



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 5, 1982

JOHN Y. BROWN, Jr.
GOVERNOR

CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #854

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

AMERICAN SAW & TOOL
DIVISION OF VERMONT AMERICAN CORPORATION

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 December 15, 1981, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

Summary of the Case

The case below involved alleged serious violation of Citation 2, Item 1, 29 CFR 1910.217(c)(2)(i)(a); Citation 2, Item 2, 29 CFR 1910.213(h)(1), 29 CFR 1910.213(h)(4); and Citation 2, Item 3, 29 CFR 1910.217(d)(9)(iv) (as adopted by 803 KAR 2:020).

At the outset of the hearing of the matter the Respondent indicated that the alleged violation and proposed penalty of \$450 were being contested with regard to Citation 2, Item 2. The proposed penalties of \$360 each for Items 1 and 3 of Citation 2 were also in contest.

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The Recommended Order affirms the serious violation and proposed penalty of \$450 of Citation 2, Item 2. The proposed penalties for Items 1 and 3 of Citation No. 2 are vacated by the Hearing Officer based upon his finding that the testimony as to establishment of the proposed penalty is insufficient to constitute a prima facie case. The Complainant has petitioned for review of this latter ruling by the Hearing Officer.

Decision of the Commission

The serious violation, 29 CFR 1910.213(h)(1) and 29 CFR 1910.213(h)(4) (as adopted by 803 KAR 2:020), is clearly established by the record, and the Hearing Officer's decision affirming this violation and the proposed penalty of \$450 is adopted by this Commission.

The Hearing Officer correctly notes that, due to the Respondent's limited contest, he lacks jurisdiction to consider the merits or the serious designation of the violation set forth in Item 1 and Item 3 of Citation 2. Mr. Goodman further finds that, pursuant to Kentucky Ignition, KOSHRC #683 (1980) and Bruner Aluminum Products, KOSHRC #635 (1980), the Complainant must establish a prima facie violation before any penalty proposal will be imposed by the Commission. According to the decision below the only substantive testimony regarding the uncontested violations was that presented by the Compliance Officer in explaining the penalty calculation process and adjustment factors. This evidence is deemed insufficient to constitute a prima facie case, therefore no penalty can be imposed for Items 1 and 3 of Citation No. 2.

The Complainant, in its brief on review, contends that the Compliance Officer's testimony as to the penalty must be considered along with the entire case record which contains admissions made by the Respondent, through failure to contest Items 1 and 3. According to the Complainant, consideration of the entire record reveals that a prima facie case has been established.

The Complainant further contends that because an uncontested serious violation was set forth in Items 1 and 3, the total vacating of the penalty proposal therefor is contrary to KRS 338.991(2).

The Hearing Officer's ruling is apparently consistent with this Commission's stated position regarding proof in penalty only contests. In Kentucky Ignition Co., supra, we held that, "The Complainant must establish a prima facie violation, that is, the Department of Labor must meet its burden of proof that the alleged violation did in fact exist, before the concomitant penalty will be upheld as reasonable by this Commission."

In a case in which only the penalty assessment has been placed in contest, the sole issue before this Commission is the reasonableness of the proposed penalty assessment in light of the circumstances at hand. The Complainant bears the burden of proof in cases before us and must therefore establish that their proposed penalty is reasonable.

We affirm our statement in Kentucky Ignition Co., supra, that, "proof by the Complainant that it complied with Departmental guidelines in assessing a proposed penalty will not be sufficient to establish that the penalty was in fact reasonable." In Edwards and Webb Construction Co., KOSHRC #284 (1977), we noted that this Commission "must necessarily consider the merits (of an uncontested citation) as they tend to establish the reasonableness or unreasonableness of (a) contested penalty." The Complainant must therefore present more than a mere calculation process to show that a penalty is reasonable; proof must be presented as to those circumstances and aspects of the citation which reveal that the proposed assessment is reasonable and appropriate for the violation.

Our decision in Kentucky Ignition Co., supra, is reversed to the extent that it requires that the Department of Labor must set forth a prima facie case and prove the existence of a violation before the penalty can be upheld as reasonable. We agree with the Complainant's position that the elements of a prima facie case are established by Respondent's failure to contest the violation set forth in the citation.

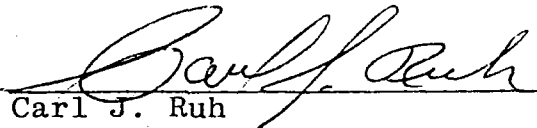
In reviewing the record below we find that the Complainant has presented limited proof as to the reasonableness of the penalty assessment. Although the Compliance Officer has explained the calculation process resulting in the proposals for Items 1 and 3, there is no testimony regarding the nature or operation of the machine, the work process followed by the employee or other considerations which this Commission can consider in determining that the penalty is in fact reasonable under the circumstances.

While we find that the proof as to reasonableness of the penalty assessment for Items 1 and 3 is lacking, we cannot sustain the Hearing Officer's order totally vacating penalties for these items. We have consistently held, Alholm Company, KOSHRC #776 (1980), Barney Miller's Inc., KOSHRC #903 (1982), that KRS 338.991(2) requires that a serious violation be accompanied by some penalty assessment. We find that a penalty assessment of one dollar (\$1.00) shall be imposed for the uncontested serious violation in Item 1 of Citation 2 and an identical amount shall be imposed for Item 3.

ORDER

IT IS HEREBY ORDERED that the serious violation of 29 CFR 1910.213(h)(1) and 29 CFR 1910.213(h)(4) (as adopted by 803 KAR 2:020) is SUSTAINED with a penalty of \$450. Abatement shall be accomplished immediately.

IT IS FURTHER ORDERED that the penalty for Item 1, Citation 2, 29 CFR 1910.217(c)(2)(i)(a) (as adopted by 803 KAR 2:020) shall be one dollar. The penalty for Item 3, Citation 2, 29 CFR 1910.217(d)(9)(iv) (as adopted by 803 KAR 2:020) shall be one dollar.


Carl J. Ruh
Commissioner

s/Charles E. Braden
Charles E. Braden
Commissioner

DATED: April 5, 1982
Frankfort, KY

DECISION NO. 1118

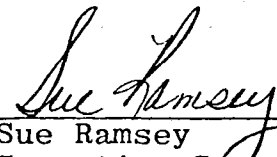
• Copy of this Decision and Order has been served by mailing or personal delivery on the following parties:

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 (First Class Mail)
Assistant Counsel
Department of Labor
620 South Third Street
Louisville, Kentucky 40202

Mr. Merle T. Purvis, Gen. Mgr. (Cert. Mail #P209 357 638)
American Saw & Tool, Div. of
Vermont American Corporation
P. O. Box 1475
Louisville, Kentucky 40201

This 5th day of April, 1982.



Sue Ramsey
Executive Secretary