

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001363-MR

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 96-CI-01708

SECRETARY OF LABOR AND
ROSS BROTHERS CONSTRUCTION COMPANY

APPELLEES

AND NO. 1998-CA-001443-MR

ROSS BROTHERS CONSTRUCTION COMPANY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 96-CI-01708

SECRETARY OF LABOR AND
KENTUCKY OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND MILLER, JUDGES.

GUIDUGLI, JUDGE: Ross Brothers appeals from an order of the Franklin Circuit Court entered on May 13, 1998, which reversed the Kentucky Occupational Safety and Health (KY-OSH) Review Commission's final order dismissing the citation and penalty issued against Ross Brothers. The KY-OSH Review Commission appeals from the portion of the remand order instructing it to reinstate the original citation and penalty. After reviewing the record, we affirm.

Ross Brothers, an industrial construction contractor, was contracted by AK Steel Corporation Coke Plant to install a new steam aspiration line behind and below standpipes of the coke ovens on top of coke battery number three. The coke ovens are used to burn coal in order to form coke. Gases formed by the burning process are transferred to a collector main through standpipes located on the top of each oven. The standpipes are connected to the collector main by a pullman valve, which is opened and closed by a pullman lever. When the coal is burned, the pullman valve is open to allow gases to flow through the standpipe to the collector main. When the oven is reloaded with coal, the pullman valve is closed and a lid on top of the standpipe is opened to vent any gases remaining in the oven. Gases periodically leak into the oven where they ignite and escape by flame through the open lid on top of the standpipe.

On November 10, 1996, an employee of Ross Brothers accidentally raised a pullman lever, causing the pullman valve connecting the standpipe to the collector main to open. As a result, gases from the collector main re-entered the oven through the standpipe and ignited. Flames shot out of the open lid on top of the standpipe, as designed, and from the bottom of the standpipe where the refractory brick had been removed by another contractor. A Ross Brothers employee working near the standpipe was engulfed by the flames. Fortunately, the employee was wearing protective equipment and only received a first-degree burn on his ear and a second-degree burn on his cheek.

The Secretary of Labor (the Secretary), Commonwealth of Kentucky, issued a citation against Ross Brothers for violating Kentucky Revised Statute (KRS) 338.031(1)(a) by failing to lock out the pullman levers on the collector main while employees worked near them, as required by recognized industry guidelines set forth in American National Standards Institute (ANSI) publication Z244.1-1982. Pursuant to KRS 338.141(1), Ross Brothers filed a notice to contest the citation and penalty. The KY-OSH Review Commission appointed a hearing officer to conduct a hearing in accordance with KRS 338.081. The hearing officer dismissed the citation and penalty for failure to prove by a preponderance of the evidence that Ross Brothers had violated KRS 338.031(1)(a). The Secretary filed a petition for discretionary review with the KY-OSH Review Commission. The KY-OSH Review Commission elected not to grant discretionary review, thus, the hearing officer's recommended order became the final order of the

KY-OSH Review Commission. The Secretary appealed the final order to the Franklin Circuit Court.

On May 13, 1998, the circuit court found that the KY-OSH Review Commission had misapplied the law and Ross Brothers had violated KRS 338.031(1)(a). The circuit court remanded to the KY-OSH Review Commission with instructions to "reinstate the citation and penalty as originally issued against" Ross Brothers. Both Ross Brothers and the KY-OSH Review Commission appeal the circuit court's opinion and order.

Ross Brothers was issued a citation for violating the general duty clause of the Kentucky Occupational Health and Safety of Employees Act, KRS 338.031(1)(a). KRS 338.031(1)(a) provides:

- (1) Each employer:
 - (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

KRS 338.031(1)(a) is identical to the federal general duty clause found in 29 U.S.C.S. § 654(1)(a). In Nelson Tree Services, Inc. v. Occupational Safety and Health Review Commission, 60 F.3d 1207, 1209 (6th Cir. 1995), the court stated that the Secretary of Labor must demonstrate the following in order to establish a violation of the federal general duty clause: "[1] A condition or activity in the workplace presented a hazard to employees; [2] The cited employer or the employer's industry recognized the hazard; [3] The hazard was likely to cause death or serious physical harm; and [4] A feasible means existed to eliminate or materially reduce the hazard." Ross Brothers argues that the

circuit court erred in finding a violation of KRS 338.031(1) (a) because the hazard which caused the injury to the employee was not a "recognized hazard" and was not likely to, and did not, cause a serious injury.

Ross Brothers attempts to characterize the hazard which caused the employee's injuries as the removal of the bricks from the bottom of the standpipe. In the normal operations of the ovens, gases often leak back into the ovens and ignite, causing a sudden burst of flames to shoot out of the open lid on top of the standpipe. On this particular occasion, flames not only shot out from the lid on top of the standpipe but were able to escape from the bottom where the brick had been removed. Ross Brothers contends that the removal of the bricks was a hazard which it did not recognize nor should have been expected to recognize.

The KY-OSH Review Commission's final order characterized the hazard which caused the injury as the "unexpected energizing, start-up, or release of stored energy...." In this case, the stored energy was the pressurized flammable gas located in the collector main. This type of hazard was identified by the construction industry in the ANSI standards. ANSI standards are national consensus standards developed by industry, labor and safety representatives. This particular ANSI standard, publication Z244.1-1982, makes employers responsible for surveying the work area for potentially hazardous energy sources, identifying their isolating devices, and applying a lockout/tagout device to each energy isolating device. While the ANSI standard has not been legislatively

adopted by the Commonwealth, it is an industry guideline which adequately supports the contention that this hazard was recognized by Ross Brothers' industry.

Ross Brothers next argues that the hazard which existed was not likely to, and did not, cause a serious injury to the employee. Under KRS 338.031(1)(a), the Secretary is required to show the recognized hazard caused or was likely to cause death or serious physical harm to the employee. The Secretary argues that the employee suffered "serious physical harm" by receiving a first-degree burn on his ear and a second-degree burn on his cheek. The hearing officer disagreed and found that the Secretary failed to prove that the hazard was likely to cause death or serious physical harm because the employee used protective equipment.

On review, the circuit court correctly stated that the use of protective equipment "may be considered when assessing the probability that an injury will result from a hazard." However, the circuit court mistakenly found that the "probability assessment" was only a factor used in assessing the penalty and had no bearing on whether a violation had occurred. If the employee does not suffer a serious physical injury, the Secretary must prove that the hazard was likely to cause death or serious physical harm in order to establish a violation of KRS 338.031(1)(a). Only after finding a violation should the probability assessment then be used as a factor in determining the gravity-based penalty.

The fact that this employee was engulfed in flames and only received two minor burns is a testament to the effectiveness of the protective equipment he was wearing and is relevant to determining the likelihood that this hazard could cause death or serious physical harm. The conditions under which these employees work are extreme. While working on top of a battery of ovens, which stands two stories high and burns coal at a temperature of over 2,200 degrees, employees are required to wear special clothing and a respirator because of the severe heat and fumes. After reviewing the evidence, we are not willing to adopt the supposition that employees wearing the protective equipment are free from the likelihood that they may be killed or seriously injured by ignition of the pressurized flammable gas. Because the requirements of the general duty clause have been met, the circuit court did not err in its determination that Ross Brothers violated KRS 338.031(1)(a).

The KY-OSH Review Commission appeals from the circuit court's remand order which instructed it to "reinstate the citation and penalty as originally issued against" Ross Brothers. The KY-OSH Review Commission argues that the order prevents it from exercising its statutory discretion to modify the penalty assessment under KRS 338.071(4) and KRS 338.081(1). This Court believes that the KY-OSH Review Commission has misinterpreted the remand order.

The KY-OSH Review Commission has been ordered to reinstate the original citation and penalty, not to adopt the citation and penalty as originally issued in its final order.

The citation and penalty must exist in order for the KY-OSH Review Commission to exercise its discretionary authority in KRS 338.081(3). In other words, now that the citation and penalty have been reinstated, the KY-OSH Review Commission is free to exercise its statutory authority under KRS Chapter 338.

For the reasons stated above, the Franklin Circuit Court's order is hereby affirmed.

ALL CONCUR.

BRIEF FOR KENTUCKY
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REVIEW COMMISSION:

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