COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 3043-97

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

LOUISVILLE LUMBER AND MILLWORK, CO. — RESPONDENT

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DECISION AND ORDER
OF THIS REVIEW COMMISSION

We called this case for review on our own motion[1] to consider whether respondent Louisville Lumber and Millwork proved the elements of the "greater hazard" defense to the citation issued by the secretary of labor, the enforcer of Kentucky's occupational safety and health act. KRS chapter 338. Both the complainant (the secretary) and Louisville Lumber responded to our invitation to file briefs on the issue.

Louisville Lumber produces architectural woodwork. Transcript of the evidence (TE) 19. Among the power wood cutting tools used, the company owns a swing cutoff saw depicted in complainant's exhibit 1 and respondent's 4. The saw, which somewhat resembles a handheld power saw, hangs from a pivot above the operator's head. To make a cut, the operator pulls the saw across a table where the work to be cut lies, resting against a fence at the back of the table.

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[1] Section 47 (3) of our rules of procedure (ROP), enacted as 803 KAR 50:010.

Standard CFR 1910.213 (g) (1), cited by the secretary, requires the employer to guard completely the upper half of the round saw blade. But the standard also requires that the lower portion of the blade be protected by a guard which rises over the wood being cut, all the while remaining "...in contact with the table or material being cut." At the rear of the table is a fence against which the wood to be cut rests. Because on the day of the inspection, as the compliance officer observed, the lower portion of the blade had no guard, the secretary issued the citation in question.

Through the testimony of its inspecting compliance officer, the secretary of labor proved the lower portion of the saw blade was exposed. Transcript of the evidence (TE) 22. See secretary's exhibit 1. Mr. Gary Brewer, Louisville Lumber's president, proved the saw had a guard for the lower blade which an operator occasionally disabled with a bolt to hold it in the retracted position when the wood being cut was taller than the fence at the rear of the table. TE 43-44. As Mr. Brewer testified, the saw operator disabled the saw blade guard when cutting the taller wood because the guard, after it rode over the table fence, then had to ride over the taller work as well, causing the saw blade to catch. TE 52

The operator, according to Mr. Brewer, felt the saw posed a greater hazard when the saw blade caught on the taller work; that is, the guard posed a greater hazard when cutting the taller stock than cutting without it.

Our hearing officer dismissed the citation because, she said, the employer proved the greater hazard defense. Although the hearing officer correctly observed "This defense was not objected to nor was it refuted[2]," there is more to it than that. In Truss Supply, Inc., KOSHRC 2831-95, citing General Electric v. Secretary of Labor and OSHRC, 576 F.2d 558, 560, (CA3 1978), CCH OSHD 22,752, we restated the three elements which a respondent must prove to establish a greater hazard defense:

1. "...proving that compliance with a standard would result in a hazard to employees greater than that resulting from existing procedures...,"

2 "'...alternative means' of protecting employees are unavailable..." and

3. "'...a variance application...would be inappropriate..." or, we add, had not been sought.

As Mr. Brewer explained the hazard:

> Now, if he puts a piece on there thicker than that piece [the fence], then, that saw guard catches on the piece and he's [the operator] created a hazard because it's going to jerk him around a little. He's trying to hold a piece of wood with one hand, pull a saw out with the other to cut it. TE 52.

But then we asked the parties, in their briefs to us, to draw our attention to any proof in the record about whether the company tried alternative means of compliance and whether a variance was applied for or found inappropriate; neither party did so and our review of the record also failed to turn up testimony on those issues.

Because we find respondent Louisville Lumber proved the

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[2] Recommended order p. 4 (RO 4).

greater hazard element, but not the other two, we reverse[3] our hearing officer and affirm the citation. We do so because for a respondent to prevail in its attempt to establish an affirmative defense, all elements of the defense must be proven. General Electric, supra.

Although the respondent failed to prove the greater hazard defense, the secretary did prove the violation. Louisville Lumber employed a saw operator exposed to the hazard of an unguarded saw blade. TE 51. Standard 1910.213 (g) (1) applies because the saw, when observed by the compliance officer, did not have a guard. TE 22. To comply with the standard, the employer must guard the saw or apply for a variance. KRS 338.153. Although Mr. Brewer did not know, prior to the inspection, the operator regularly disabled the guard, he could have become aware of the hazard by observing the work in progress. KRS 338.991 (11).

As the hearing officer dismissed the citation, she did not attempt to calculate an appropriate penalty. When the secretary wrote the citation, he proposed a penalty of $625. Mr. Brewer volunteered that $625 "...isn't going to break us." TE 53. Under our authority to determine penalties once an employer contests a citation, then we set the penalty. In this case we find the $625

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[3] This commission possesses the authority to call hearing officer decisions for review. Sections 47 (3) and 48, 803 KAR 50:010. The federal courts, and the federal review commission which is part of a regulatory scheme remarkably similar to Kentucky's, have consistently construed "review" to grant the commission the power to affirm, modify or reverse an administrative law judge's decision. General Electric v. Secretary of Labor, et. al., 576 F.2d 558, 560 (CA3 1978), CCH OSHD 22,752.

penalty reasonable. KRS 338.081 (3). A serious penalty is derived, according to the formula followed by the secretary, by first determining the gravity based penalty and then adjusting it downward if the employer qualifies for penalty reduction credit.

Serious violations, based on the potential injury, are categorized as high, medium or low serious. Because amputation is a potential injury when using an unguarded saw, the compliance officer felt high serious to be appropriate. Next the compliance officer (CO) determines if there is a greater or lesser probability of an injury occurring. Here the CO testified lesser probability was the proper choice. TE 28-29. Using a matrix, the CO testified that high serious-lesser probability calls for a "gravity based penalty" of $2,500.

Then utilizing the three factors for penalty reduction, size of the business measured by the number of employees, the employer's good faith (the presence or absence of occupational safety and health programs found on the employer's premises) and history of prior violations, the CO reduced the gravity based penalty by 75%. He awarded 40% for size (32 employees), 25% for good faith because the company had implemented written safety and health programs and 10% for history because it had no prior violations, at least in the past three years. TE 29-30. When we apply the 75% credit to the gravity based penalty of $2,500, we get $625. TE 27-30.

Although not at issue in this case, we wish to correct a conclusion drawn by our hearing officer who wrote that this commission "...is authorized to adopt established federal standards

for occupational safety and health." RO 4. While this commission has jurisdiction to "...hear and rule on appeals from citations[4]...," the standards board, with the commissioner for workplace standards as its chair, bears the responsibility for promulgating occupational safety and health standards (also known as regulations). KRS 338.051 and 061. Rounding out this trio, the secretary of labor, otherwise known in the statute as the commissioner for workplace standards, enforces the standards when he conducts inspections of places of employment and issues citations where appropriate. KRS 338.031 and 338.141.

We affirm citation 1, item 1, which charged the employer with not guarding the lower portion of the swing cutoff saw blade and set the penalty at $625. If abatement has not been achieved, we order the employer to do so within thirty days.

It is so ordered.

Entered this May 5, 1998.

Robert M. Winstead
Chairman

Donald A. Butler
Member

[4] KRS 338.071 (4).

Thomas M. Bovitz
Member

CERTIFICATE OF SERVICE

Copy of the foregoing Order has been served upon the following parties in the manner indicated:

GORDON R SLONE
COUNSEL
OFFICE OF GENERAL COUNSEL
KY LABOR CABINET
1047 US 127 SOUTE STE 4
FRANKFORT KY 40601

(MESSENGER MAIL)

GERALD F BREWER
PRESIDENT
LOUISVILLE LUMBER
PO BOX 36095
LOUISVILLE KY 40233

(CERT MAIL P 059 750 490)

This 6th day of May, 1998.

KOSH REVIEW COMMISSION
#4 Millcreek Park
Frankfort, KY 40601
PH: (502) 573-6892
FAX: (502) 573-4619

Jacques J. Wigginton
Executive Director