



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

3-21-74

WENDELL H. FORD
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 1

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

vs.

DECISION & ORDER
OF REVIEW COMMISSION

COLLIER CONSTRUCTION CO.

RESPONDENT

Before H. L. Stowers, Chairman, Merle Stanton and
Charles B. Upton. Commissioners:

This matter is now before this Commission and is being reviewed by the Commission on application and petition of Respondent, received by this Commission March 18, 1974, following issuance on March 4, 1974, of the decision of the Hearing Officer for the Commission, the Honorable Lloyd Graper. Respondent asks review of contested Item No. 3, of the citation issued on August 23, 1973, alleging a serious violation of 29CFR 1926.951 (b) (1), as adopted by OSH 12). In the opinion of the Hearing Officer, "the Commissioner has met his burden of proof and both the citation and the proposed penalty of \$900.00 should stand."

Respondent by memorandum brief asks that citation
2 Ky OSHA 1 No. 004, dated August 27, 1973, be vacated and

the penalty be cancelled.

In support of its position, respondent argues that 29CFR 1926.951 (b) (1) does not offer a safe enough working condition and therefore a safer working condition must be developed. It then submits that several proposed changes of section 29CFR 1926.104 have been PROPOSED (emphasis ours) in November 1973, three months after this citation, at the Federal Construction Safety Advisory Committee meeting. Respondent also refers to safety standards of a Local Union No. 126 of Electrical Workers, which in no case would be controlling of, supersede, or applicable to the problem before us.

Respondent further cites the case before the Federal Review Commission of Industrial Steel Erectors, OSHRC # 703, issued January 10, 1974. This case involved dismantling of a steel structure of a building, and in its opinion the Federal Review Commission, Cleary, Commissioner writing, stated:

"The preponderance of the evidence establishes that in the circumstances of this case the employees were safer in not tying-off than if they had. They were in the process of dislodging a truss in the column of the framework. There were about 20 bolts in the truss being removed. The employer-required protective cage had been used by the employees to remove all but four of the bolts used to secure the truss until the crane cable could be attached. The four bolts and safety pins would

then be removed so the pressure could be exerted, if necessary, to break the truss loose from the columns. It was adduced that when the bolts are removed or the truss is dislodged with pressure, it is impossible to predict its movement. It may flip end-over-end, sideways, fold together, warp, or fly in any direction. The employees refused to tie-off under these circumstances because a lanyard would restrict their movement when the truss was dislodged."

"In this regard, it should be emphasized that the scope of this decision is narrow and is to be construed strictly in light of the peculiar circumstances of this case."

It is interesting to note that a week later, on January 17, 1974, the Federal Review Commission, through OSHRC Judge Abraham Gold, rendered a decision involving this Respondent for the same type violation charged here (failure to use safety nets for employees working more than 25 feet above the ground if use of ladders, -- or safety belts is considered impractical.) In this case reported at CCH Vol. 2, decision # 17, 178, this respondent was successful in having the citation dismissed on the grounds that it was cited under the general provisions relating to Personal Protective and Life Saving Equipment, when there was a particular standard relating to Power Transmission and Distribution applicable to their particular business, electrical construction, and that it was engaged at the time of that citation in the construction of an electric power transmission line, and that respondent was in compliance with 29CFR 1926.951 (b)

which states:

1926.951 Tools and protective equipment.

(b) Personal Climbing equipment. (1) Body belts with straps or lanyards shall be worn to protect employees working at elevated locations on poles, towers, or other structures except where such use creates a greater hazard to the safety of the employees, in which case other safeguards shall be employed.

29CFR 1926.950 provides: General Requirements:

(a) Application. The occupational safety and health standards contained in this Subpart V shall apply to the construction of electric transmission and distribution lines and equipment.

(1) As used in this Subpart V the term "construction" includes the erection of new electric transmission and distribution lines and equipment and the alteration, conversion, and improvement of existing electric transmission and distribution lines and equipment.

In the case now before this Commission, this same respondent has stated its business is Transmission line construction (Tr. of Ev. A to Q 2, p. 67). It was cited under 29CFR 1926.951 (b) (1), which it alleged it should have been cited under in the federal case, and which it also alleged it was compliance with, and now as a defense here, respondent alleges because 29CFR 1926.104 may possibly be amended or revised it should have the citation here dismissed.

Accordingly, the Commission finds none of the submission of respondent relative to possible changes in a standard not at issue here is not pertinent or controlling and no justifiable basis being shown why any part of the opinion of the Hearing Officer is in error, IT IS ORDERED that we grant the request for review and that the Decision, Findings of Fact, Conclusions of Law, and Order, of the Hearing Officer, issued by this Commission on March 4, 1974, is affirmed.

Dissenting:

Concurring:


CHAIRMAN

Merle H. Stanton

Charles B. Upton

Copy a



WENDELL H. FORD
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6592

March 4, 1974

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 1

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

V

THE COLLIER CONSTRUCTION COMPANY

RESPONDENT

NOTICE OF RECEIPT OF
DECISION OF HEARING OFFICER
AND ORDER

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a decision of our hearing officer, the Honorable Lloyd Graper, has this day been received and is attached hereto as a part of this Notice and Order of this Commission.

You will take further notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may submit a petition for discretionary review by this Commission.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this decision of the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, the decision of the hearing officer is adopted and affirmed as the decision and final order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been filed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

FOR RESPONDENT:

The Collier Construction Company
14650 Pearl Road
Strongsville, Ohio 44136

Attention: Robert J. Martin
Safety Director

FOR COMPLAINANT

James I. Foley, General Counsel
Department of Labor
Frankfort, Kentucky 40601

This the 4th day of March, 1974.


IRIS R. BARRETT, EXECUTIVE DIRECTOR

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 1

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

V.

DECISION, FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND ORDER

THE COLLIER CONSTRUCTION COMPANY

RESPONDENT

* * * * *

This hearing was held under the provisions of KRS 338.071(4), one of the provisions of Chapter 338 of the Kentucky Revised Statutes dealing with the Safety and Health of Employees, which authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of this Chapter and to adopt and promulgate rules and regulations with respect to the procedural aspect of its hearings. Under the provisions of KRS 338.081, hearing authorized by the provisions of this Chapter may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal, the Review Commission may sustain, modify, or dismiss a citation or penalty.

On August 23, 1973, the Kentucky Department of Labor, Division of Occupational Safety and Health Compliance, Complainant,

issued a Citation for Alleged Occupational Safety and Health Violations to Respondent, The Collier Construction Company, 15650 Pearl Road, Strongsville, (Cleveland) Ohio.

On August 27, 1973, an Amendment to the Citation, an Amendment to Citation for Serious Violation, and an Amendment to Notification of Proposed Penalty was issued by Complainant to Respondent.

The Amendment to Citation for Serious Violation listed 29 CFR 1926.951(b)(1) (as adopted by OSH 12) as the standard or regulation allegedly violated and described the alleged violation as follows:

Body belts with straps or lanyards not worn by employees working at elevated locations on towers,

and proposed a penalty of \$900.00.

The Amendment to Citation listed three items. Item Number 1 listed 29 CFR 1926.550(a)(14)(i) (as adopted by OSH 12) as the standard or regulation allegedly violated and described the alleged violation as follows:

An accessible fire extinguisher of 5BC rating or higher, was not available on a crane at the operator station or cab of the equipment,

and proposed no penalty.

Item Number 2 listed 29 CFR 1926.550(a)(6) (as adopted by OSH 12) as the standard or regulation allegedly violated and described the alleged violation as follows:

Records of annual inspections of the hoisting machinery (crane) were not available.

and proposed a penalty of \$123.00.

Item Number 3 listed 29 CFR 1910.179(j)(2)(v) (as adopted by OSH 11) as the standard or regulation allegedly violated and described the alleged violation as follows:

Signed monthly inspection reports were not available on rope slings (setting bridles)

and proposed a penalty of \$192.00.

By letter, dated August 30, 1973, Respondent notified Complainant that it was contesting the alleged serious violation together with the proposed fine and all of the alleged other than serious violations together with the proposed fines.

On September 7, 1973, Complainant, pursuant to the provisions of KRS 338.141 of the Kentucky Occupational Safety and Health Act of 1972, certified this case to the Occupational Safety and Health Review Commission.

A Notice of Receipt of Contest was mailed by the Review Commission to Complainant and Respondent enclosing a notice to employees of Respondent of the contest of the citation and the fact that it would be the subject of a hearing before the Review Commission in which affected employees would be entitled to participate.

A Certificate of Service indicating that such Notice supplied by the Review Commission advising affected employees of this case and a copy of the Respondent's Notice of Contest were posted at each place where the Kentucky Occupational Safety and Health Act Citation is required to be posted and served upon Local Union No. 183, 129 S. Main Street, Somerset, Kentucky 42501, attention: Mr. Jim Steele, the local union representing affected employees, was received by the Review Commission on September 19, 1973.

A Complaint was filed with the Review Commission on September 24, 1973.

By letter, dated October 1, 1973, as an Answer to the Complaint, Respondent again denied the alleged serious violation and the proposed penalty therefor and denied the other than serious violation hereinabove titled Item Number 3. Respondent agreed to the other charges described as Item Number 1 and Item Number 2 and agreed that the proposed penalties for such violations are just.

On December 10, 1973, all parties were given written notice that a hearing of this matter would be held before a hearing officer assigned under KRS 338.081 and the Rules of Procedure of the Review Commission on Monday, January 7, 1974, at 10:00 a.m., at the Daviess County Courthouse, Owensboro, Kentucky.

By letter dated January 2, 1974, and by telephone request made to the hearing officer, and good cause having been shown, the hearing was ordered postponed to Monday, January 28, 1974, at 10:00 a.m. at the New State Office Building, Owensboro, Kentucky.

As to the Citation for Serious Violation, the fact that body belts with straps or lanyards were not worn by employees working at elevated locations on towers is not in dispute. Inasmuch as 29 CFR 1926.951(b)(1) provides that:

Body belts with straps or lanyards shall be worn to protect employees working at elevated locations on poles, towers, or other structures except where such use creates a greater hazard to the safety of the employees, in which case other safeguards shall be employed. (underlining added)

Respondent contends, in the situation in question, that use of such devices operate to create a greater hazard to the safety of the employees and that the "ability of the men" without any further physical safeguards would meet the standard "in which case other safeguards shall be employed".

As to the Citation for the other than serious violation hereinabove titled Item Number 3, the fact that signed monthly inspection reports were not available on rope slings (setting bridles) is not in dispute. Inasmuch as 29 CFR 1910.179(j)(2)(v) is a subsection of 29 CFR 1910.179 entitled: "Overhead and gantry cranes", Respondent contends that such standard is inapplicable since Respondent was using a mobile truck crane.

After hearing the testimony of the witnesses and having considered the same together with the exhibits and the stipulations, and the representations of the parties, it is concluded that the substantial evidence, on the record considered as a whole, supports the following findings of fact:

FINDINGS OF FACT

1. It is, upon stipulation of the parties, found that Respondent is engaged in the business of constructing electrical power lines and distribution towers; was subject to the Kentucky Occupational Safety and Health provisions on the date of the inspection of its place of employment; and has, on the average, over 100 employees.

2. It is found that body belts with straps or lanyards were not worn by Respondent's employees working at elevated locations

on towers, and that no variance had been granted to Respondent in regard thereto.

3. It is found that Respondent operated a mobile truck crane and not an overhead or gantry crane at the time of the alleged violation described in Item 3 above.

Upon the basis of the foregoing, the Hearing Officer makes the following:

CONCLUSIONS OF LAW

1. Limiting the Review Commission's review to the citations agreed upon by the parties appears appropriate under the circumstances since it does not appear that error would result from not reviewing the unchallenged citations.

2. Respondent has the duty to comply with occupational safety and health standards promulgated under Chapter 338 of the Kentucky Revised Statutes. Under the provisions of KRS 338.051 and KRS 338.061, the Occupational Safety and Health Standards Board within the Department of Labor is charged with adopting and promulgating occupational safety and health rules, regulations, and standards. Because of this, the Review Commission does not have the power to decide whether a standard is necessary or whether the Respondent's way is safer. Respondent should obtain permission to follow his practice rather than the practice prescribed by the standard. KRS 338.151 provides the means for doing so--the Respondent may request in writing a variance from the Commissioner of Labor. A variance may be granted if the proponent of the variance has demonstrated that the

conditions, practices, means, methods, operations, or processes used or proposed to be used will provide employment and place of employment which are as safe and healthful as those which would prevail if the standard were complied with.

The Compliance Officer, as an agent of the Commissioner of Labor, as to the serious violation, gave effect to the criteria prescribed by statute and gave them the proper weight under the circumstances. As to the serious violation, the Commissioner has met his burden of proof and both the citation and the proposed penalty of \$900.00 should stand.

3. 29 CFR 1910.180 is titled "Crawler locomotive and truck cranes". Subsection (g) entitled "Rope inspection" provides:

(1) Running ropes. A thorough inspection of all ropes in use shall be made at least once a month and a full written, dated, and signed report of rope condition kept on file where readily available. All inspections shall be performed by an appointed or authorized person. Any deterioration, resulting in appreciable loss of original strength, such as described below, shall be carefully noted and a determination made as to whether further use of the rope would constitute a safety hazard:

(There follows a description of such items which include reduction of rope diameter, broken outside wires, worn outside wires, corroded or broken outside wires, corroded, cracked, bent, worn or improperly applied end connections, and severe kinking, crushing, cutting or unstranding.)

(2) Other ropes. (i.e., describes locations where heavy wear and/or broken wires may occur; inspection of rope that has been idle for a period of a month or more; and inspection of nonrotating rope.)

Subsection (d)(6) entitled "Inspection classification--Inspection records" provides:

Written, dated, and signed inspection reports and records shall be made monthly on critical items in use such as brakes, crane hooks, and ropes. Records shall be kept readily available. (underlining added).

29 CFR 1910.179 is titled "Overhead and gantry cranes."

Subsection (j) (2) (v) entitled "Inspection--Frequent inspection" provides:

The following items shall be inspected for defects at intervals as defined in subparagraph (1) (ii) of this paragraph or as specifically indicated, including observation during operation for any defects which might appear between regular inspections. All deficiencies such as listed shall be carefully examined and determination made as to whether they constitute a safety hazard:

Rope slings, including end connections, for excessive wear, twist, distorted links interfering with proper function or stretch beyond manufacturer's recommendations
Visual inspection daily; monthly inspection with signed report.

29 CFR 1910.5(c) (1) and (2) provide, in part:

(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process...

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies...

The Review Commission must decide the facts in each contest before it in a fair and impartial manner. It cannot routinely approve the Compliance Officers interpretation of a

standard's application to the facts. It must judge the employer's compliance with the standard in the context of what a reasonable person of ordinary prudence would do under the circumstances. 29 CFR 1910.180 provides detailed rope inspection procedures for truck cranes. Such inspection procedures are broad enough to include inspection of rope slings as well. 29 CFR 1910.179 by its very title is made applicable to overhead and gantry cranes, the fundamental characteristics of which are dissimilar from truck cranes. 29 CFR 1910.5(c)(1) provides for the particular standard to prevail over a different general standard in this situation. It is therefore concluded that the standard set forth in 29 CFR 179 (j)(2)(v) is inapplicable to Respondent's activities in connection with its operation of a mobile truck crane, and both the citation and the proposed penalty of \$192.00 should be vacated.

ORDER

IT IS ORDERED that both the citation and the proposed penalty of \$900.00 for the serious violation shall be and the same hereby are SUSTAINED, and that both the citation and the proposed penalty of \$192.00 for the alleged non-serious violation titled Item Number 3 shall be and the same hereby are VACATED.



LLOYD GRAPER
Hearing Officer, KOSHRC

DATED: February 21, 1974,
Frankfort, Kentucky

Decision No. 2