



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 2, 1982

JOHN Y. BROWN, Jr.
GOVERNOR

CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #734

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THE BARBEE COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before RUH and BRADEN, Commissioners:

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro issued under date of January 21, 1982, is presently before this Commission for review pursuant to an Order of Direction for Review issued by the Commission on February 19, 1982.

At issue in this case is whether the Respondent limited his contest to a penalty only issue, and, if not, whether the Hearing Officer erred in sustaining the violation and penalty as alleged.

The Respondent herein was cited for a violation of 29 CFR 1910.23(c)(1), which requires standard rail guards around a wooden pallet supported by a forklift and used as an open-sided platform ten (10) feet above an adjacent floor. A penalty of \$420 was assessed.

At the hearing the Complainant maintained that the Respondent contested only the penalty, that the violation itself was not in contest and that the Complainant therefore could dispense with the prima facie proof of the violation, that is, with the proof necessary to establish the conditions cited by sufficient evidence. The Complainant argues that in a penalty only contest, the Respondent has waived his entitlement to proof on the issue of whether

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the violation has occurred; he in effect has admitted that portion of the proof.

We question the Complainant's premise that the contest herein was a penalty contest only.

The letter essentially says: (1) We are contesting the penalty; (2) it was not a common practice for employees to ride the pallet like an elevator. The second statement in fact almost raises the issue of isolated employee misconduct which is an affirmative defense to a contested citation. Thus, the letter of contest contains an ambiguity.

The latest Federal Review Commission opinion addressing the issue of how letters of contest shall be interpreted, Maxwell Wirebound Box Co., Inc., 1980 CCH OSHD Paragraph 25,578 (August 29, 1980), holds that employer contests must be construed liberally where ambiguous. In that case a letter requesting extension of an abatement date contained language alluding to whether engineering controls to bring noise made by Respondent's manufacturing process within acceptable limits were feasible. The letter was construed to be a full contest of citation.

We agree with the rule of construction stated in the Maxwell Wirebound Box Co. case, and we therefore find that the Hearing Officer herein was in error in accepting Complainant's premise that only the penalty was in contest.

Thus the question becomes whether the Complainant presented sufficient evidence to establish a violation of 1910.23(c)(1), and, if so, whether the Respondent established a defense thereto.

We find sufficient evidence in the record to establish that an employee of the Barbee Company was using a pallet supported by a fork lift as an open-sided platform, and that the pallet was not guarded by standard railings and toeboards as required by 29 CFR 1910.23(c)(1) (as adopted by 803 KAR 2:030).

We further find that the Respondent has not established that his employee was engaged in an isolated instance of employee misconduct, as alleged in the letter of contest, nor was there sufficient proof to establish an improper inspection as alleged by the Respondent at the hearing. We therefore find that the Hearing Officer was correct in sustaining the violation.

We find, however, that the totality of facts and circumstances in the record of this case warrant a reduction in penalty in the amount of fifty percent (50%).

Accordingly, IT IS ORDERED that the Hearing Officer's Recommended Order sustaining a violation of 29 CFR 1910.23 (c)(1) is hereby AFFIRMED. The recommendation sustaining the proposed penalty in full is hereby REVERSED, and a reduced penalty in the amount of \$210 is hereby ORDERED. All findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby SUSTAINED. Abatement, if not accomplished, shall be immediate.



Carl J. Ruh
Commissioner

s/Charles E. Braden
Charles E. Braden
Commissioner

DATED: April 2, 1982
Frankfort, KY

DECISION NO. 1117


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

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 (First Class Mail)
Assistant Counsel
Department of Labor
620 South Third Street
Louisville, Kentucky 40202

Mr. Tom D. Barbee (Cert. Mail #P209 357 637)
The Barbee Company
P. O. Box 323
Louisville, Kentucky 40201

This 2nd day of April, 1982.



Sue Ramsey
Executive Secretary