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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

**REVIEW COMMISSION**

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 8, 1981

JOHN Y. BROWN, Jr.  
GOVERNOR

JOHN C. ROBERTS  
CHAIRMAN

CARL J. RUH  
MEMBER

CHARLES E. BRADEN  
MEMBER

KOSHRC #760

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CLOPAY CORPORATION

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Thomas E. Meng, issued under date of March 9, 1981, is before this Commission for review pursuant to an Order of Direction for Review issued on April 7, 1981.

Although this case generated an extensive record, there are few significant legal issues posed. The protracted proceeding below is a function of the number of witnesses called to testify to the factual circumstances surrounding the alleged violations.

The case has been called by this Commission for consideration of several of the findings, conclusions and recommendations rendered by Hearing Officer Meng..

Decision of the Commission

Citation One, Item 5, alleges nonserious violations of 1910.22(a) (as adopted by 803 KAR 2:020) at several locations within the Respondent's facility. Item 5(a) involved the area of a rest room on the north side of the maintenance shop.

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Hearing Officer Meng finds that the rest room comes within the scope of the cited standard and a violation is sustained. We disagree with the disposition of the sub item.

The record establishes that the area is maintained at the beginning and at the end of the first shift, and we find that this practice satisfies the standard for that particular shift.

Citation Two, Item 1, alleges various violations of the National Electrical Code Article 110-17(a) as adopted by 1910.309(a) (as adopted by 803 KAR 2:020).

A receptacle with a damaged face plate, allegedly exposing employees to accidental contact with live parts, was cited as sub item (b). The Recommended Order sustains a violation.

According to the Respondent's witness, the receptacle could not be found several days after the inspection because it had been removed along with machinery in the area. The testimony further establishes that current to the area was disconnected approximately one week prior to the inspection. In consideration of the evidence, we reverse the Hearing Officer and dismiss the sub item.

Citation Two, Item 1(f), is affirmed in the Recommended Order. After review of the record and resolving doubts in favor of the Respondent, we conclude that the Complainant has not met its burden of proof regarding this sub item and it must therefore be dismissed.

Item 1(g) of Citation Two has also been affirmed below. After consideration of the Complainant's proof regarding this instance and the Respondent's explanation, we again conclude that the Complainant has failed to meet its burden and a dismissal is appropriate.

Citation Two, Item 3(a), alleges a serious violation of 1910.176(b) (as adopted by 803 KAR 2:020) which is dismissed by the Hearing Officer for the reasons set forth in the Recommended Order. While we agree with the dismissal, the failure to assess any penalty for Item 3 is inappropriate in light of the violation set forth in sub part (b) which has become final and enforceable by failure to contest.

#### Order

IT IS THE UNANIMOUS ORDER of this Commission that:

CITATION ONE, Item 5(a), is DISMISSED,

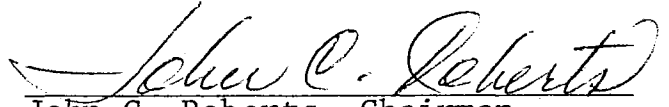
CITATION TWO, Item 1(b) is DISMISSED,

CITATION TWO, Item 1(f) is DISMISSED,

CITATION TWO, Item 1(g) is DISMISSED.

IT IS FURTHER ORDERED that the penalty for Citation Two, Item 1, is reduced to \$50. The penalty for CITATION TWO, Item 2 is reduced to \$250. A penalty of \$300 is imposed for CITATION TWO, Item 3.

All other findings of the Hearing Officer not inconsistent with this opinion are incorporated herein.

  
John C. Roberts, Chairman

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

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

DATED: May 8, 1981  
Frankfort, Kentucky

DECISION NO. 997

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

Hon. Edward J. Rudd (Cert. Mail #P27 9171699)  
P. O. Box 25  
Brooksville, Kentucky 41004

Mr. James R. Rawlings (First Class Mail)  
Clipay Corporation  
4th at Hamilton Avenue  
Augusta, Kentucky 41002

This 8th day of May, 1981.



John C. Roberts, Chairman  
KOSH Review Commission

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

Airport Bldg., Louisville Rd.  
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 9, 1981

John Y. Brown, Jr.

GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

Carl J. Ruh  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC # 760

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CLOPAY CORPORATION

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:

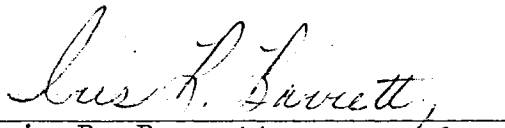
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Hon. Kenneth J. Costelle (Messenger Service)  
Assistant Counsel  
Department of Labor  
U. S. 127 South  
Frankfort, Kentucky 40601

Hon. Edward J. Rudd (Cert. Mail #0067064)  
P. O. Box 25  
Brooksville, Kentucky 41004

Mr. James R. Rawlings (First Class Mail)  
Clipay Corporation  
4th at Hamilton Avenue  
Augusta, Kentucky 41002

This 9th day of March, 1981.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY & HEALTH  
REVIEW COMMISSION

KOSHRC #760

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

COMPLAINANT

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

CLOPAY CORPORATION

RESPONDENT

\* \* \* \* \*

This matter arises out of two citations issued against CLOPAY CORPORATION, hereinafter referred to as "Clopay" by the Commissioner of Labor, hereinafter referred to as the "Commissioner", for violations of the Kentucky Occupational Safety & Health Act, hereinafter referred to as the "Act".

On May 13, 1980 and May 14, 1980, a Compliance Safety and Health Officer made an inspection of Clopay's Plastic Product Division in Augusta, Kentucky. As a result of that inspection, the Commissioner issued two citations on June 4, 1980, charging Clopay with 21 non-serious violations of the Act and 4 serious violations of the Act, and proposing a penalty therefore of \$2,250.00.

On June 25, 1980, Clopay sent a notice to the Commissioner contesting certain items of the citations. On June 26, 1980, Clopay filed a corrected copy of its Notice of Contest setting forth additional items of the citations. Notice of the contest was transmitted to this Review Commission on July 1, 1980, and notice of receipt of the contest was sent

by this Review Commission to the parties on July 2, 1980. Thereafter, on July 16, 1980, a Complaint was filed by the Commissioner. On August 6, 1980, this matter was assigned to a Hearing Officer and scheduled for hearing to be held on September 8, 1980.

The hearing was held in Covington, Kentucky on September 8, 1980, pursuant to KRS 378.070(4). This section of the statute authorizes this Review Commission to rule on appeals from citations, notifications, and variances to the Act, and to adopt and promulgate rules and regulations concerning the conduct of those hearings. KRS 378.081 further authorizes this Review Commission to appoint hearing officers to conduct its hearings and represent it in this matter. The decisions of the Hearing Officers are subject to discretionary review by the Review Commission on appeal timely filed by either party, or upon its own motion.

The Standards allegedly violated and under contest, the description of the alleged violations, and the penalty proposed for same are as follows:

National Electrical Code Article 400-4(1) as adopted by 29 CFR 1910.309(a)

(A) 1 Flexible cords were being used as substitute for fixed wiring of the structure at following:

(A) 2 (1) Three (3) flexible cords (220-V), on west side, bottom level of building #12, were being used to energize heating elements on extruder machine #19.

(2) Flexible cord (110-V), on south side building C, was being used to energize hopper #18.



29 CFR 1910.22(a) (2)

(B) Floors of work areas were not maintained in a clean and so far as possible, in a dry condition at the following:

(1) Area of rest room, on north side of maintenance shop.

(2) Area of oil storage area in building #11 and the bottom level of building #12.

(3) Area of "Joy" pump, on east side of building #11.

(4) Area of "Joy" pump at extruder machine #12, east side of building #10.

29 CFR 1910.178(g) (1)

(C) Battery charging installations for powered industrial trucks, in the maintenance shop, were not located in an area designated for that purpose.

National Electrical  
Code Article 110-17(a)  
as adopted by 29 CFR  
1910.309(a)

(D) Live parts of the following equipment operating at fifty (50) volts or more, were not guarded against accidental contact by approved cabinets or other forms of approved enclosures:

(1) Breaker box (220 volts), on west wall of Building C, approximately five (5) feet in height, had two (2) breakers missing, exposing live parts.

(2) Receptacle (220 volts), on a metal support on south side, bottom level of Building #11, approximately four (4) feet in height, had exposed live parts.

(3) Extruder machine #19, west side, bottom level of Building #12, had exposed live terminals (220 volts) on the heater head, that were approximately four and one-half (4 1/2) feet in height.

(4) Poly-mixer #60, north side, top floor of Building B, had exposed live parts (110 volts) of the wiring to the heating element that were approximately five (5) feet in height.

(5) Breaker box (440 volts), on east wall in polyolefin department of Building #10, had two (2) missing breakers exposing live parts, that were approximately five (5) feet in height.

(6) "Lepel" (220 volts), "high frequency power" portable machine, in the polyolefin dept. of Building #10, had exposed live conductor, approximately thirty-six (36) inches in height, where the cable plugged into extruder machine #28.

\$630.00

29 CFR 1910.132(a)

(E) Employees did not use or were not provided with personal protective equipment for eyes, face and extremities, where it was necessary by reason of hazard of being exposed to acid and corrosives at following:

(1) Employees exposed to acid, in maintenance shop; battery charging.

(2) Employee exposed to corrosive "red lime" in the oil storage area Building #11.

(3) Employee exposed to acid, on west side of Building #13; battery charging.

(4) Employee exposed to acid, on southeast side 2nd floor Building B; battery charging.

\$450.00

29 CFR 1910.176(b)

(F) Storage of material created hazard in that they were not stacked, blocked, interlocked and limited in height so that they were stable and secure against sliding or collapsing at the following:

(1) Two (2) pallet of corrugated material, stored on bend section #10 of warehouse Building #13, weighing approximately two hundred fifty (250) pounds per pallet, at approximate height of twenty-four (24) feet, were not secured.

\$720.00

At the hearing, the Commissioner moved to amend the complaint to delete Items A(1) and A(2), which were two non-serious violations and set forth above as alleged violations of 29 CFR 1910.309(a). This motion was sustained and same are hereby dismissed.

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

Clopay is an industrial plant that manufactures plastic material through the process of extrusion, the finished product being different items of plastic.

During the course of his inspection, the Compliance Officer made one inspection of the restroom on the north side of the maintenance shop. At that particular time, dry cuds of tobacco were laying in the commode area, the commode was filthy, and the floor was dirty. (Transcript of Hearing [hereinafter TR], page 11.) The inspection was conducted at approximately 11:30 a.m., which would have been shortly prior to the lunch break. (TR page 71) Testimony for the Respondent indicates the area is maintained two times during the first shift (TR page 91 and 93). The restroom receives the greatest use during the first shift, and is cleaned at the beginning of the shift and at the end of the shift (TR page 91). The restroom is used during breaks and before and after the lunch period. Respondent's employee, Fred Reynolds, testified he has been in the restroom around 11:00 or 11:30,

and its condition is as depicted by the Compliance Officer (TR page 91).

The Compliance Officer found a thin oil film in the area of oil storage in Building No. 11 and the bottom level of Building No. 12, causing the floor to be slick. The Respondent explains the situation by introducing testimony that the unusual circumstance of shutting down portions of the plant and dismantling machinery worsened conditions such as oil on the floor. In fact, Mr. Reynolds stated "our housekeeping was deplorable." However, the area was maintained by sweeping with floor dry at least every other day. (TR 94 and 95) No testimony was introduced controverting the Compliance Officer's findings with regard to the condition of the area or hazard created, nor was any evidence presented that maintenance has been stepped up as a result of the unusual changeover circumstances, and this citation must therefore be sustained.

The Respondent was issued two citations for slippery conditions around the "joy" pumps in Buildings 10 and 11. The pumps are used for cleaning machinery, and the process itself leaks water and joy on the floor. Respondent introduced testimony, through James R. Rawlings, that the area was indeed wet, but that floor dry had been spread over it (TR page 98). At the time of inspection, the floor dry which had been spread on the floor had not as of yet been swept up (TR page 100). The area affected was approximately 2' x 2'

(TR page 101). The record indicates that spreading floor dry is the correct method of removing the hazard and that it takes some amount of time for the wetness to be absorbed. It appearing that Respondent was applying proper procedures to correct the problem, that the inspection was made at an intervening time before the area was swept, these citations will be dismissed.

At the time of inspection, there was a small portable battery charger in the maintenance shop. Although it was not energized at the time, an employee, Mr. Jones, indicated to the Compliance Officer that it was used for jumping industrial truck batteries at different locations. There was no designated area in the basement for the usage of a battery charge unit. (TR page 14) The Compliance Officer had no occasion to observe the charging unit in actual use, and the employee, Mr. Jones, testified at the hearing that he originally misunderstood the Compliance Officer's question, that the charging unit was broken and was in the shop for repair, that it was not capable of being repaired, and that it had never to his knowledge been used in an area not designated for that purpose (TR 102-106). This citation, set forth as item (C) of the Complaint, should therefore be dismissed.

Respondent, Clopay, was cited for seven different violations of 29 CFR 1910.309(a). Six of these citations were contested in Respondent's Notice of Contest.

~~Mr. Jones, the Compliance Officer, found two breakers~~ missing inside a breaker box on the west wall of Building C. Although he made no independent confirmation, he stated "live" parts were exposed. On the contrary, Arnold Welte, an electrician in Respondent's maintenance department, testified the switches in controversy were not in use, did not have live wires, and that a person could not receive a shock as a result (TR 110-111). Based on this testimony and the failure of the Commissioner to present evidence that the wires were in fact live, this cited violation set out as item (D) (1) on the Complaint should be dismissed.

Respondent was cited for having a 220 volt receptacle in Building No. 11 with exposed live parts. In his opinion, the Compliance Officer stated that the receptacle appeared to have been damaged by either a punching or a push force, which had broken and separated the plastic causing a minimum exposure to live parts. Charles Reese, Respondent's employee, testified that he could not find the receptacle at the time of his investigation approximately three days after the inspection. Apparently, the receptacle had been removed during the dismantling of machinery, but the receptacle did contain electric current prior to the dismantling (TR page 122-123).

With regard to the exposed live terminals on the heater heads of Extruder Machine No. 19, it appeared from the testimony that the machine was not in use or energized at the time of inspection, and further, it had not been in use for some three to six months prior to the date of the

inspection (TR page 133 and 134). No evidence was presented that live terminals were exposed when the machine had been in use. Mr. Rawlings testified that he did not know whether the terminals were exposed during the time the machine was in use. (TR p. 135) It being apparent that the terminal covers could have been removed during the long period since the machine had been in use, this citation should be dismissed.

The testimony of Respondent's employee, Arnold Welte, was in direct conflict to that of Mr. Jones, the Compliance Officer with regard to the exposed parts of the Poly-mixer #60. On the same day of and subsequent to the inspection, Mr. Welte examined the cord and found that the rubberized Greenfield that the wires go through had slipped out of the connector, exposing two insulated wires. No tests were made to determine whether the wires were capable of giving a shock, the citation being based upon a visual inspection only. The Complainant having the burden of proof, this matter must be resolved in Respondent's favor.

Respondent was cited for two missing breakers in a breaker box on the east wall of Building No. 10, exposing live parts. Approximately one week after the inspection, Respondent's employee, Charles Reese, attempted to locate the box for repair (TR page 149). He was unable to locate any breaker boxes on the east wall of the building, but did locate a heat controller box which is similar in appearance. There are four breaker boxes located on the north or west

wall of this building (TR 149 and 150). Not being able to locate the particular box, Mr. Reese consulted Mr. Rawlings, another employee, who accompanied the Compliance Officer on the inspection and who also did not know which breaker box resulted in the citation (TR page 148). There having been a substantial lapse of time between the inspection and the date of Respondent's follow-up inspection, and there being no testimony in the record by Mr. Rawlings, controverting the Compliance Officer's testimony that two breakers were missing on the date of inspection exposing live parts, this citation must be affirmed.

The Compliance Officer found approximately three quarters to an inch of live parts exposed on the energizing cable plugged into Extruder Machine No. 28. The Compliance Officer testified on direct examination (TR page 31) and on cross examination (TR page 78) that insulation was torn away and bare wire was exposed. Respondent's employee, Mr. Welte, merely found a piece of masking tape around the cord, used to prevent damage to the cord. Upon removal of the tape and inspection of the cord, he found the cord to be in perfect condition (TR page 142). It is impossible to reconcile the testimony of the two witnesses, assuming they examined the same cord. Mr. Rawlings, who accompanied the Compliance Officer during at least some portion of the inspection (TR page 98) gave no testimony concerning the particular cord and its condition, assuming he was with the Compliance Officer during this portion of the inspection. Naturally, the testimony of an employee who accompanied the Compliance



Officer and observed what should be an obvious condition of the particular cord would be given great weight. From the record, it must be concluded that either the Compliance Officer's testimony was a total fabrication, or Respondent's employee mistakenly examined a different cord. Based upon the testimony of the Compliance Officer, this citation will therefore be affirmed.

Respondent was cited for four alleged violations relative to provision and use of protective equipment. 29 CFR 1910.132(a) provides as follows:

Protective equipment, including personal and protective equipment for eyes, face, heads, and extremities, protective clothing, respirator 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, by processes or environment, chemical 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.

The first related to employees exposed to acid explosion during battery charging in the maintenance shop. The citation relative to the use of the battery charger in the maintenance shop having heretofore been dismissed, this citation, as set forth as item (E) (1) of the Complaint, must also be dismissed.

The second citation concerning the use of protective equipment arises from employee exposure to corrosive "red lime" in the oil storage area in Building 11. After determining that personal protective equipment was required, the Compliance Officer interviewed one or more employees who informed him that no protective equipment was used during the procedure

(TR page 34 and 79). Respondent's employee, Fred Reynolds, testified that such protection equipment was furnished and available, that most of the employees had their own individual equipment, and that to his knowledge all of the employees used the protective equipment (TR page 152 and 156). The Compliance Officer did not see any employee using the red lime without protective equipment, and could not recall the name of the employee who informed him that protective equipment was not always used (TR page 79). The citation will not be dismissed because the Compliance Officer's testimony was hearsay, but because it was hearsay testimony of a completely unknown employee. Respondent, having no way of offering evidence that such unknown employee was not in a position to have knowledge of the facts, offered testimony to rebut the statements of the unknown employee and show that protective equipment was used. This citation, as set forth in item (E) (2) of the Complaint, will therefore be dismissed.

Respondent was issued two citations concerning the use of additional protective equipment during battery charging by employees. The hazard cited was a possible explosion during the hook up and disconnecting of the battery. The compliance officer found, through observation and talking to employees, that no protective equipment was being used. Complainant's Exhibit 3 is a photo showing an employee raising or lowering a battery either before or after putting it on charge. No protective equipment was being used (TR Page 37 and 38). Respondent's witness, Fred Reynolds,

testified the battery might explode if shorted out or if something were laid across both posts. (TR. Page 155) He further testified that there is a possibility of an employee getting acid spilled on him when distilled water is added to the battery (TR 159). In its brief, Respondent contends that protective equipment is not necessary. This, apparently, because the employee would have to walk away from the battery, plug the battery cord into the charger cord, and then turn the charger on. No testimony was introduced as to whether the employee would be a sufficient distance away so as not to be affected by an exploding battery. Also, this argument does not consider any other employees who might be in the immediate area. It is, therefore, found that the hazard as cited exists, that personal protective equipment was not always used by affected employees and the citations set forth as items (E)3 and (E)4 of the Complaint, are, therefore, sustained.

The last contested citation involved two 250 pallets stored approximately 24 feet in height which were unsecured. This citation was issued because of the way the pallets protruded over the rack on which they were stacked, the rack itself apparently having sufficient strength to hold the pallets (TR. Page 44 and 84). 29 CFR 1910.176(b) provides as follows:

Storage of material shall not create a hazard. Bags, containers, bundles, and so forth, stored in tiers shall be stacked, blocked, interlocked, and limited in height, so that they are stable and secure against sliding or collapse.

Complainant's Exhibit 4 and 5 were introduced to depict the protruding pallets. Forklifts were used to transport and store the pallets, and the compliance officer stated that a bumping by the forklifts could cause the pallets to fall and thereby injure an employee in the area (TR Page 41).

Respondent's employee, Lawrence Bonar, testified that the protruding pallets would still have 40 inches sitting on the rack itself and there would be no possibility of falling (TR Page 166, 167). A close examination of Complainant's Exhibit 4 and 5 reveal the pallets are protruding, although there does not appear to be sufficient protrusion to create the possibility of the pallets falling off the rack into the aisle. This citation will, therefore, be dismissed.

In proposing the penalty for the violation, the Compliance Officer followed elaborate guidelines established by the Commissioner. Under the guidelines, the Compliance Officer first determines the gravity of the violation in terms of the probability of injury or illness which may result from it. Factors taken into consideration are the number of employees exposed, the frequency and duration of exposure, the proximity of employees to the point of danger, the speed of an operation and the resulting stress upon the employees, and any other factor which the Compliance Officer believes may significantly affect the probability of accidents. Each factor is measured on a scale of 1 to 8 and the average of all these factors is taken. This average is referred to as the "probability quotient".

For serious violations, the severity of the injury or illness is also taken into consideration. A value of 1 to 8 is also assigned for severity. The value assigned is based upon the type of treatment which would be required if an employee was injured as a result of the violation. Where the injury would only require a doctor's treatment, a value of 1 or 2 is assigned. Where hospitalization could result, a value of 3 to 6 is assigned. Where chronic illness or injury, permanent disability or death could result, a value of 7 or 8 is assigned. This value referred to as the "Severity Quotient", is averaged with the "Probability Quotient". The result, called the "Probability-Severity Quotient", is converted into a "Gravity Based Penalty" according to a table adopted by the Commissioner.

The Gravity Based Penalty can be adjusted downward as much as 80%, depending upon the employer's "good faith", "size of business" and "history". Up to a 40% reduction may be permitted for size, up to 30% for good faith, and up to 10% for history.

For the citations herein involved, there was a separate computation of the Probability and Severity Quotients for each Standard violated, irrespective of the number of cited violations of each Standard.

With regard to item 1 of Citation No. 2, set forth as item (D) of the Complaint, a Probability-Severity Quotient of 5 was obtained, which, according to the table, was converted into a Gravity Based Penalty of \$700.00.

The Gravity Based Penalty was then reduced by the Penalty Adjustment Factors of good faith, history, and size. Because the company had been inspected on prior occasions and cited for other violations, it was allowed 10% for good faith, but nothing for history. Also, because it had in excess of 100 employees, the penalty adjustment factor for size was zero. The total adjustment factor was therefore 10%, which reduced the \$700.00 Gravity Based Penalty to the proposed penalty of \$630.00. Respondent stipulated the method of calculation with regard to item (E) of the Complaint in the amount of \$450.00 and item (F) of the Complaint in the amount of \$720.00.

#### CONCLUSIONS OF LAW

29 CFR 1910.22(a)(2) provides:

The floor of every work room shall be maintained in a clean and so far as possible, dry condition. Where wet procedures are used, draining shall be maintained and false floors, platforms, mats or other dry standing places, shall be provided where practical.

In its brief, Respondent contends that this Standard applies only to work rooms, and has no application to rest rooms. In that rest rooms are required to be provided, and are used by employees before, during and after the work shift, it is hereby held that a rest room comes within the scope of this Standard. As previously noted, Respondent's own employee, Fred Reynolds gave testimony that the rest room was in the condition as cited. Thus, item (B)(1) of the Complaint should be sustained.

Based upon the Findings previously made herein, the second citation alleging a violation of this Standard, set out as item (B)(2) of the Complaint, is also sustained. However, it appearing that Respondent was employing all reasonable procedures, especially considering the conditions and circumstances of the equipment dismantling, the third and fourth citations alleging a violation of this Standard, set out as items (B)(3) and (B)(4) of the Complaint, are dismissed as heretofore noted. There was no proposed penalty in connection with the citations regarding this Standard.

The citation alleging a violation of 29 CFR 1910.178(g)(1), item (C) of the Complaint, as heretofore noted, is also dismissed.

Item 1 of Citation No. 2 alleges seven different violations of 29 CFR 1910.309(a), which provides:

Except as elsewhere required or permitted by this code, live parts of electrical equipment operating at 50 volts or more, shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures or any of the following  
. . . .

Of the seven different cited violations, six were contested in Respondent's Notice of Contest. Based upon the Findings previously set forth herein, item 1(a) of Citation No. 2, set forth as item (D)(1) of the Complaint, is hereby dismissed.

~~With regard to item 1(B) of Citation No. 2, set forth~~  
as item (D) (2) of the Complaint, Respondent objects in that  
the Compliance Officer did not personally observe the violation.  
Respondent makes the same objection with regard to numerous  
citations. In contrast to normal court proceedings, it is  
and should be the practice of allowing certain hearsay  
testimony into evidence. Frequently, a Compliance Officer  
will not personally witness a violation, but will necessarily  
investigate and rely on what employees tell him. The  
admission of such hearsay testimony was approved in B&K  
Paving Co., 1974-1975 OSHD ¶18,570 and General Electric Co.,  
1976-1977 OSHD ¶21,297. It must be concluded from the  
evidence that this receptacle contained electricity prior to  
the inspection, and the citation is therefore sustained.

Item 1(C) of Citation No. 2, set forth as item (D) (3)  
of the Complaint, for the reasons previously noted, is  
hereby dismissed.

Item 1(D) of Citation No. 2, set forth as item (D) (4)  
of the Complaint, based upon the evidence presented, is also  
hereby dismissed.

Item 1(E) of Citation No. 2, was not contested in  
Respondent's Notice of Contest, was not set forth in the  
Complaint, and, based upon the previous order entered herein,  
this citation is a final order of the Commission. It should  
be noted that Items 3(B) and 4 of Citation No. 2 were likewise  
not contested in Respondent's Notice of Contest and, pursuant  
to said previous Order, are final orders.



Items 1(F) and (G) of Citation No. 2, set forth as items (D) (5) and (D) (6), based upon the Findings of Fact herein, are hereby affirmed.

Item 2(a) of Citation No. 2, set forth in item (E) (1) of the Complaint, must be dismissed based upon the previous finding that battery charging did not take place in the maintenance shop.

Item 2(B) of Citation No. 2, set forth as item (E) (2) of the Complaint, must also be dismissed. While it has been previously made clear that hearsay testimony will be admissible, it is an altogether different situation to put Respondent in the position of refuting the testimony of a completely unknown person.

Items 2(C) and 2(D) of Citation No. 2, set forth as items (E) (3) and (E) (4) of the Complaint, involved the same violation occurring at two different places. As previously held in the Findings of Fact herein, both of said citations are sustained.

Based upon the Findings of Fact set forth herein, item (F) of the Complaint, is also hereby dismissed.

As to the appropriateness of the proposed penalties for the 2 serious violations, totaling \$1,080.00, it is the opinion of this Hearing Officer that equitable adjustments are in order. In that certain of the items of violations pertaining to the Standards were dismissed, the proposed penalty will be reduced. It should be noted that while item (F) of the Complaint was dismissed, and no penalty

therefore will be set forth in the Recommended Order, Respondent failed to contest the other cited violation of the Standard, which became a final order of the Commission.

RECOMMENDED ORDER

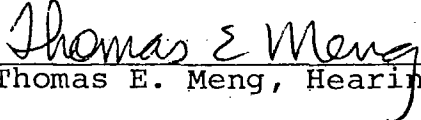
NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the citations alleging non-serious violations of 29 CFR 1910.22(a)(2), as set forth as items (B)(1) and (B)(2) of the Complaint, are hereby sustained.

2. That the proposed penalty for a grouped serious violation of 29 CFR 1910.309 (a) in the amount of \$630.00 is hereby reduced to \$450.00.

3. That the proposed penalty for a grouped serious violation of 29 CFR 1910.132(a) in the amount of \$450.00 is hereby reduced to \$350.00.

4. That the total penalty therefore in the amount of \$800.00 be paid without delay, but in no event later than 30 days from the date of this Recommended Order.

  
Thomas E. Meng, Hearing Officer

DATED: March 9, 1981  
Frankfort, Kentucky

DECISION NO. 985