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JOHN Y. BROWN, Jr.  
GOVERNOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
**REVIEW COMMISSION**

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

FRANKFORT, KENTUCKY 40601

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May 4, 1982

CHAIRMAN

CARL J. RUH  
MEMBER

CHARLES E. BRADEN  
MEMBER

KOSHRC #870

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION AND ORDER OF  
REVIEW COMMISSION

BARMET OF KENTUCKY, INC.

RESPONDENT

\* \* \*

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.

Summary of the Case

At the outset of the hearing below the parties indicated that they had reached a settlement as to a number of the items initially in contest. In response to an order of the Hearing Officer dated September 24, 1981, the parties submitted properly signed and posted documents of settlement as to the agreed items. The settlement provisions are set forth at pages 4 and 5 of the order below.

The issues in contest before the Hearing Officer involved alleged serious violations as set forth in Citation 2, Items 1a-c, Items 3a-g, Items 5a-b and the proposed penalty assessments.

After consideration of the extensive record below and reference to the appropriate legal authorities, the Hearing Officer has made the following disposition of the issues in contest:

Citation 2, Items 1 a and c are affirmed along with a penalty assessment of \$540. Item 1b is dismissed.

Citation 2, Items 3 b-g are affirmed along with a penalty assessment of \$240. Item 3a is dismissed.

Citation 3, Items 5 a and b are affirmed along with the penalty assessment of \$480.

Within 25 days of the date of issuance of the Recommended Order the Respondent filed its petition for discretionary review and brief in support of same. The Respondent's petition was timely and review has been granted to consider the alleged violation of 29 CFR 1910.95 (b)(3) - Citation 2, Item 1c; 803 KAR 2:015 Sections 2, 3, 4 - Citation 2, Items 3b-g; 29 CFR 1910.133(a)(1) and 1910.151(d) - Citation 2, Items 5 a and b, as well as the proposed assessments for these items.

#### Decision of the Commission

The initial issue before this Commission involves the alleged violation of 29 CFR 1910.95(b)(3) requiring a continuing effective hearing conservation program when employees are exposed to excessive noise levels. The Respondent poses the argument before us, as below, that, "The employer is . . . being forced to comply with a standard which fails to set out specific steps the employer must take in order to have an effective hearing program."

Safety and health standards in Kentucky are, in most instances, adopted by reference from the federal standards set forth in the Code of Federal Regulations. In interpreting and applying the Kentucky standards in cases before us frequent reference is made to the reported federal decisions involving the parallel federal standard. A review of the reported cases reveals that a standard, challenged as vague and unintelligible, need not set forth specific steps for the employer to follow. A standard can withstand a vagueness challenge if it provides "reasonable and fair notice" of its requirements.

In several instances the hearing conservation program standard has been determined to be "unenforceably vague." Kropp Forge Co., (CA-7) 25,607 OSHD (1081); Kraft Foods, Inc., (ALJ) 25,499 OSHD (1981); B. W. Harrison Lumber Co., (ALJ) 16,568 OSHD (1973-74) (RC) 20,263 OSHD (1975-76 (CA-5) 22,626 OSHD (1978).

The standard involved in the present action and the noted cases requires a continuing effective hearing conservation program when employees are exposed to excessive noise. There is no statement, outline or notice of the requirements for an effective program. The hearing conservation standard has been revised to set forth the required elements of an effective program at length as part of the standard. The revised standard was adopted and became effective in Kentucky on January 6, 1982.

In light of the above-noted cases this Commission finds that the cited standard is vague and unintelligible and the violation of 29 CFR 1910.95(b)(3) (as adopted by 803 KAR 2:020) is DISMISSED. The Hearing Officer's finding and recommendation to the contrary is reversed.

The order granting review includes the penalties proposed for the items on review. Citation 2, Item 1 was initially composed of three subparts with a penalty proposal of \$540. Although the Hearing Officer dismissed one of the subparts, the original amount is sustained in the Recommended Order. We find that a penalty assessment of \$180 is fair and appropriate for Citation 2, Item 1a, the remaining violation.

The Respondent has further petitioned for review of that portion of the Recommended Order sustaining six of seven subparts of Citation 2, Item 3. These subparts involve conditions allegedly in violation of Kentucky's "confined spaces" standard, 803 KAR 2:015, Sections 2-6.

The definition of a confined space is set forth in Section 2 of the standard. (See R.O., p. 17.) The initial point raised by the Respondent concerning Item 3 is whether a confined space is involved in this action. The Hearing Officer has determined that the work area under the hopper is a confined space regulated by the standard.

In order to sustain violations of the cited sections, the Complainant, bearing the burden of proof, must first establish by a preponderance of the evidence that, under the circumstances at hand, the pit area is a confined space. After careful review of the record below, we find that the Complainant has failed to meet its burden of proof on this decisive issue. The record fails to clearly establish that the pit area under the hopper is subject to the accumulation of toxic, combustible or corrosive agents or to a deficiency of oxygen. The proof further fails as to limited ingress and egress and inability to obtain adequate dilution ventilation.

Based upon the foregoing findings, we hold that the violation alleged in Citation 2, Items 3a-g are dismissed. The Hearing Officer's findings and recommendations to the contrary are reversed. The penalty proposal of \$240 for Item 3 of Citation 2 is vacated.

We do not hold that the pit area can never be subject to the confined space standard. We make the limited finding that under the particular set of facts in the record the Complainant has failed to establish the applicability of the cited requirements.

The final issues before us involve protective eye equipment for employees in the mill and quality control lab and a facility for quick drenching or flushing of the eyes and body of employees in the Q.C. lab. These issues are presented by Items 5 a and b of Citation 2. The Hearing Officer has sustained violations of the cited standards, 29 CFR 1910.133(a)(1) and 1910.131(d), along with a penalty of \$480.

We find that a violation of 29 CFR 1910.133(a)(1) is established in the record therefore the Hearing Officer's disposition of this item is affirmed. The description of this item originally alleged violation of the standard in two areas--the mill and Q.C. lab. The text of the Hearing Officer's decision (R.O., p. 21) indicates that the violation is established only as to the noted employees in the mill area. We agree with this finding and limit our holding to the mill area.

The record does not establish that employees working in the Q.C. lab are exposed to injurious corrosive materials therefore the alleged violation of 29 CFR 1910.151(d), regarding facilities for flushing and drenching, must be dismissed. The Hearing Officer's disposition of this subpart is reversed.

A penalty reduction is in order for Item 5 in light of our dismissal of subpart (b). We find that a penalty of \$200 is fair and appropriate for the remaining violation.

ORDER


IT IS HEREBY ORDERED that the alleged serious violation, 29 CFR 1910.95(b)(3) (as adopted by 803 KAR 2:020), is DISMISSED. The penalty assessment for Citation 2, Item 1 is reduced to \$180.

IT IS ORDERED that the alleged serious violations of 803 KAR 2:015, Sections 2-4, Citation 2, Items 3a-g are DISMISSED. The recommended penalty of \$240 is VACATED.

IT IS FURTHER ORDERED that the serious violation of 29 CFR 1910.133(a)(1) (as adopted by 803 KAR 2:020) is AFFIRMED. The alleged serious violation of 29 CFR 1910.151(d) (as adopted by 803 KAR 2:020) is DISMISSED. A reduced penalty of \$200 is imposed for Citation 2, Item 5. Abatement for Item 5(a) shall be accomplished within ten (10) days of the date of this order.

DATED: May 4, 1982

DECISION NO. 1127

  
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Carl J. Ruh  
Commissioner

s/Charles E. Braden  
Charles E. Braden  
Commissioner

KOSHRC #870  
(5)

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

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

(Messenger Mail)

Hon. Rex Hunt  
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Barnet of Kentucky, Inc.  
P. O. Box 96  
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(First Class Mail)

This 4th day of May, 1982.

  
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Sue Ramsey  
Executive Secretary