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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

**REVIEW COMMISSION**

AIRPORT BLDG., LOUISVILLE RD., (U.S. 60-WEST)

FRANKFORT, KENTUCKY 40601

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GOVERNOR

JOHN C. ROBERTS  
CHAIRMAN

CARL J. RUH  
MEMBER

CHARLES E. BRADEN  
MEMBER

October 12, 1981

KOSHRC #728

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MARTIN MARIETTA ALUMINUM

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Charles A. Goodman III, issued under date of July 1, 1981, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Summary of the Case

This case involves an alleged serious violation of the standard 803 KAR 2:015, Section 5(2) and the proposed penalty of \$640. A description of the violation alleges that:

The employer did not establish written procedures covering confined space entry under emergency conditions.

The basic facts as set forth in the record below are not in dispute.

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An industrial hygienist from the Kentucky Department of Labor conducted an inspection at the Respondent's facility in Lewisport, Kentucky, in response to a reported fatality. A new cold reduction mill was being added to Martin Marietta's Lewisport operation. The mill compresses metal between rollers and generates considerable heat from the process. A kerosene based fluid is used as a coolant-lubricant mist for the mill. Due to the fire potential of the kerosene coolant, the operation is equipped with a Cardox fire suppression system. The Cardox system dispenses carbon dioxide (CO<sub>2</sub>) which displaces oxygen, thus extinguishing any flame.

On the date of the fatal accident two employees of the Schurman Company, which separately contracted with Martin Marietta to install and erect the mill, were welding in the pit or utility area located below floor level underneath the mill. The welding apparently affected the Cardox sensors and activated the system. An alarm sounded prior to discharge of the CO<sub>2</sub> and the two Schurman employees rushed to a stairwell to exit the pit area. One of the men, Mark Williams, was asphyxiated at the bottom of the stairwell.

The relevant facts occurred when three Martin Marietta employees arrived at the stairwell area to attempt a rescue. Randall Lawson, a maintenance foreman in the cold rolling department, donned an airline respirator and descended the stairs to reach Williams and was rendered unconscious when the mask pulled away from his face. Ed Gilliam, a foreman in the finishing department, and Don Critchfield, a production department foreman, arrived on the scene with Scott airpacks and extracted Williams and Lawson.

Sometime after the inspection, the hygienist telephoned Bob Kittinger, safety engineer for Martin Marietta, informed him of the impending citation and provided an opportunity to respond.

Mr. Goodman's Recommended Order affirms the alleged serious violation of 803 KAR 2:015, Section 5(2) along with the penalty proposed of \$640.

Decision of the Commission

The first significant issue in the case is the Respondent's claim that the telephonic closing conference was inadequate, in violation of regulations and as a result thereof the citation should be dismissed. In support of this point, Martin-Marietta alleges that the proposed citation was read without provision for significant discussion of the alleged violations, a procedure violating the provisions of 803 KAR 2:070, Section 4(5) and 4(6).

The Hearing Officer finds that the closing conference procedure utilized by the Complainant did not clearly violate the noted procedural sections. He further finds that even if the procedure was not in conformity with the regulations, that fact in itself does not constitute a valid basis for dismissal of the citation. Prejudice to the Respondent is deemed the critical issue, and the record does not indicate any prejudice to Martin Marietta in presenting their case.

We find that the Hearing Officer's holding on this issue is in accord with our position and is consistent with a recently reported decision of the U. S. Court of Appeals for the Fourth Circuit, Pullman Power Products, Inc., 1981 OSHD (25,575).

The Respondent in Pullman alleged that the inspector failed to present his credentials, conduct an opening conference, provide walkaround rights or conduct a closing conference. The Appeals Court held: "We need not address the question of whether the Secretary substantially complied with established inspection procedures because we agree with the Commission that Pullman's inability to show prejudice bars its attack on the validity of the citations."

The court further stated that the decision to impose a prejudice requirements is in accord with every court that has considered the issue, (citing decisions from the 10th, 9th, 8th, 7th and 5th circuits.)

The Pullman decision concludes: "An employer that cannot show it was harmed in any way by the Secretary's procedural violations should not be allowed to insulate itself from liability as a result thereof."

We note that the Pullman decision applied a prejudice standard even to walkaround rights which are specifically provided by statute whereas the closing conference provisions are set forth by regulation only.

The reported federal OSHA decisions, such as Pullman, are not controlling for this Commission; they are, however, quite relevant and persuasive when they address issues similar or identical to those before us.

Although the Complainant's closing procedure is not a basis for dismissal of this citation, we agree that the method employed is not the most effective manner of conducting business.

The second major issue is Martin Marietta's contention that paragraph 5, page 34 of their Employee's Safety Booklet satisfies the requirements of the regulation 803 KAR 2:015, Section 5(2).

The Respondent states that its written provision makes safety in a hazardous confined space the responsibility of the supervisor who must exercise discretion concerning the handling of any emergency. The rule is disseminated to all Martin Marietta employees.

The Complainant's position is that the Respondent's written provision is clearly not designed for emergency situations. The Hearing Officer agrees with this interpretation. Paragraph 5 speaks of a "potentially" hazardous area and places the responsibility on the supervisor to "provide" and "inspect" all equipment in connection with such "work." Procedures covering entry under emergency conditions are not set forth.

We find that the cited OSH Standard is clearly intended to require a predetermined, fully considered written plan of action should an emergency occur. The discretionary action of a supervisor functioning without well-planned guidelines is exactly the type of activity the standard is designed to eliminate. The Respondent's noted provision does not meet the requirements of the standard.

The decisive issue in this case is the Respondent's argument that the cited standard is vague, uncertain and therefore unenforceable. The point was not distinctly raised before the Hearing Officer although it was alluded to at pages 10 and 11 of the Respondent's Brief. Mr. Goodman's order considers the "void for vagueness" argument at pages 13 and 14.

Martin Marietta argues that the cited regulation contains no guidelines concerning what the procedures must contain in order to be in compliance. It is alleged that this is left to the complete discretion of the Commissioner's agents, citing the testimony of Chuck Morrow as to the elements of an acceptable written procedure. The Respondent further notes that emergency procedures can eliminate the applicability of the entire entry standard if an emergency exists. It is alleged that due to these deficiencies the regulation does not give fair warning or fair notice of its requirements and is therefore unenforceable.

Hearing Officer Goodman agrees that the standard contains no guidelines and is poorly drafted. The violation is, however, sustained based upon a finding that Martin Marietta has no written emergency procedure of any kind.

We agree with the Respondent's assertion that the validity of a standard, challenged on the grounds of vagueness, turns on whether the employer is afforded "fair warning" or "fair notice" of what is required. Diamond Roofing Co., Inc., 1975-76 OSHD (20,521); Kropp Force Co., 1981 OSHD (25,607).

In determining the validity of 803 KAR 2:013 Section 5(2) the Respondent and Hearing Officer read the standard as standing alone. The case of Dravo Corporation, 1980 OSHD (24,158), involving a challenged citation, advises reading the cited provision together with other sections of the standard to obtain the necessary guidance.

Section 4 of 803 KAR 2:015 applies to entry into a confined space except as provided in Section 5. Contrary to assertions by the Respondent, the written procedure requirement of Section 5(2) permits exclusion of only certain portions of Section 4; (1), (3) and 4(a).

The plain meaning of Section 5 is that an acceptable written procedure for confined space entry under emergency conditions must address the guidelines set forth in Sections 4(2), 4(4)(b), 4(5), 4(6) and 4(7). The procedure must necessarily be adapted for the specific conditions and circumstances of each employer's worksite. Written and well-planned procedures designating the location and availability of proper equipment §4(4)(b), §4(6), properly trained rescue personnel §4(5)(c), location and availability of proper equipment §4(5)(a) and §4(7)(a), as well as other provisions which the employer may wish to add, will eliminate the hazard of unplanned action so evident in this incident.

The fact that the Respondent may have to write provisions, within the guidelines, which specifically fit its place of employment, does not render Section 5 unenforceable. Dravo Corporation, supra; Allis Chalmers Corp., 1976 OSHD (21,079; M-Co Equipment, Inc., 1974-75 OSHD (19,394).

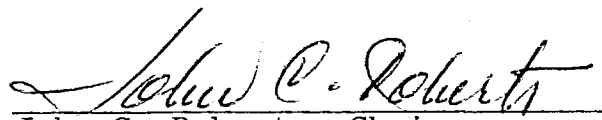
We find that the cited standard provides the requisite fair notice and fair warning and the Respondent has failed to establish the written procedures covering entry under emergency conditions.

The final contentions in this action concern the serious designation and the penalty proposal of \$640. The Hearing Officer finds that the violation was serious and that appropriate considerations were made in adjusting the penalty proposal. The \$640 fine is sustained.

After careful review of the record, we find that the seriousness of the violation has been established and the penalty assessment is appropriate in light of the relevant considerations.

ORDER

IT IS THE UNANIMOUS ORDER of this Commission that, by the reasoning and rationale set forth herein, the Recommended Order affirming a serious violation of 803 KAR 2:015, Section 5(2) and a penalty of \$640 is hereby SUSTAINED.

  
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John C. Roberts, Chairman

s/Carl J. Ruh  
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Carl J. Ruh, Commissioner

s/Charles E. Braden  
\_\_\_\_\_  
Charles E. Braden, Commissioner

DATED: October 12, 1981  
Frankfort, Kentucky

DECISION NO. 1053

Copy of this Decision and Order has been served by mailing or personal delivery on the following parties:

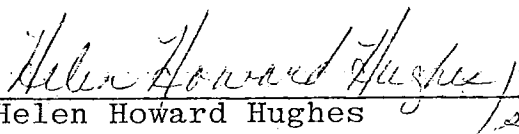
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This 12th day of October, 1981.

  
Helen Howard Hughes  
Executive Director