

COMMONWEALTH OF KENTUCKY  
OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
ADMINISTRATIVE ACTION NO. 18-KOSH-0083

KOSHRC #5495-18

COMMISSIONER, DEPT OF  
WORKPLACE STANDARDS,  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v.

TRINKLE MACHINE AND TOOL CORPORATION

RESPONDENT

**DECISION AND ORDER OF THE REVIEW COMMISSION**

On May 24, 2022, the parties to this action each requested discretionary review of our hearing officer's recommended order. The Commissioner limited her review request to the penalty assessment for Citation 1, Item 2b. Trinkle sought review of our hearing officer's determination that Trinkle was properly cited for the violation alleged in Citation 1, Item 1. We granted their requests on June 7, 2022. After review of the record, briefs, and recommended order of our hearing officer, we impose a penalty of \$1,750.00 for the violation noted in Citation 1, Item 2b. Further we find no error with our hearing officer's interpretation of law, findings of fact, or assessment of the burdens of proof for Citation 1, Item 1 substantiating a violation of the machine guarding requirements of 29 CFR 1910.212(a)(1).

- I. KOSRHC restores the recommended penalty dismissed by our hearing officer's recommended order.

Our hearing officer dismissed Citation 1, Item 2a and the associated penalty. However, Citation 1, Item 2 consisted of two (2) grouped citations, Items 2a and 2b. The Commissioner of Workplace Standards asserts dismissal of Item 2a should not have left Item 2b without a penalty.

In the Commonwealth of Kentucky grouped citations are “normally considered as one (1) violation for penalty purposes.” KY FOM pg VIII-6. By policy, the Labor Cabinet records the combined penalty for grouped citations in the first item of the grouped citations. The record is clear that Trinkle violated the cited standard as it had no employee with up-to-date training for bloodborne pathogens when the Commissioner’s investigator initiated the inspection. (hearing transcript pages 74-76). KOSHRC therefore reassess the penalty of \$1,750.00 written for the grouped Citation 1, Items 2a and 2b to the remaining Citation 1, Item 2b.

- II.** KOSHRC agrees with our hearing officer’s interpretation of law, findings of fact, and assessment of the burdens of proof for the violation of 29 CFR 1910.212(a)(1) cited within Citation 1, Item 1.

Precedent is clear that the Commissioner of Workplace Standards bears the burden of proving technological feasibility **if** the standard does not specify or suggest a means of compliance. See *Diebold, Inc. V Marshall*, 585 F.2d 1327, 1333 (6<sup>th</sup> Cir. 1978). The standard cited in this action provides multiple means of possible compliance,

*Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. *Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.*

29 CFR 1910.212 (a)(1) (emphasis added)

We therefore agree with hearing officer's determinations that: the Commissioner did not bear the burden of proving feasibility of compliance with the standard; and, Trinkle bore the burden of proof for any infeasibility defense it raised to the cited standard. We also agree with his finding that the record did not support a viable claim of infeasibility. Further, we uphold his determinations that the Commissioner met her burden of proof and demonstrated that Trinkle employees were exposed to hazardous conditions in violation of the cited standard.

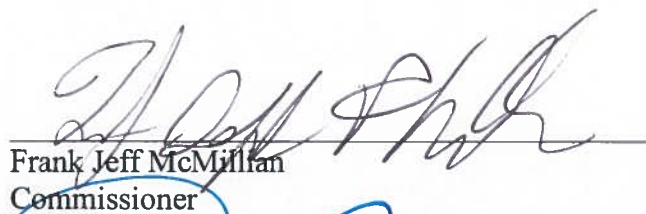
In summary, KOSHRC grants the Commissioner's request and amends the hearing officer's recommended order to impose a penalty of \$1,750.00 for Trinkle's violation of Citation 1, Item 2b. Further, KOSHRC denies Trinkle's request to alter our hearing officer's findings of fact, application of law, and assignation of the burdens of proof concerning Citation 1, Item 1.

It is so **ORDERED**.

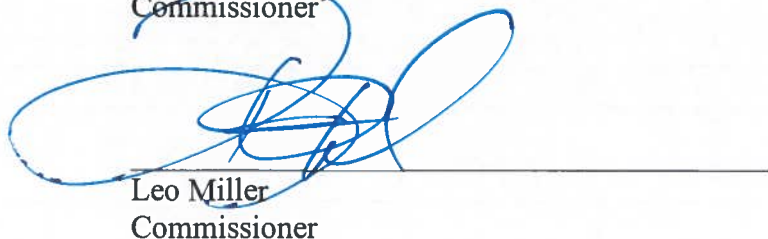
October 6, 2022.



Larry Clark  
Chairman



Frank Jeff McMillan  
Commissioner



Leo Miller  
Commissioner

## Certificate of Service

I certify that a copy of the foregoing order and decision has been served this 10 day of October, 2022, on the following as indicated:

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E.H. "Chip" Smith, IV  
Executive Director/General Counsel  
KOSH Review Commission