



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 13, 1981

JOHN Y. BROWN, Jr.
GOVERNOR

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #749

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SIPPLE BRICK, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Timothy T. Green, issued under date of February 23, 1981, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

Summary of the Case

In late March 1980 the Respondent received a piece of equipment for the packaging department of its Stanton, Kentucky, facility. The brick packaging equipment was custom made and installed by E.A. Industries of Asheville, North Carolina. Two of the manufacturer's employees remained at the Respondent's plant to observe the operation of the equipment during the production cycle and to correct any problems.

The machine, basically a counting and grouping device moving bricks within the plant, is electronically controlled and hydraulically operated. Two control panels are provided and both have emergency stop buttons to de-energize the system.

During the automatic cycle the machine would continually blow fuses at a certain point in the operation. While awaiting the return of the manufacturer's personnel, employees of the Respondent continued to operate the machine, overriding the electronic system by manipulating the hydraulic valves with welding rods.

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On May 6, 1980, Phillip R. Nelson, plant manager, and Danny Martin, maintenance man, decided to go under the machine to try to locate a grounded wire or short causing the fuse blowouts. The head clear pusher was moved to its fully extended position by manipulation of the valves. A limit switch stopped the movement and the control panel and valves were not further touched. The emergency stop buttons were not depressed because the current would have been cut off, making it impossible to locate an electrical problem.

Nelson and Martin removed the covers of the limit switch and the junction box on the face of the head clear pusher to check the wiring inside. During the replacement of these covers Nelson was called to the telephone. While Martin was tightening the screws on the covers, the head clear pusher moved forward 6 to 8 inches beyond the limit switch, pinning his head between the junction box and a stationary axle and inflicting fatal injury.

The reported fatality prompted the investigation inspection by the Department of Labor. The citation issued subsequent to the inspection.

Decision of the Commission

There are two basic issues in this case--a procedural question posed by the Respondent and the fundamental question of whether the Complainant has established a general duty violation as charged.

The Respondent has objected to the presentation and relevancy of any evidence pertaining to anything occurring prior to May 7 and May 12, 1980, the inspection date. The basis for the objection is that the citation and complaint do not refer to the date of the fatal accident.

Citing Section 20(3)(b) of this Commission's Rules, the Respondent notes that the complaint shall set forth the jurisdiction, time, location, place and circumstances of each alleged violation. The only dates set forth are the inspection dates, hence the objection to evidence pertaining to the May 6, 1980, accident.

The Hearing Officer has overruled the objection and permitted testimony citing the informal nature of administrative pleadings. We affirm the ruling on this issue. The record reveals that the Respondent has been given fair and adequate notice of the charges and issues and has been afforded an opportunity to be heard. There is no evidence of prejudice in maintaining a defense on the merits.

As noted by the Hearing Officer, the substantive issue in this case is whether the Respondent has violated KRS 338.031(1)(a), the statutory general duty clause.

The general duty clause is something of a catch-all designed for those instances in which employees are exposed to serious hazards which are not specifically or fully covered by existing safety and health standards. While we recognize, as the Complainant urges, that the safety and health act is preventive and remedial in nature, the general duty clause is not designed to subject an employee to strict liability.

In order to sustain a violation under the clause, the hazard must be shown to be feasibly preventable and recognized. To be recognized, it must be established that a hazard is common knowledge in the employer's industry or within the particular employer's actual knowledge. This recognition requirement is the most distinctive element in any general duty clause case.

The Recommended Order vacates the alleged violation and penalty proposal. We agree with the disposition of the issue.

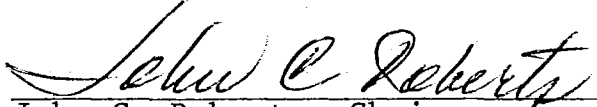
It is part of the Complainant's burden in this case to establish the recognized nature of the hazard involved. After review of the record below we conclude that the burden has not been met. Even if we were to assume that working under the equipment without totally de-energizing the system is a recognized hazard, the exposure and fatal injuries here occurred when the head clear pusher moved beyond its normal range.

Although a tragic and overwhelming event has occurred, we must agree with the Hearing Officer's dismissal of the alleged statutory violation.

ORDER

IT IS THE UNANIMOUS ORDER of this Commission that the Recommended Order vacating the alleged violation of KRS 338.031(1)(a) and the penalty proposed therefor is hereby AFFIRMED. All other findings and conclusions of the Hearing Officer not inconsistent with this decision are incorporated herein.

DATED: May 13, 1981
Frankfort, Ky.



John C. Roberts, Chairman

DECISION NO. 1003

s/Carl J. Ruh

Carl J. Ruh, Commissioner

s/Charles E. Braden

Charles E. Braden, Commissioner

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

Hon. Richard C. Stephenson (Cert. Mail #P27 9171708)
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507

Sipple Brick, Inc. (First Class Mail)
P. O. Box 567
Stanton, Kentucky 40380

This 13th day of May, 1981.


John C. Roberts, Chairman
KOSH Review Commission

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

REVIEW COMMISSION

Airport Bldg., Louisville Road

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

MERLE H. STANTON
CHAIRMAN

Carl J. Ruh
MEMBER

JOHN C. ROBERTS
MEMBER

February 23, 1981

KOSHRC # 749

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SIPPLE BRICK, INC.

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.

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

Hon. Richard C. Stephenson (Cert. Mail #0067066)
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507

Sipple Brick, Inc. (First Class Mail)
P. O. Box 567
Stanton, Kentucky 40380

This 23rd day of February, 1981.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION

KOSHRC #749

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

COMPLAINANT

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

SIPPLE BRICK, INC.

RESPONDENT

APPEARANCES:

Hon. Frederick G. Huggins
Deputy General Counsel
Department of Labor
801 West Jefferson Street
Louisville, KY 40202
Attorney for Complainant

Hon. Richard C. Stephenson
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, KY 40507
Attorney for Respondent

Hon. Timothy T. Green
Harbison, Kessinger, Lisle & Bush
400 Bank of Lexington Building
101 East Vine Street
Lexington, Kentucky 40507
Hearing Officer

* * * * *

As a result of an inspection that was made on May 7 and May 12, 1980, at a place of employment being a brick manufacturing plant on Highway 213 N, Stanton, Kentucky, at which employees of the Respondent company were employed, the Department of Labor issued a citation and made a recommended proposed penalty.

The citation and charges are as follows, together with the proposed abatement date and penalty. These will be as set forth in Paragraph 6 of the Complainant's Complaint

herein:

Violation of KRS 338.031(1)(a) in that the employer failed to furnish his employees working in the packaging department a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm to his employees in that employees were permitted to perform work under the tray of the "E. A. Industries" packaging machine without deactivating the power, exposing employees to a hazard of moving parts when the pusher malfunctioned.

The abatement date was set for May 27, 1980, and the penalty proposed was \$400.00.

Pursuant to Notice duly given, the above-styled matter was heard on Wednesday, September 24, 1980, at approximately 9:00 a.m., at the Meng & Green law offices, First National Building, 167 West Main Street, Lexington, Kentucky. The aforesaid hearing was held under the provisions of KRS 338.071 (4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearing. Under the provisions of KRS 338.081, the hearing was authorized by provisions of said Chapter as such may be conducted by the Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal the Review Commission may sustain, modify, or dismiss a citation or penalty.

The alleged violations were alleged to be serious, according to the Complainant. The pertinent procedural information is as follows:

1. An inspection of the premises at which the employees of the Respondent company were alleged to have been working was made on May 7 and 12, 1980. The Respondent was issued one (1) citation alleging a serious violation on or about May 22, 1980. On June 10, 1980, the Respondent filed a Notice of Contest, objecting to and contesting items referred to above.

2. Notice of Receipt Contest was mailed on June 17, 1980, and the employer's certification form was received on June 19, 1980.

3. The Complaint was received on June 26, 1980, and the Answer was received on June 11, 1980.

4. The case was assigned to a Hearing Officer on July 28, 1980, and was scheduled to be heard on August 26, 1980. The hearing was continued on motion of the Complainant and was heard on September 24, 1980.

5. Notice of Receipt of Transcript of the testimony of the hearing was mailed to the parties on November 14, 1980.

6. The Brief for the Complainant was received on January 5, 1981, and Brief for the Respondent was received on February 3, 1981, and Reply Brief of the Complainant was received on February 11, 1981.

DISCUSSION OF EVIDENCE

On May 7 and May 12, 1980, Jerome Scott Connelly, a Safety Compliance Officer for Kentucky Occupational Safety and Health, inspected the Respondent's business operation in Stanton, Kentucky pursuant to a fatality report. (TE 6) It

is undisputed that a brick packaging machine manufactured by E. A. Industries was malfunctioning on the morning of May 6, 1980. The machine apparently continued to blow a fuse at a certain point in the automatic operation of the equipment forcing the moving parts of the machine to stop completely. (TE 103-104, 107, 115) The manufacturer instructed Respondent to move the equipment past the point where the fuse blew by manually manipulating the hydraulic valve.

Prior to the arrival of the manufacturing personnel, Daniel Martin, maintenance person, and Philip Nelson, plant engineer, went under the machine to try to find an electrical short which was causing the fuse to blow. (TE 117) The head clear pusher which is a piston-like rod with fingers or dogs which slide the bricks from one end of a large tray to the other was first moved by the hydraulic override to its normally fully extended position whereas forward travel was normally stopped by a limit switch. (TE 118-119, 136) Once the head clear pusher was positioned, Eddie Back, the operator of the hydraulic valves, moved to a position 12 to 14 feet from the valves and neither he nor anyone else again approached the valves. (TE 137) The control panel operator, Roy Epperson, put the control selector handle which controls the head clear pusher into the "hand" position and never again touch the panel. (TE 138) The emergency stop buttons were not depressed. (TE 96, 117, 124)

Martin and Nelson checked the junction box on the face of the head clear pusher, took the cover off one of the

limit switches which controlled the movement of the dogs and were in the process of replacing this cover when Nelson was called to the telephone. (TE 120-121) At this time, Nelson and Martin were standing between the head clear pusher and the stationary axle. (TE 121) After Nelson left, Martin apparently tightened the screws on the limit switch and reached up with his right hand toward the limit switch which stops the forward motion of the head clear pusher. (TE 140-141) At that moment, the head clear pusher came forward an additional six to eight inches even though it had never previously moved forward of the limit switch position (TE 124, 142) and pinned Martin between the junction box on the face of the head clear pusher and the stationary axle, fatally injuring him. (TE 122, 141) These facts as set out in the Respondent's Brief are basically uncontroverted.

Both parties offered numerous exhibits including pictures and diagrams to enlighten the Hearing Officer and have argued their cases with spirited professionalism.

DISCUSSION OF CASE

The Respondent argued in his brief (Respondent's Brief 4-8) that proof concerning violations of KRS 338.031(1)(a) was not supported by appropriate pleading in the Complaint and should be excluded. Respondent further argued that no proof was made of any violations on May 7 or May 12 as had been pleaded in the Complaint.

In his Reply Brief the Complainant refers to National Realty and Construction Co. v. Occupational Safety and Health Review Commission, 489 F2d 1257, 1973-1974 OSHD Sec.

17, 018, quoting at length from the opinion. The Complainant's Reply Brief is to the point and stresses the rule which was summed up by Professor Davis:

The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. . .

K. Davis, Administrative Law Treatise, Sec. 804 at 523 (1958). See also Tashofvftc, 141 U.S.App.D.C. 274, 437 F2d 707 (1970).

Although the Respondent argues at great length concerning the appropriate pleading in the Complaint, the main and sole issue in the instant action is whether the Respondent, Sipple Brick, Inc., violated KRS 338.031(1)(a) and furnished to its employees employment and a place of employment which was free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees. By virtue of the Kentucky Revised Statutes, the Complainant must prove (1) that the employer failed to render a work place "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm".

Congress quite clearly did not intend the general duty clause to impose strict liability in that the word "duty" implies an obligation capable of achievement. See Restatement (Second) of Torts, Sec. 4 (1965). Congress' language is confident with its intent only where the "recognized" hazard in question can be totally eliminated from the work place.

Congress intended to require elimination only of preventable hazards. It follows, we think, that Congress did not intend others to be considered "recognized" under the clause. Though a generic form of hazardous conduct, such as equipment riding, may be "recognized", unpreventable instances of it are not, and thus the possibility of their occurrence at the work place is not inconsistent with the work place being "free" of recognized hazard. (National Realty, at 1266.)

This Hearing Officer readily distinguishes the facts in National Realty from the instant case. In National Realty the injured employee willfully and knowingly violated a safety regulation of the company. In the instant case, the employees were attempting to correct a malfunction in a heavy piece of equipment called a de hacker. The citation and Complaint charged the Respondent with failing to

furnish his employees working in the packaging department a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm to his employees in that employees were permitted to perform work under the tray of the "E. A. Industry" packaging machine without deactivating the power, exposing employees to a hazard of moving parts when the pusher malfunctioned.

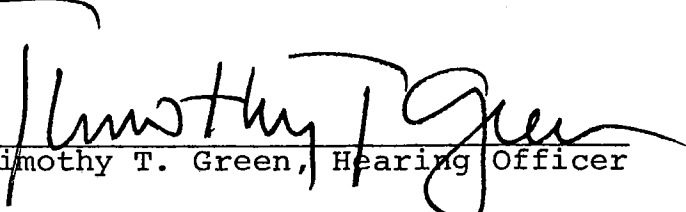
A recognized hazard is a condition that is known to be hazardous. It is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. To sum it up, whether or not a hazard is "recognized" is a matter for objective determination. It does not depend on whether the particular employer is aware of it. See 116 Cong. Rec. (part 28) 3877 (1970). There are no apparent distinguishing differences between the adoption of 338.031(1)(a) by the Kentucky Legislature and the adoption of the general duty

clause by the Congress of the United States. It is not contemplated by this Hearing Officer that strict liability should be imposed upon the Respondent herein by virtue of an employee being injured at the workplace by a malfunction of a machine. The de hacker moved outside of the normal sphere contemplated by anyone with any contact with the machine. Although working within movable parts, as alleged by the Complainant, might possibly be a recognized hazard, it is not the situation presented here. The control console was in the "hand mode", a position requiring two more deliberate actions to cause movement in the head clear pusher. It is uncontroverted that the head clear pusher had never previous to the accident not after the accident travelled forward of its normal stroke. (TE 59, 124, 142, 167-168).

Though the accident was overwhelming in consequence, this Hearing Officer can find no reason to believe that the Respondent, SIPPLE BRICK, INC., failed to furnish its employees with a place of employment free from recognized hazard.

RECOMMENDED ORDER

For the above stated reason it is hereby ordered that the citation for violation of KRS 338.031(1)(a) issued on May 22, 1980 to the Respondent, SIPPLE BRICK, INC., is hereby vacated.


Timothy T. Green, Hearing Officer

DATED: February 23, 1981
Frankfort, Kentucky

DECISION NO. 978