



**KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION**

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 11, 1982

JOHN Y. BROWN, Jr.
GOVERNOR

CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #850

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CHESAPEAKE CONTAINER, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before RUH and BRADEN, Commissioners.

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of January 11, 1982, is presently before this Commission for review pursuant to a petition for discretionary review filed by the Respondent.

The Respondent was issued a serious citation composed of three subparts alleging violation of 29 CFR 1910.95(a), 29 CFR 1910.95(b)(1) and 29 CFR 1910.95(b)(3) (all as adopted by 803 KAR 2:020). A penalty of \$640 was initially proposed for the alleged violations. After hearing, consideration of the evidence and positions presented by the parties and reference to appropriate sources, the Hearing Officer issued his Recommended Order affirming the violations of the standards as charged along with a reduced penalty of \$300. The Respondent filed a timely petition for review of the Hearing Officer's opinion.

The first item before this Commission involves the alleged violation of 29 CFR 1910.95(a). The Respondent claims that the noise sample, showing that the first helper on the flexfold machine was exposed to 93.2 dBA for an eight-hour period, is not representative of noise levels normally encountered and is unreliable. The record establishes that the

flexfold machine was operating at a rate of between seven and thirteen thousand boxes per hour when noise assessments were obtained, while usual operations involve a rate of 5700 per hour. Higher speeds or rate per hour clearly produce higher noise levels.

The Respondent does not dispute the accuracy of the Complainant's noise samples; the claim seems to be that the day on which the samples were obtained was unusual and unrepresentative. Several cases are cited to bolster the Respondent's position, but we agree with the Hearing Officer that the cases do not provide the desired support.

The Cincinnati Enquirer (ALJ) 16,992 OSHD 1973-74 involved an attempt to project excessive exposure from a very brief sample. Weyerhaeuser Co. (RC) 18,468 OSHD 1974-75 and Union Timber Corp. (ALJ) 18,661 OSHD 1974-75 likewise involved attempts to establish excessive exposure by use of short-term readings. In Crown Zellerbach Corp., Gaylord Container Div. (ALJ) 21,544 OSHD 1977-78 the citation was dismissed after rejection of the dosimeter readings and a finding that the sound level meter readings did not represent the employee exposure..

In the present case the dosimeter reading is of substantial duration and is corroborated by a significant number of sound level meter readings. It cannot be said that the readings are unrepresentative of exposure of the sampling date. On the inspection day the first helper on the flexfold machine was exposed to noise in excess of permissible levels. The cited standard requires that the employer provide protection when sound levels exceed those in Table G-16. If the sampling day was unusual, it follows from the standard that the employer has an obligation to determine whether levels are excessive and to provide protection if needed.

There are indications in the record that hearing protection was available to the first helper but not utilized. In keeping with our prior decisions involving this standard, we find that the employer's obligation to "provide" protection against effects of excessive noise includes a duty to require use of the necessary equipment. The Hearing Officer's disposition of this item is affirmed.

The Recommended Order sustains a violation of 1910.95(b) (1) requiring feasible administrative or engineering controls to reduce noise levels from the flexfold machine. In Kenwood Pallet Corp., KOSHRC #632, the burden of establishing feasible engineering controls was placed upon the Complainant. Controls are deemed feasible based upon economic and technological considerations. The Complainant is not required to set forth a specific and detailed abatement plan for the Respondent, only an initial showing of the existence of feasible measures is required.

The Hearing Officer finds that the Complainant has shown that the measures it proposes are likely to produce meaningful results. The finding is not supported by the record; we therefore reverse on this item.

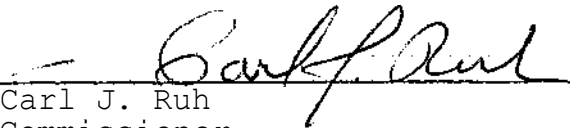
The third item, concerning a hearing conservation program, has been sustained by the Hearing Officer. The record reveals that the Respondent had been conducting some audiometric testing of its employees prior to 1980. As we noted in the case of Barnet of Kentucky, Inc., KOSHRC #870, the hearing conservation standard prior to January 6, 1982, did not set forth a statement, outline or notice of the requirements for an effective program. In light of our decision in Barnet, supra, we find that the Hearing Officer's decision on this item must be reversed.

ORDER

IT IS HEREBY ORDERED that the serious violation of 29 CFR 1910.95(a) (as adopted by 803 KAR 2:020) is AFFIRMED. The Hearing Officer is SUSTAINED.

IT IS ORDERED that the alleged violations of 29 CFR 1910.95(b)(1) and 1910.95(b)(3) (as adopted by 803 KAR 2:020) are DISMISSED. The Hearing Officer's disposition of these items is REVERSED.

IT IS FURTHER ORDERED that the proposed penalty of \$300 is reduced to \$100 and is hereby imposed.



Carl J. Ruh
Commissioner

s/Charles E. Braden

Charles E. Braden
Commissioner

DATED: June 11, 1982
Frankfort, KY

DECISION NO. 1140

KOSHRC #850
(4)

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

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This 11th day of June, 1982.


Kenneth Lee Collova
Executive Director