

**COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATION ACTION NO. 00-KOSH-0397
KOSHRC 3485-00**

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

**DECISION AND ORDER OF THIS
REVIEW COMMISSION**

PACKAGING UN-LIMITED, INC.

RESPONDENT

This matter is before the Review Commission on its own motion for review following the denial of the Secretary of Labor's, Commonwealth of Kentucky ("Secretary") Petition for Discretionary Review. The Respondent contested two Citations issued by the Secretary; Citation 1 contains 7 sub-parts, with sub-part 7 containing three sub-parts and Citation 2, contains 5 sub-parts. Citation 1 contains violations deemed Serious and Citation 2 contains violations deemed Other Than Serious. Monetary penalties proposed for Citation 1 total \$6,325.00. Citation 2 carried no monetary penalties.

The Review Commission, having reviewed the hearing transcript, the evidence submitted therein, the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Order, the Secretary's arguments in its motion for discretionary review and being sufficiently advised, finds as follows:

1. The Secretary did not prove by a preponderance of the substantial evidence violations of 29 CFR 1910.101(b), (Citation 1 Item 1); 29 CFR 1910.1025(d)(2), (Citation 1 Item 6); 29 CFR 1910.1200(g)(1), (Citation 1 Item 7b) and 29 CFR

1910.1025(1)(1)(i), (Citation 2, Item 5). The Recommended Findings of Facts, Conclusions of Law and Order of the Hearing Officer in regard to these specific violations shall be affirmed.

2. The Secretary did prove by substantial evidence violations of 29 CFR 1910.106(d)(3)(ii)(a), (Citation 1, Item 2); 29 CFR 1910.157(c) (1), (Citation 1, Item 5); 29 CFR 1910.1200(e)(1)(I), (Citation 1, Item 7a), 29 CFR 1910.1200(h)(3)(ii), (Citation 1, Item 7c); 803 KAR 2:180 Section 6(1), (Citation 2, Item 1); and 29 CFR 1910.106(d)(3)(ii), (Citation 2, Item 2). The Recommended Findings of Fact, Conclusions of Law and Order of the Hearing Officer shall be affirmed in regard to these specific violations for a total monetary penalty of \$3,075.00.

3. The Hearing Officer recommended dismissal of Citation 1, Items 3 and 4 and Citation 2, Items 3 and 4, containing violations of 29 CFR 1910.134(e)(1), 29 CFR 1910.134(f)(2), 29 CFR 1910.134(c)(1) and 29 CFR 1910.134(k)(iv). These Citations involve Respondents' failure to provide medical evaluations or a "fit test" to employees before respirator use and failure to establish and implement a written protection program or conduct training for the wearing of respirators.

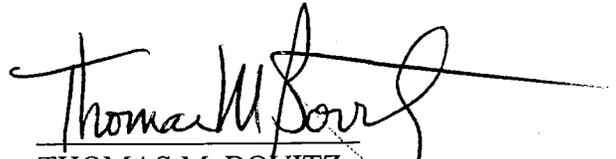
The recommendation of dismissal was based on the Hearing Officer's interpretation of instructions and/or directives in the Secretary's Field Operations Manual. Specifically, the Hearing Officer relied on FOM, IV at 19-20 regarding "unobserved violations." The FOM sets forth generally the policy and guidelines used by the Labor Cabinet in identifying violations and issuing Citations. The compliance officer testified, during the hearing, that she relied on the FOM for information used to calculate the monetary penalties in the case at hand.

The Secretary was not afforded an opportunity to refute the Hearing Officer's interpretation of its own policies prior to the submission of the Recommended Findings of Fact, Conclusions of Law and Order to the Review Commission.

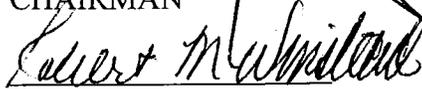
Therefore, in the interest of a full and fair hearing on the application of the Secretary's policies to the issuance of Citation 1, Subparts 3 and 4 and Citation 2, Subparts 3 and 4, this matter shall be remanded to the Hearing Officer to allow argument from the parties regarding the relevancy and applicability of any FOM provisions which specifically address Citation 1, subparts 3 and 4, and Citation 2, subparts 3 and 4.

IT IS HEREBY ORDERED that the Findings of Facts, Conclusions of Law and Recommended Order of the Hearing Officer shall be accepted in part and remanded in part, for a hearing to be held with all due expediency, with new evidence to be presented, if necessary, on the application of the Field Operations Manual policies to the issuance of Citation 1, Subparts 3 and 4 and Citation 2, Subparts 3 and 4. This is not a final Order.

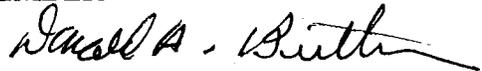
Entered this 22d day May, 2001.



THOMAS M. BOVITZ
CHAIRMAN



ROBERT M. WINSTEAD
MEMBER



DONALD A. BUTLER
MEMBER

CERTIFICATE OF SERVICE

A true copy of the foregoing Decision and Order has been served on the following in the manner indicated:

By Messenger Mail:

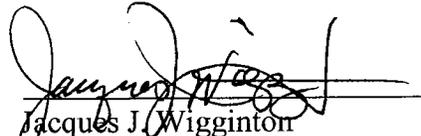
Hon. Gordon R. Slone
Counsel
Labor Cabinet
Office of General Counsel
1047 U.S. 127 South Ste 4
Frankfort, Kentucky 40601

By Certified Mail: 7000 0520 0012 3379 7918

Mr. Bob Hanekamp
Chief Executive Officer
Packaging Unlimited, Inc.
1729 McCloskey Avenue
Louisville, Kentucky 40210

This 2nd day of May, 2001.

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Jacques J. Wigginton
Executive Director