hearing Officer may amend the citation to conform to the evidence. Considering the similarity of conditions and guarding requirements for open-sided floors and wall openings, even if 29 CFR 1926.500(c)(1)(i) is deemed applicable in this case, amendment to conform to the evidence would be the appropriate disposition.

In recommending reduction of the penalty proposal for the repeated serious violation of 29 CFR 1926.500(b)(7), the Hearing Officer has noted the advisory ~~notice~~ ^{ADVICE} of the Complainant's proposals and the Commission's authority and duty to impose the appropriate amount in each case. To determine the appropriateness of a monetary sanction in this case, significant attention must be given to the repeated and serious nature of the violation. In consideration of these factors as well as the entire record below, we find that the initially proposed amount of \$1600 should be imposed for this violation.

ORDER

IT IS THE ORDER of this Commission that the Recommended Decision dismissing the repeated serious violation of 29 CFR 1926.500 (d)(1) (as adopted by 803 KAR 2:030) and the penalty of \$1600, is REVERSED. The violation and penalty are hereby SUSTAINED.

Further, IT IS ORDERED that the Recommended Decision reducing the penalty for the repeated serious violation of 29 CFR 1926.500(b)(7) (as adopted by 803 KAR 2:030) is likewise REVERSED. A penalty of \$1600 is hereby SUSTAINED.


John C. Roberts, Commissioner

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

DATED: September 8, 1980
Frankfort, Kentucky

DECISION NO. 906

Copy of this 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: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Kenneth J. Costelle (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Mr. W. Ray Harrell, Corp. Saf. Dir. (Cert. Mail #P14 8475627)
Brock & Blevins Co., Inc.
P. O. Box 160
Rossville, Georgia 30741

Brock & Blevins Co., Inc. (First Class Mail)
General Delivery
Sebree, Kentucky 42455

This 8th day of September, 1980.


Iris R. Barrett
Executive Director