



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 9, 1982

JOHN Y. BROWN, Jr.
GOVERNOR

CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #777

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

J. A. JONES CONSTRUCTION COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before RUH and BRADEN, Commissioners.

A Recommended Order of Hearing Officer Charles A. Goodman III, issued under date of March 22, 1982, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Summary of the Case

The Respondent in this action was cited for an alleged violation of the reporting requirements of 803 KAR 2:180 Section 7. The citation charges that the Respondent failed to report a fatal employment accident to the Kentucky Department of Labor within forty-eight (48) hours after occurrence.

During the course of the proceeding below three basic issues were raised as defenses by the Respondent: 1) The search warrant authorizing inspection by the Complainant is unlawful and invalid and any evidence obtained pursuant thereto must be suppressed. 2) The record fails to clearly establish that a fatal employment accident occurred. 3) The Respondent is excluded from coverage of the cited standard.

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The Hearing Officer (R.O., p. 6) finds that the search warrant was indeed issued in contravention of KRS 338.101(2) therefore all evidence obtained as a result of the inspection conducted must be suppressed. The ruling on this issue, according to the Hearing Officer, is pursuant to the authority and precedent of the Review Commission in The Cincinnati, New Orleans & Texas Pacific Railway Company, KOSHRC Nos. 542 and 544 (1979).

Despite the ruling on the search warrant issue, the Hearing Officer further finds (R.O., p. 8-9) that valid and competent evidence introduced in the record establishes the occurrence of a fatal employment accident which was not reported to the Kentucky Department of Labor. The order below sustains the citation and penalty as charged based upon the preceding findings of fact and the finding and conclusion of law that the reporting requirement set forth in 803 KAR 2:180 Section 7 is applicable to the Respondent. (R.O., P. 4-6, 10).

The Respondent filed a timely petition for review challenging the finding of an employment accident in which the employee of J. A. Jones was fatally injured and also challenging the conclusion that the Respondent is covered by and violated the provisions of 803 KAR 2:180 Section 7.

Decision of the Commission

We will not expend much time or effort to address the issue of whether the occurrence of a fatal employment accident involving a Jones employee has been established in the record of this case. The safety director at the Respondent's worksite, Mr. Stanley Whitworth, testified that there was an accident involving an employee of J. A. Jones (TR, 32). The witness further stated that he was on the job site and was one of the witnesses to the fatality involving Martin Duane Thomas. Complainant's Exhibit #2, a copy of a report by the Muhlenberg County coroner, was introduced in the record without objection (TR, 14). The report states that Martin Duane Thomas died at the TVA power plant from multiple internal injuries resulting from a fall from a seventy-one foot (71') elevation. The report further lists the victim as an employee of the Respondent company and describes the accident as occurring during installation of cable around a stairway landing. The totality of evidence clearly establishes the occurrence of a fatal employment accident involving an employee of the Respondent. The witness for the Respondent further acknowledged that the accident was not reported to the Kentucky Department of Labor because the company felt that the Department lacked jurisdiction over the employer and employees on the project. (TR, 32.)

The issue of coverage of the cited standard is the only real question presented by this case. After review of the facts presented as well as the relevant legal authorities, we find that the Hearing Officer's conclusion, that the standard extends to Jones, is correct.

Respondent claims it is exempt from the reporting requirements of the cited standard by the scope regulation, 803 KAR 2:050 Section 1(2), (and by implication, KRS 338.021 (1)(b)). The aforementioned standard exempts from coverage: "Employers, employees, and places of employment over which federal agencies other than the United States Department of Labor exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

The exemption claim is further based upon the fact that the Respondent is a contractor with TVA at the Paradise Steam Plant, and as a federal agency TVA is subject to the provisions of 29 CFR 1960. Pursuant to 29 CFR 1960.8, the TVA must report employment accidents involving both federal and non-federal employees which result in a fatality or hospitalization of five or more employees. The Respondent further notes that their contract specification (RX4, p. 15) requires that every accident be reported to TVA's manager of engineering.

Like the Hearing Officer, we are not persuaded by the Respondent's claim of exemption in this instance. The scope regulation, 803 KAR 2:050 Section 1(2), and the parallel statutory provisions are intended to relieve employers from multiple legal obligations and duties created by overlapping coverage and jurisdiction for job safety and health. As noted by the Hearing Officer, 29 CFR 1960 places various responsibilities on federal agencies--such as the TVA--but does not burden an employer such as J.A. Jones (see 29 CFR 1960.1(f)). We note in passing that it is questionable whether 29 CFR 1960.8(a) could require TVA to report a fatal employment accident involving only a non-federal employee.

Jones is required to report under the cited Kentucky OSH standard, 803 KAR 2:180 Section 7, and any additional reporting is required pursuant to contract with the TVA rather than by exercise of statutory authority or regulations for workplace safety and health. We have consistently held that an employer cannot avoid its OSH duties and responsibilities by contract provision and we now reaffirm that position.

Although the Respondent in this action may have acted in good faith, it has failed to meet its responsibility as set forth in the cited standard, and we agree with the Hearing Officer's disposition of the matter.

ORDER

IT IS HEREBY ORDERED that the Hearing Officer's decision, affirming a violation of 803 KAR 2:180 Section 7, and a penalty of one hundred dollars (\$100), is SUSTAINED.



Carl J. Ruh
Commissioner

s/Charles E. Braden
Charles E. Braden
Commissioner

DATED: August 6, 1982
Frankfort, KY

DECISION NO. 1156

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

Commissioner of Labor
Commonwealth of Kentucky
Department of Labor
U. S. 127 South
Frankfort, KY 40601

(Messenger Mail)

Hon. Hugh M. Richards
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, KY 40601

(Messenger Mail)

Mr. James C. Watson
Loss Control Supervisor
J. A. Jones Construction Co.
One South Executive Park
P. O. Box 31066
Charlotte, NC 28231

(Cert. Mail #230 414 824)

J. A. Jones Construction Co.
P. O. Box 1
Drakesboro, KY 42337

(First Class Mail)

This 9th day of August, 1982.


Kenneth Lee Collova
Executive Director

NW
4-16-82
5-1-82



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 22, 1982

JOHN Y. BROWN, Jr.
GOVERNOR

Signature
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC # 777

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

J. A. JONES CONSTRUCTION COMPANY

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 submit a petition for discretionary review by this Commission. The petition must be received by the Commission in its offices in Frankfort on or before the 25th day following the date of this notice. 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 parties:

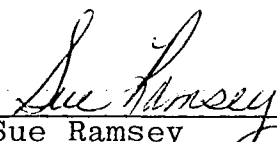
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. James C. Watson, C.S.P. (Cert. Mail #P209 357 627)
J. A. Jones Construction Co.
One South Executive Park
P. O. Box 31066
Charlotte, North Carolina 28231

J. A. Jones Construction Co. (First Class Mail)
P. O. Box 1
Drakesboro, Kentucky 42337

This 22nd day of March, 1982.



Sue Ramsey
Executive Secretary

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

KOSHRC DOCKET
NO. 777

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

J. A. JONES CONSTRUCTION COMPANY

RESPONDENT

*

*

*

FOR COMPLAINANT: Hon. Hugh M. Richards
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

FOR RESPONDENT: Mr. James C. Watson, CSP
J. A. Jones Construction Company
One South Executive Park
P. O. Box 31066
Charlotte, North Carolina 28231

GOODMAN, HEARING OFFICER

On or about June 24, 1980, an inspection was conducted by a Compliance Officer on behalf of the Commissioner of Labor (hereinafter referred to as "Commissioner"), said inspection being upon the Paradise Steam Plant, in Muhlenberg County, Kentucky, approximately five miles east of Drakesboro on Highway 176. At said time and place, employees of J. A. Jones Construction Company (hereinafter referred to as "J. A. Jones") were engaged in the construction of precipitators as a part of J. A. Jones' general contractor responsibilities.

As a result of that inspection, the Commissioner issued one (1) Citation on July 1, 1980, charging J. A. Jones with one (1) regulatory violation of the Kentucky Occupational Safety and Health Act (hereinafter referred to as "Act"), with a proposed penalty therefor in the amount of One Hundred Dollars (\$100.00).

The pertinent procedural information is as follows:

- 1) Inspection was conducted on or about June 24, 1980, by the Commissioner at the Paradise Steam Plant construction site approximately five miles east of Drakesboro, Kentucky, on Highway 176.
- 2) One (1) Citation was issued on July 1, 1980, containing one (1) regulatory violation, with a proposed penalty therefor in the amount of One Hundred Dollars (\$100.00).
- 3) Notice of Contest was received on July 21, 1980, and Notice of Receipt of Contest was mailed on July 29, 1980.
- 4) Certification of Employer Form was received on July 31, 1980.
- 5) Complaint was received on August 6, 1980, and Answer by J. A. Jones was received on August 20, 1980.
- 6) Notice of Assignment to Hearing Officer and Notice of Hearing were mailed on August 22, 1980.
- 7) Motion to Dismiss by J. A. Jones was received by this Hearing Officer on September 22, 1980.
- 8) Hearing was conducted on Monday, September 22, 1980, at the Bureau of Highways District Office No. 3, Morgantown Road, Bowling Green, Kentucky.
- 9) Transcript of Testimony at Hearing was received by the Hearing Officer on September 30, 1980, and Notice of Receipt of Transcript was mailed on October 1, 1980.
- 10) Motion For Extension of Time Within Which to File Brief by Commissioner was received on October 29, 1980, and Order granting same was mailed on October 30, 1980.
- 11) Additional Order granting extension of time for Commissioner to file Brief was mailed on December 2, 1980.

- 12) Brief for Complainant was received on December 17, 1980, and Brief for Respondent was received on January 2, 1981.

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 in subject Citation, the description of the alleged violation, and the penalty proposed for same are as follows:

| | | |
|-----------------------------|--|----------|
| 803 KAR 2:180, Section 7 | An employment accident which was fatal to one employee was not reported either orally, or in writing to the Kentucky Department of Labor within forty-eight (48) hours after occurrence. (fatal accident involving Martin Duane Thomas which occurred on June 6, 1980, at the Paradise Steam Plant construction project near Drakesboro, Kentucky in Muhlenberg County.) | \$100.00 |
|-----------------------------|--|----------|

803 KAR 2:180, Section 7, reads as follows:

Reporting of Fatality or Multiple Hospitalization Accidents.
Within forty-eight (48) hours after the occurrence of an employment accident which is fatal to one (1) or more employees or which results in hospitalization of five (5) or more employees, the employer of any employees so injured or

killed shall report the accident either orally or in writing to the Commissioner of the Department of Labor. The reporting may be by telephone or telegraph. The report shall relate the circumstances of the accident, the number of fatalities, and the extent of any injuries. The commissioner may require such additional reports, in writing or otherwise, as he deems necessary concerning the accident.

Due and timely notice of the hearing is found by this Hearing Officer. However, as to jurisdiction, J. A. Jones has raised an issue which must at this point be examined.

J. A. Jones contends that the above set forth reporting requirement contained in 803 KAR 2:180, Section 7, does not apply to it due to preemption by Federal law. It argues that 803 KAR 2:050 provides that the Act shall not apply to employers, employees and places of employment over which federal agencies other than the United States Department of Labor exercise statutory authority to prescribe or enforce Standards or regulations affecting occupational safety and health. Thus, it argues, there can be no violation of the Act, in that J. A. Jones' reporting requirements are contained in 29 CFR 1960, which is a promulgation of industry Standards and record keeping requirements pursuant to 29 USC §668, providing for Occupational Safety and Health programs for federal agencies.

J. A. Jones admits that it is most assuredly not a federal agency. However, it argues that 29 CFR 1960.8, requiring the reporting by federal agencies of fatal employment accidents involving both federal and non-federal employees represents an exercise of statutory authority sufficient to satisfy 803 KAR 2:050(2) and thus excluding J. A. Jones from the scope of the Act's reporting requirements.

J. A. Jones points to certain language contained in 29 CFR 1960.1(f),

which states, "...although this part does not make provision for the inclusion of Federal contractors nor their employees and agency safety and health programs, except as provided in 1960.8 for reporting of serious accidents..." (emphasis added) as further authority for the proposition that it does not fall within the scope of 803 KAR 2:180, Section 7.

This Hearing Officer is not persuaded by this argument. To be sure, the above set forth language contained in 29 CFR 1960.1(f) does, by way of negative implication, seem to say that federal contractors and their employees are included in the reporting requirements of 1960.8. However, the very clause cited by J. A. Jones continues to state, "...safety and health programs operated pursuant to this part will offer some incidental protection to contractor employees working with Federal employees." (emphasis added) Moreover, the very first sentence of 29 CFR 1960.1(f) states as follows:

The regulations and guidelines of this part are applicable only to Federal employees and do not apply to employees of private contractors performing work under Government contracts, regardless of whether such privately employed workers perform their duties in Government-owned or -leased facilities, with Government equipment, and together with Government personnel. Protection of employees of private contractors is assured under the other provisions of the Act. (emphasis added)

The "other provisions of the Act" are in this case 29 CFR 1926, et seq., Federal Standards issued for the construction industry which have been adopted under Kentucky's state plan by 803 KAR 2:030, and which have been supplemented by promulgation of Kentucky's own regulations, among those being 803 KAR 2:180.

It is also noted that J. A. Jones introduced into evidence as its Exhibit No. 4, certain specifications issued by the Tennessee Valley Authority which provides in numerical paragraph 20.0, Safety Regulations:

"The Contractor shall be responsible for enforcing safety

regulations in accordance with American National Standards Institute and other recognized national codes, including OSHA. Any work attempted to be made or actually accomplished in violation of any existing applicable law, ordinance, regulation, or approved safety practice shall be the Contractor's sole responsibility."

It seems, then, from this portion of Jones' own evidence, that the Tennessee Valley Authority recognizes that there is no exercise of any alternative statutory authority to prescribe or enforce Standards or regulations other than that of OSHA.

It is therefore the opinion of this Hearing Officer that the reporting requirement as set forth in 803 KAR 2:180, Section 7, extends to J. A. Jones, and thus the Kentucky Occupational Safety and Health Review Commission is vested with jurisdiction in that there has been no preemption by Federal statutory authority to prescribe or enforce other Standards or regulations.

An additional preliminary matter must now be dealt with. J. A. Jones next argues that the search warrant authorizing the inspection of the construction facility was "incomplete, overly broad and invalid," and therefore all information obtained as a result of the inspection conducted pursuant thereto should be suppressed.

It will be unnecessary to consider the assertion that the search warrant was overly broad and incomplete, in that this Hearing Officer finds that the warrant was invalidly issued pursuant to KRS 338.010(2), which provides, "If an employer refuses such entry (for OSHA inspections), then the Commissioner may apply to the Franklin Circuit Court for an Order to enforce the right of entry."

In Commissioner of Labor v. The Cincinnati, New Orleans & Texas Pacific

Railway Company, KOSHRN Nos. 542 and 544 (1979), a strict interpretation of the above set forth Section was utilized by this Review Commission. In No. 542, an inspection of an employer's facility in Lexington, Kentucky, was conducted pursuant to a search warrant issued by the Fayette District Court. In No. 544, an inspection of an employer's Ludlow facility was conducted pursuant to a search warrant issued by the Kenton District Court. The Review Commission, in a per curiam decision, affirmed the Opinion contained in the Recommended Order of Hearing Officer Fowler that KRS 338.101(2) vests the Franklin Circuit Court with exclusive venue for issuing a warrant for inspection under the Act.

The Commission held that Yocom v. Burnett Tractor Co. (Ky.), 566 S.W.2d 755 (1978), requiring a Court Order or warrant based upon a showing of probable cause for Kentucky OSHA inspections, did not modify KRS 338.101(2) to provide for the obtaining of a search warrant from any Court other than the Franklin Circuit Court. The Review Commission stated:

The determination is to be made by a neutral magistrate, and although the District Courts possess jurisdictional authority to make such determination, the Statute specifies the Franklin Circuit Court as the forum if the Department of Labor elects to seek entry under Court authorization.

The above set forth decision by the Review Commission is now on appeal to the same Franklin Circuit Court. However, pending any Appellate decision to the contrary, this Hearing Officer is bound to follow the authority of the Review Commission. The search warrant, which in this case was obtained from the Muhlenberg District Court, is invalid, being obtained from a Court having improper venue, and therefore all evidence as to any violation obtained as a

result of an inspection conducted pursuant thereto must be suppressed and will not be considered by this Hearing Officer.

The Standard in question simply requires an employer to report any employee fatality occurring on the job site to the Department of Labor within forty-eight (48) hours after its occurrence. Thus, the only factual findings necessary to support a violation is that a fatal accident did indeed occur on the day in question to an employee of J. A. Jones while on the job site, and that same was not reported to the Department of Labor within the required period of time.

In that all evidence obtained by the Compliance Officer as a result of the invalidly obtained search warrant must not be considered by this Hearing Officer, all such evidence contained in the file, including the testimony of the Compliance Officer, Jerry M. Wells, and supporting exhibits introduced in connection with this testimony as contained in the Transcript of Hearing cannot be the basis for the finding of a violation.

However, in the course of the hearing, Mr. Stanley Joe Whitworth, Safety Director for J. A. Jones at the Paradise Steam Plant, testified as a witness for and on behalf of J. A. Jones. After introducing testimony concerning the Tennessee Valley Authority Hazard Control Plan and J. A. Jones' own safety program, Mr. Whitworth stated the following in response to direct examination by J. A. Jones' representative, Mr. James C. Watson:

Q. 25 Was there an accident on June 6, 1980, involving an injury to an employee of J. A. Jones?

A. Yes there was. (Transcript of Hearing [hereinafter TR], p. 32)

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Q. 37 Was the accident reported to the Kentucky Department of Labor by J. A. Jones?

A. No sir. (TR, p. 34)

Thereupon, under cross-examination by counsel for Commissioner, Mr. Whitworth stated the following:

Q. 8 Now you were on the job site the day of the fatality, is that correct?

A. Yes sir.

Q. 9 According to the coroner's report you were one of the witnesses to the fatality, is that correct?

A. That's right.

Q. 10 Approximately what time of day did that fatality occur?

A. Approximately 10:25.

Q. 11 And that fatal accident was to Martin Duane Thomas, is that correct?

A. Yes. (TR, p. 38)

At this point, Mr. Watson of J. A. Jones objected to the use of the word "fatal," but gave no grounds therefor. In point of fact, there could be no grounds - Mr. Whitworth, by his own admission, was an eyewitness to the fatality, was a representative of J. A. Jones making an admission against interest, and the line of questioning was begun upon direct examination by Mr. Watson himself.

FINDINGS OF FACT

Therefore, by virtue of the testimony given by Mr. Whitworth, this Hearing Officer finds as a matter of fact that there was an employment accident which occurred at approximately 10:25 A.M. on June 6, 1980, at the Paradise Steam Plant construction project, in which an employee of J. A. Jones, Martin Duane Thomas, was fatally injured. This Hearing Officer further finds as a

matter of fact that the fatality was not reported either orally, or in writing, to the Kentucky Department of Labor within forty-eight (48) hours after its occurrence.

The within matter concerns an alleged regulatory violation concerning failure to report an accident. The particular factual circumstances surrounding the fatal accident can have no bearing upon the failure by J. A. Jones to report same to the Kentucky Department of Labor, and therefore are of no material consequence or concern to this Hearing Officer.

Under the Revised Policy Guidelines promulgated by the Commissioner, if a violation is found to be a regulatory violation involving failure to report a fatality within the required period of time, a One Hundred Dollar (\$100.00) penalty is assessed, which is not subject to adjustment. Thus, the final proposed penalty for the regulatory violation was in the amount of One Hundred Dollars (\$100.00), and not subject to adjustment.

CONCLUSIONS OF LAW

It is the opinion of this Hearing Officer that J. A. Jones was in violation of the regulatory reporting requirement of 803 KAR 2:180, Section 7, and that the proposed penalty in the amount of One Hundred Dollars (\$100.00) is just and equitable under the circumstances.

RECOMMENDED ORDER

NOW THEREFORE, IT IS HEREBY ORDERED:

That the Citation charging a regulatory violation of 803 KAR 2:180, Section 7, and the proposed penalty therefor in the amount of One Hundred Dollars (\$100.00) are hereby affirmed, and that the said penalty be paid

without delay, but in no event later than thirty (30) days from the date of this Recommended Order.



CHARLES A. GOODMAN III
HEARING OFFICER

DATED: March 22, 1982
Frankfort, Kentucky

DECISION NO. 1112