KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
AIRPORT BLDG., LOUISVILLE RD., (U.S. 60-WEST)
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JOHN Y. BROWN, JR.
GOVERNOR

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

May 28, 1981

KOSHRC #745

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

ESSEX GROUP, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Thomas E. Meng issued under date of March 9, 1980, is presently before this Commission for review, pursuant to a Direction for Review issued by former Commission Chairman Merle H. Stanton.

The Respondent was cited by a Kentucky Department of Labor Compliance Safety and Health Officer for an alleged failure to provide protective gloves as required by 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020)[1] to seven employees whose hands were allegedly exposed to a solvent containing methyl ethyl ketone and toluene, which was used as a dilating fluid in the manufacture of electrical appliance cords.

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[1]1910.132(a) provides: "Protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact." (Emphasis added.)

Upon finding that "the nature of the potential hazard . . . was not "permanent and debilitating," Hearing Officer Meng has dismissed the citation alleged herein. No case law has been cited by Hearing Officer Meng to support his conclusions of law.

We uphold the dismissal of the citation herein; however, we reverse the Hearing Officer's Conclusions of Law, for the reasons set forth below.

I

The Respondent herein was cited for a nonserious violation of the Kentucky Occupational Safety and Health Act (hereinafter, the Act).

Had the Respondent been cited for a serious violation of the Act, Hearing Officer Meng's conclusion that the citation should have been dismissed because the hazard would not cause permanent debilitating injury would have been relevant in that it would have implied that the Labor Department had not proved a serious violation of the Act.[2]

To establish a nonserious violation of the KOSH Act, however, the Complainant need not show substantial probability of death or serious physical harm, but only that there is a direct and immediate relationship between the violative condition and occupational safety and health. Crescent Wharf and Warehouse Co., 1971-1973 CCH OSHD Paragraph 15,687 (1973); Lee Way Motor Freight Company, 10th Cir., 511 F.2d 864 (1975), cited in Bluegrass Industries, KOSHRC #724.

Thus, the issue in this case is not whether the Complainant proved that skin exposure to the solvents in question was "permanent and debilitating," but whether the Complainant proved that under the particular facts in evidence herein, there is a direct and immediate relationship between the non-use of protective gloves and the safety and health of the subject employees.

II

We find that the Complainant did not introduce sufficient proof into the record to establish the existence of a nonserious violation as alleged.

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[2]A serious violation is defined in KRS 338.991(11) as one which harbors a "substantial probability of death or serious physical harm . . . "

To establish a violation of 1910.132(a) as cited herein, the Labor Department should have proven (1) that skin contact with MEK and toluene is hazardous, (2) that there was contact by Respondent's employees with the substances, and that the amount and severity of the contact with MEK and toluene under the particular circumstances of the Respondent's work process in fact exposed its employees to a health hazard; and (3) that the provision and use of protective gloves by Respondent's employees was necessary in order to prevent such exposure.

Had the Complainant organized its direct testimony by first laying a general foundation of expert testimony by the hygienist establishing the nature of the solvents in question and their possible impacts upon skin contact, and then completed its proof by applying that general foundation to the specific facts of the Respondent's work process, perhaps the Complainant's prima facie proof would have been sufficient.

We find, however, that the Complainant did not sustain the necessary burden of proof.

It appears that a minimal theoretical scientific base was laid by the Complainant establishing that skin contact with the solvents in question may cause drying and peeling of the skin, resulting in a medical condition known as dermatosis. The hygienist notes on page 41 of the Transcript the medical and scientific research on which she relied.

We find, however, that the Complainant failed to establish that this particular Respondent exposed its employees to MEK and toluene in sufficient quantity and duration to create a hazard of the type alleged.

The Compliance Officer was under the impression that the work process necessitated that the employees dip their fingers in the chemical solution to remove the rubber tubing.

The Respondent's personnel manager and safety officer, however, testified at T.R., pp. 77-80 that the process is completed as follows. There are three steps to the dipping process: (1) about one hundred (100) to two hundred-fifty (25) 3/4" long pieces of dry tubing are placed in a colander. That colander is then placed in a solution of one hundred percent (100%) toulene for a period of time less than two hours. The colander is removed from the pure solvent and placed into a solution of two parts solvent to one part water. After removal from the second solution, the tubing is "scooped" into smaller cans (see Complainant's Exhibit 1) located at each work station where the excess solvent runs off. The employees at the stations then individually wrap the tubing around pieces of spliced copper wire.

It is not clear from the testimony whether the tubes are manually "scooped" from the colander and placed in the smaller cans (although the implication is that they are), or whether the tubes are poured into the smaller cans. There is no unequivocal testimony indicating whether the tubes are removed from the smaller cans wet or dry. Thus the testimony is ambiguous concerning the nature of the work process and the degree of exposure.

We therefore find insufficient evidence in the record to outweigh the Respondent's testimony that exposure was so minimal as to render it harmless.

We find it unnecessary to reach the issue of whether the Respondent established other defenses.

Accordingly, and for the reasons set forth herein, IT IS ORDERED that the Hearing Officer's Recommended Order dismissing the citation of 29 CFR 1910.132(a) (as adopted by 803 KAR 2:020) be and it is hereby SUSTAINED. It is further ORDERED that the Hearing Officer's Conclusions of Law are hereby REVERSED. All findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.

John C. Roberts, Chairman

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

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

DATED: May 28, 1981
Frankfort, Kentucky

DECISION NO. 1011

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. Hugh M. Richards (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Hon. Robert J. Tscholl (Cert. Mail #P27 9171720)
Labor Relations Attorney
Essex Group
1601 Wall Street
Fort Wayne, Indiana 46804

Mr. Gerald W. Lancour, Mgr. (First Class Mail)
Essex Group, Inc.
1601 Wall Street
Fort Wayne Indiana 46804

This 28th day of May, 1981.

John C. Roberts, Chairman
KOSH Review Commission

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
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FRANKFORT, KENTUCKY 40601
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John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

Carl J. Ruh
MEMBER

JOHN C. ROBERTS
MEMBER

March 9, 1981

KOSHRC #745

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

ESSEX GROUP, INCORPORATED — RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

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

Hon. Hugh M. Richards (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Hon. Robert J. Tscholl (Cert. Mail #0067065)
Labor Relations Attorney
Essex Group
1601 Wall Street
Fort Wayne, Indiana 46804

Mr. Gerald W. Lancour, Mgr. (Cert. Mail #0067065)
Essex Group, Inc.
1601 Wall Street
Fort Wayne, Indiana 46804

This 9th day of March, 1981.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION

KOSHRC #745

EUGENE F. LAND,
COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION

ESSEX GROUP, INC. — RESPONDENT

* * * * *

This matter arises out of one citation issued against Essex Group, Inc., hereinafter referred to as "Essex", by the Commissioner of Labor, hereinafter referred to as the "Commissioner", for violation of the Kentucky Occupational Safety and Health Act.

On March 10 and March 21, 1980, a Compliance Safety and Health Officer made an inspection of Essex's manufacturing plant in Georgetown, Kentucky. As a result of that inspection, the Commissioner issued one citation charging Essex with one non-serious violation of the Act, with a proposed penalty of $140.00 which was vacated because less than ten (10) alleged violations were cited as a result of the inspection. At said time and place, employees of Essex were engaged in the manufacture of electrical appliance cords.

The pertinent procedural information is as follows:

1. Inspection was conducted on or about March 10 and March 21, 1980, by the Commissioner at the facility of Essex located in Georgetown, Kentucky.

2. One (1) citation was issued on May 5, 1980, containing one (1) alleged non-serious violation, with a proposed penalty therefore in the amount of $140.00, which has been vacated.

3. Notice of Contest received on June 2, 1980.

4. Notice of Receipt of Contest was mailed on June 10, 1980, and Certification of Employer Form was received on June 13, 1980.

5. The Complaint was received on June 19, 1980, and Respondent's Answer was thereafter received on July 7, 1980.

6. Notice of Assignment to Hearing Officer and Notice of Hearing were mailed on July 25, 1980.

7. Hearing was conducted on October 15, 1980, at 1204 First National Building, Lexington, Kentucky.

8. Transcript of Testimony of Hearing was received by Hearing Officer on November 10, 1980. Respondent's Brief was received on December 14, 1980.

The above-mentioned hearing was held pursuant to KRS 388.071(4), which authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of the Act, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 388.081, the within hearing was authorized by the provisions of said chapter and same may be conducted by a Hearing Officer appointed by the Review Commission to serve in its

stead. The decisions of said Hearing Officer are subject to review by the Review Commission upon appeal timely filed by either party, or upon its own Motion, subsequent to which the Review Commission may sustain, modify or dismiss a citation or penalty.

The Standard alleged to have been violated, the description of the alleged violation under contest and the penalty proposed for same, is as follows:

29 CFR 1910.132(a) The 7 employees working with dialating fluid containing methyl ethyl ketone and toluene at the dialating line located at the rear of building #2 (department 42) were not provided with gloves impervious to these chemicals to protect their hands.

$140.00

The proposed penalty of $140.00 for this non-serious violation was vacated by the Commissioner because less than 10 alleged violations were cited as a result of the inspection.

Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law, and Recommended Order are hereby made.

FINDINGS OF FACT

29 CFR 1910.132(a), as adopted by 803 KAR 2:020, reads as follows:

> Protective equipment including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields and barriers shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of process or environment, chemical hazards, radiological hazards or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

On the days of the inspection, employees of Essex Group, Inc. were engaged in the manufacture of electrical appliance cords at the facility of Essex Group, Inc. located in Georgetown, Kentucky. The Health Compliance Officer, Kim Holder, is an Industrial Hygienist who presented her credentials and held an opening conference with Jeri Schneider, the Personnel Manager for Respondent. During the course of the inspection, the Compliance Officer observed 5 women working on the dialating line, which exposed the employees hands to solvents (TR p. 19 and 20). After determining that the solvents used were methyl ethyl ketone and toluene, the Compliance Officer determined that a potential hazard existed based on her knowledge and experience with solvents in the work place. (TR p. 25 and 26). It was noted that the manufacturer of the chemical, Ashland Chemical, recommends the use of personal protective equipment in the form of gloves and aprons. (TR p. 30). Two of the women employees complained that the solvent caused redness and cracking of the skin, a condition known as dermatitis.

The Compliance Officer further testified that the hazard, dermatitis, is not one to which everyone is susceptible. On an individual basis, some employees might develop the condition while others will not (TR p. 47 and 48). In her opinion, rubber gloves should be required of all employees to remove the potential hazard from the susceptible and nonsusceptible employees.

Jeri Schneider, Respondent's Personnel Manager, testified that she knew of no complaints from employees regarding the condition (TR p. 81). At any rate, she did have gloves and hand lotion available for employee use (TR p. 82).

Respondent presented expert testimony from Mr. Gerald W. Lancour, Manager of Industrial Hygiene and Safety for Respondent. Mr. Lancour testified that the solvents can indeed cause the condition for which the citation was issued. However, it was his position that the citation should not have been issued in that all employees should not be forced to wear gloves where only some employees will develop the condition.

CONCLUSIONS OF LAW

The Standard allegedly violated is a general protective Standard, there being no set Standards for dermatological hazards. Further, the application of the Standard is a matter of and subject to interpretation. Like all Standards, its purpose is to remove potential hazards from the work area.

It is Respondent's position that the Standard requires personal protective equipment only where necessary, and that the employer should not be forced to require all employees to wear gloves, but that gloves should be provided for those employees who have a reaction. It is Complainant's interpretation that all employees should be required to wear gloves except in those instances where the gloves themselves cause skin irritation.

In this particular situation, a determination of whether personal protective equipment in the form of gloves is necessary under the Standard, consideration must be given to the potential hazards involved. The potential hazard is an inflamation of the skin, which cannot be considered permanent or debilitating. Articles written by experts in the field were introduced which set forth that hand lotion and creams will in many instances solve the condition.

In this particular situation, based upon the nature of the potential hazard, the citation will be dismissed.

RECOMMENDED ORDER

NOW THEREFORE, IT IS HEREBY ORDERED, that the citation for a non-serious violation of 29 CFR 1910.132(a) is dismissed.

Thomas E Meng
Thomas E. Meng, Hearing Officer

DATED: March 9, 1981
Frankfort, Kentucky

DECISION NO. 986