



692

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

REVIEW COMMISSION

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CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

July 21, 1980

KOSHRC #692

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

GLOBE UNION, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Settlement issued in this matter by Hearing Officer John T. Fowler, Sr., under date of April 25, 1980, is presently before this Commission for review pursuant to an Order of Direction for Review issued by this Commission on May 29, 1980.

The Hearing Officer's Recommended Order of Settlement has permitted the Respondent Globe Union to withdraw contest and has ordered that the agreement between the parties be approved and incorporated in its entirety into the Recommended Order.

The Respondent Globe Union is engaged in the manufacture of batteries at its place of business located in Jefferson County, Kentucky, at or near 3200 Fern Valley Road. On November 20, 1979, Globe Union was issued two citations and a Notification of Proposed Penalty by the Kentucky Department of Labor subsequent to an inspection conducted by a Compliance Safety and Health Officer employed by the Kentucky Occupational Safety and Health Administration, Division of Compliance.

The Respondent contested only the serious citation and the \$720 penalty proposed therefor.

The citation not contested alleged one nonserious violation of the KOSH Act. That citation was initially assessed an \$80 penalty. That penalty was deleted, however, by the Labor Department's own admission on the Notification of Proposed Penalty that since a citation for less than ten (10) nonserious violations resulted from that inspection, the \$80 penalty would be deleted.

The Order of Settlement in this matter, however, permits an agreement between the parties assessing an \$80 penalty for Item 1d of contested Citation No. 4, which the parties have agreed shall be reduced from a serious to a nonserious violation.

The statement on the Notification of Proposed Penalty deleting the \$80 penalty assessed for the uncontested Citation No. 3 is consistent with the policy of the Commissioner of Labor as stated in an intra-departmental Memorandum of February, 1980, setting forth "guidelines to congressionally mandated exemptions and limitations to federally funded occupational safety and health activities."¹

The subject Memorandum refers to OSHA Instruction CPL 2.33, which implements at the federal level exemptions and limitations placed on OSHA activities by the United States Congress in the Fiscal Year 1979 Labor and Health and Human Services Appropriations Act (P.L. 94-480), including a limitation which requires the deletion of any penalty assessed for an alleged first-instance nonserious violation where less than ten (10) such violations have resulted from that particular inspection of a respondent's worksite. That OSHA Instruction contains the following guideline with reference to that limitation:

The limitation is applicable to penalties involved in proceedings before the Review Commission. Area Directors and Regional Solicitors will take appropriate action to assure conformity with these instructions in amendments or settlements that reduce the total number of violations to less than 10.

We have directed the Order of Settlement in this matter for review in order to determine whether the parties may stipulate to a penalty assessment that disregards the administrative policy of the Kentucky Department of Labor as stated in the February 1980 Memorandum.

¹Memorandum, Kentucky Department of Labor, Occupational Safety and Health Program, February, 1980, "Exemptions and Limitations," to Otis Ragland and Bob Whitlow from Steven A. Forbes, Federal/State Coordinator, p. 1.

We hold that the parties may not so stipulate. The February Memorandum has not the force of law, and we do not find that the Commissioner of Labor has committed a per se violation herein of any statute or of any properly promulgated administrative regulation.

We do find, however, that to approve the stipulated settlement herein is to deprive that class of respondents which negotiates settlements of equal treatment under the departmental policy set forth in Labor Department's Memorandum vis a' vis two other classes of respondents: (1) that class which is initially cited by the Department of Labor for ten or fewer first-instance nonserious violations, and (2) those respondents who contest serious violations which are later reduced to first-instance nonserious as the result of a hearing on the merits, where less than ten nonserious violations have been cited against the individual respondent.

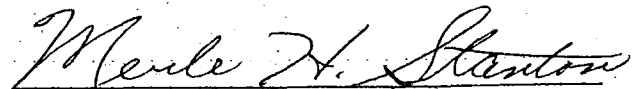
Since January of 1979 the Commissioner of Labor has in fact consistently deleted uncontested proposed penalties where Respondents have been issued a citation for less than ten first-instance nonserious violations of the KOSH Act (See Lexington Lamp Plant, Division of General Electric Company, KOSHRC #558, and Tell City Chair Company, KOSHRC #655).

In B. C. Christopher & Company, dba Hutson Grain Terminal, KOSHRC #581 (DEOC, Kentucky Decisions, Vol. 5) this Commission upheld a Hearing Officer's decision vacating the total amount of a proposed penalty where he found (1) that the facts supported a first-instance nonserious rather than a serious violation of the Act, and (2) that the penalty should be vacated in toto because the Respondent was cited for less than ten (10) nonserious violations.

In The University of Louisville, KOSHRC #605, the Complainant offered during the course of a hearing to stipulate that the contested serious violation was in fact nonserious and to reduce the proposed penalty therefor to \$100. The Hearing Officer approved the stipulation that the violation was nonserious but vacated the \$100 penalty settlement offered, on the basis that since less than ten (10) first-instance nonserious violations had been cited, the imposition of such a penalty was at variance with the policy guidelines of the Commissioner. That conclusion was affirmed by Decision and Order.

While this Commission fully supports the right of the parties to negotiate and to settle a contest, and while we appreciate how necessary the freedoms and flexibilities inherent in the negotiations process are to the achievement of a final settlement agreement, we nevertheless hold that a stipulation and settlement agreement may not deprive a Respondent of benefits he would have received had the same legal conclusion been accomplished via administrative decision prior to contest, or as the result of a due process hearing before this Commission.

Accordingly and for the reasons hereinabove stated, it is the ORDER of this Commission that the \$80 penalty approved in the Recommended Order of Settlement be and it is hereby VACATED. As all other aspects of the Recommended Order of Settlement appear to comply with the purposes and policies of the Kentucky Occupational Safety and Health Act, 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: July 21, 1980
Frankfort, Kentucky

DECISION NO. 890

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. Frederick G. Huggins (First Class Mail)
Deputy General Counsel
Department of Labor
801 West Jefferson Street
Louisville, Kentucky 40202

Hon. Stanley S. Jaspan (Cert. Mail #P15 5401418)
Foley & Lardner
First Wisconsin Center
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Mr. Robert L. Miller (First Class Mail)
Globe Union, Inc.
3200 Fern Valley Road
Louisville, Kentucky 40213

This 21st day of July, 1980.


Iris R. Barrett
Executive Director