KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

JOHN Y. BROWN, Jr.
GOVERNOR

CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

August 24, 1982

KOSHRC #921

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

RALSTON PURINA COMPANY — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before RUH and BRADEN, Commissioners.

A Recommended Order of Hearing Officer Wayne Waddell, issued under date of May 7, 1982, 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 an alleged nonserious violation of 29 CFR 1910.20 (e)(1)(i) and a serious violation of 29 CFR 1910.1000(a)(2), 29 CFR 1910.1000(e) and 29 CFR 1910.134(a)(2) (all as adopted by 803 KAR 2:020). A proposed penalty of $300 was set forth for the serious citation.

The Hearing Officer's decision affirms the nonserious violation as cited. The serious violation is dismissed and the proposed penalty vacated based upon the finding and conclusion that the Complainant failed to establish by a preponderance of the evidence that Respondent's employee was exposed to excessive levels of acrylamide.

The Complainant filed a timely petition for review challenging the dismissal of Item 1a of Citation 2 and the vacating of the proposed penalty. Complainant's petition was granted, and the parties have filed briefs with this Commission pursuant to an established briefing schedule.

Decision of the Commission

We find that the issue before us for review is whether the hydrolysis operator was exposed to excessive levels of acrylamide on May 29, 1981; and, if so, what, if any, penalty should be assessed for the violation of the standard.

We agree with the Hearing Officer's statement that the Complainant is saddled with the burden of proof regarding issues in contest before us. In meeting its burden the Complainant has the dual obligation of going forward with evidence in support of its allegation and establishing the allegation by a preponderance of the evidence. The Complainant establishes a fact or issue by a preponderance when consideration of all the evidence in the case leads us to find that the existence of the fact or proposition is more probable than its non-existence.

In deciding the issue set forth above we must therefore review and weigh the entire record of evidence in light of the Complainant's burden of proof.

Both the Complainant's and Respondent's personal monitoring readings of the hydrolysis operator on May 29, 1981, indicate exposure in excess of the permissible limits. The indicated excessive levels are the result of significantly high readings for the second four-hour sampling segment on that date. Although the results of both parties indicate overexposure, the Complainant's afternoon and eight-hour results are significantly higher than those recorded by the Respondent. If our consideration of the record was limited to these facts, we would perhaps find that the Complainant has met its burden of proof regarding the issue in contest. There are, however, other significant and substantial factors in the record which affect and challenge the weight and credibility of the proffered evidence of overexposure.

The Complainant's witness has admitted that further testing was necessary to explain the discrepancy between her results and those of the Respondent for May 29, 1981. The discrepancy between the samples of the parties was admitted to be an "unusual deviation." The hygienists for the Complainant and Respondent both concluded that the high afternoon and low morning readings on May 29, 1981, didn't make sense because the employee was performing the same function in the morning that he was in the evening.

Complainant's witness conducted a second set of samplings on June 24, 1981, because of the initial high readings. The witness explained that if something unusual came up she resamples to verify, and that is what she was doing in the present case. A third sampling session was conducted on July 20, 1981, because of the initial high readings and nothing on the second sampling. These subsequent parallel samplings by the parties produced readings well within permissible exposure limits, and the Complainant's witness stated that the third group of tests substantiated the second group. The employee's job function was the same on the various sampling dates. The Respondent conducted personal sampling on the hydrolysis operator on May 30, 1981, which produced results below detectable limits.

In explanation of the discrepancy between the initial and subsequent samplings, the witness for the Complainant stated that an exhaust fan in the ceiling of the building was blowing inward on May 29 and was perhaps reintroducing vented acrylamide vapors. It was further stated that engineering changes, involving checking of hoses and exhaust pipes for leaks and sub-surface injection of acrylamide into the hydrolysis tanks, were implemented after the initial sampling and prior to the second and third samplings

The record indicates that sub-surface injection of acrylamide was instituted prior to the May 29, 1981, sampling date. Extension and repairs of the exhaust system duct were performed in early May of 1981. The exhaust stack, which was extended to ten feet above the roofline and approximately 13 feet above the ceiling exhaust fan, vents the four hydrolysis tanks in the northwest portion of the building as well as the acrylamide storage tank.

In reviewing the record we find only two samples from the afternoon of May 29, 1981, which indicate sufficient exposure for that period to produce excessive exposure for the entire work day. The Complainant's witness has acknowledged the unusual nature of those readings and therefore attempted to verify them by subsequent tests. The latter tests, under nearly identical working conditions, indicated a lack of excessive exposure. All subsequent testing by both parties produced readings within permissible levels. The record further indicates that engineering changes, offered as an explanation for the varying readings, were not instituted during the interim between samplings.

The fan theory also fails as an explanation or substantiation of the unusual readings on the afternoon of the first sampling date. The Complainant's witness did not suggest the fans as a cause of the readings until after the second sampling. Although the fan is listed as a potential cause of overexposure, there was no area sample taken in the area even though the Complainant's witness acknowledged that such monitoring would be an appropriate method to test the theory. The Complainant's witness acknowledged that she did not know the wind direction on the afternoon of May 29, though wind direction is a crucial factor in the theory. Ultimately the witness acknowledged that explanation of the high readings for May 29, 1981, is speculation.

After review and consideration of the record in this case, including but not limited to the various points noted above, we agree with the Hearing Officer's finding and conclusion that the Complainant has failed to establish by a preponderance of the evidence that the hydrolysis operator was exposed to excessive levels of acrylamide on May 29, 1981.

ORDER

IT IS HEREBY ORDERED that the Hearing Officer's decision dismissing the alleged violation of 29 CFR 1910.1000 (a)(2) (as adopted by 803 KAR 2:020) and vacating the proposed penalty of $300 is AFFIRMED. All other findings of the Hearing Officer not inconsistent with this opinion are adopted and incorporated herein.

DECISION NO. 1159

Carl J. Ruh, Commissioner

Charles E. Braden
Char es E. Braden, Commissioner

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, KY 40601

Hon. Rose Ashcraft (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, KY 40601

Hon. Michael Alden (Cert. Mail #P230 414 837)
Ralston Purina Company
CheckerBoard Square Plaza
St. Louis, MO 63188

Mr. Richard Jansen (First Class Mail)
Ralston Purina Co.
Protein Division
2441 South Floyd Street
Louisville, KY 40217

This 24th day of August, 1982.

Kenneth ee Collova
Executive Director