



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

REVIEW COMMISSION

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

July 21, 1980

KOSHRC #683

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY IGNITION COMPANY

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 March 28, 1980, is presently before this Commission for review pursuant to a Direction for Review issued by Chairman Merle H. Stanton.

The Respondent Kentucky Ignition Company was inspected on October 25, 1979, by a Safety and Health Compliance Officer authorized by the Commissioner of Labor to make inspections under the Kentucky Occupational Safety and Health Act, KRS Chapter 338. The Respondent was issued two citations as a result of that inspection. Citation No. 1 alleged ten (10) nonserious violations of the KOSH Act and carried no penalty. That citation was not contested by the Respondent. Citation No. 2 alleged a violation of the National Electrical Code, Article 250-45(d)(3) (as adopted by 29 CFR 1910.309(a) and 803 KAR 2:020), for an alleged failure by the Respondent to ground exposed non-current carrying parts of the cord- and plug-connected "Black & Decker" drill. The Labor Department alleged that the Respondent has exposed its employee to a serious hazard, and assessed a \$300 penalty for the alleged violation.

The Respondent notified the Commissioner of Labor on 8 November 1979 of its intent to contest the \$300 proposed penalty for Citation No. 2.

In the Recommended Order Hearing Officer Fowler found that the Complainant failed to introduce sufficient proof to sustain a serious violation of the Act, but that the Commissioner of Labor did in fact establish a nonserious violation of the cited standard. The Hearing Officer therefore adjudged the violation to be nonserious and reduced the proposed penalty therefor to \$100.

We uphold the decision of Hearing Officer Fowler to reduce the proposed penalty to \$100.

We find, however, that pursuant to the jurisdictional limitations placed upon this Commission by KRS Chapter 338.141(1), the Hearing Officer was without jurisdiction to reverse, alter or in any way modify the merits of the citation herein.

KRS Chapter 338.141(1) provides that "If within fifteen (15) working days from the receipt of the citation an employer fails to notify the Commissioner that he intends to contest the citation, then the citation shall be deemed a final order of the Commission and not subject to review by any court or agency." (Emphasis added.)

This statutory provision serves the purpose of limiting the issues before the Review Commission in a contest to those issues which in fact have been placed into contest by the Respondent.

We find that the Respondent's Letter of Contest herein indicates an intent to contest only the proposed penalty for Citation No. 2, Item 1. We therefore find that since the Respondent indicated no intent to contest, the existence of the serious violation alleging the failure of the Black & Decker drill to comply with grounding requirements adopted by 29 CFR 1910.309(a) (as adopted by 803 KAR 2:020), Citation No. 2 has become "a final order . . . not reviewable by any court or agency" by operation of KRS 338.141(1). Edwards and Webb Construction Co., Inc., KOSHRC #284; M. C. Webb, Incorporated, KOSHRC #465.

We note, however, our decision in Edwards and Webb Construction Co., supra, where we held that this Commission "must necessarily consider the merits of [a citation] as they tend to establish the reasonableness or unreasonableness of [a] contested penalty." We hold herein that proof by the Complainant that it complied with Departmental guidelines in assessing a proposed penalty will not be sufficient to establish that the penalty was in fact reasonable. The Commissioner must establish a prima facie violation--that is, the Department of Labor must meet its burden of proof that the alleged violation did in fact exist--before the concomitant penalty will be upheld as reasonable by this Commission.

Accordingly, it is ORDERED by this Commission that the Hearing Officer's Recommended Order of March 28, 1980, insofar as it vacates the serious nature of Citation No. 2, Item 1, is without the jurisdiction of this Commission and is therefore without legal effect. It is further found that the \$100 penalty assessed by the Hearing Officer for Citation No. 2, Item 1, is reasonable under the facts and circumstances indicated and established in the record, and that penalty is therefore and hereby SUSTAINED. All other findings and conclusions of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.


Merle H. Stanton, Chairman

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

s/John C. Roberts
John C. Roberts, Commissioner

DATED: July 21, 1980
Frankfort, Kentucky

DECISION NO. 891

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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. James M. Fyock, Vice President (Cert. Mail #P15 5401419)
Kentucky Ignition Company
737 South Third Street
Louisville, Kentucky 40201

This 21st day of July, 1980.



Iris R. Barrett
Executive Director