

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO.

KOSHRC #5656-20

COMMISSIONER OF WORKPLACE STANDARDS
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v.

BAILEY'S MASONRY INC.

RESPONDENT

DECISION AND ORDER OF THE REVIEW COMMISSION

On December 27, 2023, this Commission received a Petition for Discretionary Review from Bailey's Masonry, Inc (hereafter "Bailey"). Bailey took "exception with the Recommended Order generally based upon the time and circumstances surrounding its issuance, and particularly the Hearing Officer's findings, conclusions and Order affirming Citation 1, Items 2, 4, and 5." Counsel for the Commissioner of Workplace Standards (hereafter "The Cabinet") filed a Statement of Opposition to Petition for Discretionary Review on January 7, 2024. We granted the Petition for Discretionary Review on January 9, 2024.

I. Bailey's General Exceptions

Change of Hearing Officers Post Evidentiary Hearing

The requisite elements for procedural due process are "a hearing, the taking and weighing of evidence, a finding of fact based upon an

evaluation of the evidence and conclusions supported by substantial evidence.” *Kaelin v. City of Louisville, Ky.*, 643 S.W.2d 590, 591 (1982). However, due process is not necessarily based upon an opportunity to personally observe the claimant. See *Bentley v. Aero Energy, Inc.*, Ky.App., 903 S.W.2d 912, 913 (1995) (“It is therefore evident that **the requisites of due process focus upon the appraisal and evaluation of evidence supplied the decision-maker, not upon the opportunity to personally observe the claimant.**”); *Coleman v. Eastern Coal Corp.*, Ky.App., 913 S.W.2d 800, 801 (1995) (“Moreover, **we have consistently held that a claimant's due process rights are not violated even when one ALJ hears the case and another ALJ writes the actual decision.**”)

Sec'y, Lab. Cabinet v. Bos. Gear, Inc., a Div. of IMO Indus., Inc., 25 S.W.3d 130, 134 (Ky. 2000) (emphasis added)

The record shows Bailey was given a hearing and the opportunity to present evidence. The Recommended Order includes the hearing officer's findings of fact, evaluation of the evidence, and conclusions based on evidence in the record. Bailey has not persuaded the Commission the change from one hearing officer to another denied the company due process.

Passage of Time from Hearing to Final Order

Hearings before the Commission are governed by our own rules of administrative procedure found in 803 KAR 50:010. Like the civil rules governing actions before judges in Kentucky courts, our regulations do not set a deadline for hearing officers to submit a recommended order. We find no merit to Bailey's claim its due process rights were violated because of the amount of time our hearing officers took to reach a recommended order. Further, if Bailey was concerned about the amount of time our hearing officers were taking to reach a decision, it could have

requested a status conference. We do not find the passage of time to be a violation of Bailey's due process rights.

Extended Exposure to the Possibility of a Repeat Citation

Bailey argues due process was violated because the period in which it could be cited for a repeat violation will not start to run until the final order is entered. However, it is Bailey's decision to appeal that prevented entry of a final order fifteen days after the citations first issued in July of 2020. It is Bailey's appeal that drives the pre-hearing, administrative hearing, decision preparation, and discretionary review processes. Each step takes time and necessarily delays the entry of a final order. Working through each of these steps has been necessary to assure Bailey's due process rights are protected.

The passage of time pending a final decision does not increase cause Bailey's injury. Regardless of whether the matter is resolved to Bailey's satisfaction, the company must continue to provide the same protections required by the standards. It is not required to do more to prevent a future citation. We find the argument "raises the spectre of some future deprivation; and the due process clause does not protect against specters." *Muscarello v. Winnebago Cnty. Bd.*, 702 F.3d 909, 914 (7th Cir. 2012)

II. Citation 1, Item 2

Bailey argues the Review Commission must overturn the hearing officer's finding of a violation. It challenges the decision based on relevance of photograph IMG_1884.¹ Bailey argues the hearing officer erred to consider the exhibit because the Cabinet did not establish the photo was taken when workers were present at the jobsite or when employees were actively working from the scaffold. It further argues the hearing officer discounted the evidence of the company's compliance depicted in photograph IMG_1888.²

We find the Cabinet did not need to provide further evidence that photograph IMG 1884 depicted the working conditions at the Orbis worksite. The parties made that unnecessary. On June 10, 2022, the Cabinet and Bailey filed Joint Stipulations in which they agreed to the admissibility of the Affidavit of Greg King and the three photographs attached to the affidavit as IMG 1884, 1888, and 1889. Item 6 of the affidavit states, "The three (3) photographs accurately depict the working conditions of Bailey Masonry on January 28, 2020 at Orbis Corporation Bardstown, KY." Based on the parties' agreement, we find IMG 1884, 1888, and 1889 show the working conditions as they existed on January 28, 2020.

We also disagree with Bailey's conclusion the conditions shown in IMG_1888 establish the company's compliance with the standard. The fact that both

¹ The exhibit shows an empty scaffold without a ladder for access.

² The exhibit shows employees on the scaffolding at a time when a ladder was present.

photographs were taken on the same day, by the same person, and were offered as accurate representations of the worksite leads us to conclude Bailey's compliance with the scaffold standard varied during the workday on January 28, 2020. It is not disputed that employees were present at the worksite or that they used the scaffolding during that day. We uphold our hearing officer's determination that employees had access to the violative condition. We affirm Citation 1 Item 2, its classification, and the associated penalty.

III. Citation 1, Item 4

The standard allegedly violated reads:

Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

29 CFR 1926.451(g)(4)(i)

The January 28, 2020, photograph IMG_1888 shows a person standing on the top level of the scaffold without a complete midrail extending between the vertical poles. To comply with the standard a guardrail system must have "toprails, midrails, and posts, erected to prevent employees from falling off a scaffold platform or walkway to lower levels." 29 CFR 1926.450(b) IMG 18888 shows a partial mid-rail in place. Partial compliance does not meet the requirements of the standard. The partial mid-rail left an unprotected gap in the area where the worker was standing. That gap exposed the employee to the hazard of falling from the scaffold. We agree

with the conclusion that a fall from the top level of the scaffold shown in IMG 1888 could lead to death or serious physical injury. We find the partial mid-rail in the area where the employee worked did not protect the employee in the manner required by the standard. We affirm Citation 1 Item 4, its classification, and the associated penalty.

IV. Citation 1, Item 5

The standard allegedly violated reads:

When portable ladders are used for access to an upper landing surface, the ladder side rails **shall extend at least 3 feet (.9 m)** above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

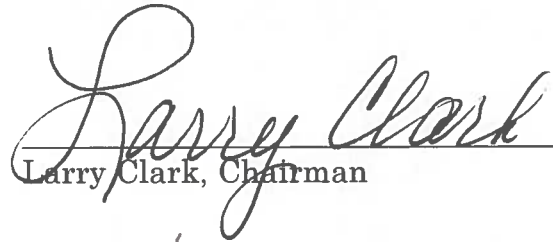
29 CFR 1926.1053(b)(1)(emphasis added)

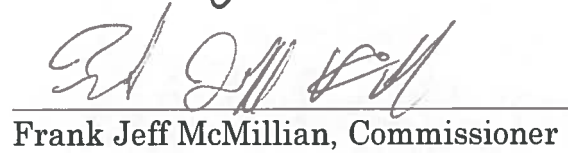
We have reviewed the record and CSO testimony concerning the citation. TR 81-82. We agree with our hearing officer's conclusion that the standard was violated. We find photo IMG 1888 and CSO testimony concerning the conditions depicted prove Bailey employees were working on the scaffolding's top level at a time when the red extension ladder did not extend at least three feet above the upper platform's surface. We affirm Citation 1 Item 5, its classification, and the associated penalty.

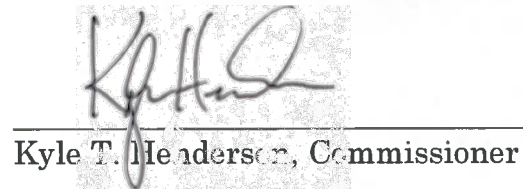
For the foregoing reasons, we **AFFIRM** our hearing officer's evidentiary rulings, findings of fact, and conclusions of law and adopt the order as the final order of this Commission.

It is so ORDERED.

March 5, 2024.


Larry Clark, Chairman


Frank Jeff McMillian, Commissioner


Kyle T. Henderson, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Decision and Order of the Kentucky Occupational Safety and Health Review Commission is being served by electronic mail upon the following:

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This 5th day of March, 2024.


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