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GOVERNOR

IRIS R. BARRETT  
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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

July 10, 1974

KOSHRC # 11

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

vs.

POWER SYSTEMS, INC.

RESPONDENT

REVIEW COMMISSION  
DECISION

Before H. L. STOWERS, Chairman; MERLE H. STANTON,  
and CHARLES B. UPTON, Commissioners.

STANTON, COMMISSIONER:

On April 16, 1974, the Commission appointed Hearing Officer, Lloyd Graper, issued a Decision, Findings of Fact, Conclusions of Law, and Recommended Order in this case, in which one contested item was sustained and two contested items, proposed penalty and abatement dates, were vacated.

On May 1, 1974, pursuant to Rules of Procedure of this Commission, this case was called for review by the Commission.

The Commission has reviewed and examined the entire record and based thereon adopts the Hearing Officer's decision insofar as it is consistent with the following determination.

Item No. 4 of the citation reads:

"Guard rails not less than 2 x 4 inches or the equivalent, approximately 42 inches high with a mid-rail and toeboards shall be installed at all open sides and ends on all scaffolds more than six feet above the ground or floor. Toeboards shall have a minimum of four inches in height. Wire mesh shall be installed in accordance with Paragraph (a) 6 of this section."

This standard was amended to read:

"Guard rails made of lumber not less than 2 x 4 inches or other material providing equivalent protection, approximately 42 inches high with a mid-rail and toeboards shall be installed at all open sides and ends on all scaffolds more than ten feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with Paragraph (a) 6 of this section."

While there is question that the ropes used as guardrails are "equivalent" or are of "other material providing equivalent protection," under the section as amended, we are of the opinion the respondent was not prejudiced by this and when the two sections were read into the record by the complainant, no objection was made by respondent or noted or prejudice shown.

However, the provision of this standard required guardrails at all open sides and ends on all scaffolds and this provision was not amended or changed. According to proof offered by the Compliance Officer, not refuted by the respondent, this scaffold was approximately 100 feet high and the guardrail as provided by respondent did not go all the way around the platform area (Tr. of Evidence, p. 44). It was stated the guardrail provided was on only one side of the scaffold (Tr. of Evidence, p. 72).

It is the finding of this Commission that there was no guarding at the open ends of the scaffold and that the respondent was in violation of this standard.

ORDER

Therefore, it is ordered the decision of the Hearing Officer is modified in that the citation, the proposed penalty of \$31.00 and the abatement date for the non-serious violation titled Item 4 shall be and is sustained.

It is so ordered.

Merle H. Stanton  
Merle H. Stanton, Commissioner

Concurring:

s/ H. L. Stowers  
H. L. Stowers, Chairman

s/ Charles B. Upton  
Charles B. Upton, Commissioner

COMMONWEALTH OF KENTUCKY  
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC DOCKET NO. 11

COMMISSIONER OF LABOR OF KENTUCKY

COMPLAINANT

V.

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

POWER SYSTEMS, INC.

RESPONDENT

\* \* \* \* \*

This hearing was held on Tuesday, February 19, 1974, in the Daviess County Grand Jury Room, Daviess County Courthouse, Owensboro, Kentucky, 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 November 16, 1973, as a result of an inspection made on October 22, 1973, at a place of employment located at Kentucky Utilities Green River Power Plant, Highway 431, Central City, Kentucky, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued a citation to the respondent alleging non-serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

Item 1

The standard, regulation or section of KRS Chapter 338 allegedly violated is 29CFR 1926.28(a) (as adopted by OSH-12) and the description of the alleged violation is:

Personal protective equipment (safety belts) was not required to be worn where employees were exposed to hazardous conditions. (Falling, at elevation 480) (approximately 70 feet high).

and the date by which the alleged violation must be corrected was immediately upon receipt of the citation.

Item 2

The standard, regulation or section of KRS Chapter 338 allegedly violated is 29CFR 1926.25(a) (as adopted by OSH-12) and the description of the alleged violation is:

Debris was not kept cleared from work areas and passageways. (Elevations 480, 531, and at top of precipitator platform).

and the date by which the alleged violation must be corrected was without delay but no later than November 29, 1973.

Item 3

The standard, regulation or section of KRS Chapter 338 allegedly violated is 29CFR 1926.451(a)(13) (as adopted by OSH-12) and the description of the alleged violation is:

An access ladder or equivalent safe access was not provided at elevation 480. (single plank used for scaffold access).

and the date by which the alleged violation must be corrected was without delay but no later than November 29, 1973.

Item 4

The standard, regulation or section of KRS Chapter 338 ~~allegedly violated was 29CFR 1926.451(a)(13) (as adopted by OSH-12)~~ and the description of the alleged violation was:

Guardrails, not less than 2 x 4 inches, or the equivalent, approximately 42 inches high, with a midrail and toeboard, were not installed on all open sides and ends of scaffolds more than 10 feet above the ground or floor. (Top of inlet elevation).

and the date by which the alleged violation must be corrected was without delay but no later than November 29, 1973.

Item 5

The standard, regulation or section of KRS Chapter 338 allegedly violated was 29CFR 1926.500(d)(1) (as adopted by OSH-12) and the description of the alleged violation was:

An open-sided platform 6 feet or more above the ground was not guarded by a standard railing or equivalent. (Stairway landing up from hopper room).

and the date by which the alleged violation must be corrected was without delay but no later than November 29, 1973.

Item 6

The standard, regulation or section of KRS Chapter 338 allegedly violated was 29CFR 1926.500(d)(2) (as adopted by OSH-12) and the description of the alleged violation was:

A runway (elevation 531) was not guarded by a standard railing, or the equivalent on all open sides, 4 feet or more above floor or ground level.

and the date by which the alleged violation must be corrected was without delay but no later than November 29, 1973.

Item 7

The standard, regulation or section of KRS Chapter 338 allegedly violated was 29CFR 1926.500(e)(1)(iii) (as adopted by OSH-12) and the description of the alleged violation was:

Flights of stairs less than 44 inches wide, having four or more risers and both sides open, were not equipped with standard stair railings on the open sides (At trailers).

and the date by which the alleged violation must be corrected was without delay but no later than November 29, 1973.

On the same date, the same division of the same department issued to respondent a notification of proposed penalty

whereby respondent was notified, pursuant to the provisions of KRS Chapter 338, that the proposed penalty for Item 1 was \$68.00, for Item 2 was none, for Item 3 was \$31.00, for Item 4 was \$31.00, for Item 5 was none, for Item 6 was none, and for Item 7 was none.

On November 29, 1973, Power Systems, Inc., respondent, by W. H. Griffin, Sr., its safety director, wrote to the Kentucky Department of Labor, Division of Occupational Safety and Health Compliance contesting Items 1, 3 and 4.

On December 4, 1973, the Kentucky Department of Labor, Occupational Safety and Health Compliance Division, certified to the Occupational Safety and Health Review Commission that the following documents were issued or received on the dates indicated: On November 16, 1973, a citation was issued; on the same date a Notice of Proposed Penalty in the total amount of \$130.00 was sent; on December 4, 1973, Notice of Contest from the employer was received.

Also included in the record is a receipt dated December 4, 1973, indicating receipt from the Kentucky Occupational Safety and Health Review Commission of notice of receipt of contest in this case.

A Notice of Receipt of Contest issued by the Kentucky Occupational Safety and Health Review Commission accompanied by the Commission's Rules of Procedure, a form for use in notifying affected employees of the case and a certification form was mailed to Complainant and the Respondent on December 5, 1973.

On December 11, 1973, a memorandum was sent from Bob Lindon, Director of Compliance, to the Executive Director of the

Occupational Safety and Health Review Commission indicating that attached was a notice of compliance received by that office to be made a part of the file. Such form indicated that the alleged violations observed on October 22, 1973, as to Item 1 were abated immediately, and as to Items 2, 3, 4, 5, 6, and 7 were abated on November 29, 1973. This form was signed by William H. Griffin, Sr., Safety Director of respondent and bore the date December 6, 1973.

An employer's certification dated December 14, 1973, indicated that the name and address of each local union representing affected employees is: Boilermakers' Local No. 40, Bardstown Road, Louisville, Kentucky 40205.

A complaint was received by the Occupational Safety and Health Review Commission on December 18, 1973.

On January 8, 1974, by letter, the Review Commission advised the respondent that the case had been assigned to hearing officer, Lloyd Graper, and that all pleadings and papers shall be filed with Mr. Graper until a decision in the case is made by him.

On January 16, 1974, the Review Commission mailed a notice of hearing to both complainant and respondent indicating that a hearing of this matter would be held before a hearing officer assigned under KRS Chapter 338.081 and under the Rules of Procedure of the Commission, on Tuesday, February 19, 1974, at 10:00 a.m.

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 the stipulation of the parties, found that the Kentucky Occupational Safety and Health Act was approved by the U. S. Department of Labor on July 23, 1973; that respondent is engaged in the business of mechanical construction on power plant sites and was subject to the Kentucky Occupational Safety and Health provisions on the date of the inspection of its place of employment; and that the approximate number of employees working for respondent at the time of the inspection was ten men.

2. As to Item 1, it is found that personal protective equipment (safety belts) was not required to be worn where employees were exposed to hazardous conditions. (Falling, at elevation 480) (approximately 70 feet high).

3. As to Item 3, there is not sufficient evidence from which to find that the single plank in question was actually used for access to a scaffold.

4. As to Item 4, there is not sufficient evidence from which to find that guardrails, not less than 2 x 4 inches, or the equivalent, approximately 42 inches high, with a midrail and toeboard, were not installed on all open sides and ends of scaffolds more than 10 feet above the ground or floor. (Top of inlet elevation).

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 and penalties actually challenged by the respondent appears appropriate under the circumstances since it does not appear that error would result from not reviewing the unchallenged citations and penalties.

2. Respondent's letter of November 29, 1973, served the same purpose as an answer to the complaint. Respondent was not represented by counsel but, nevertheless, adequately advised complainant of the basis of its position, and complainant has shown no prejudice to it by reason thereof. For this reason, the formal requirements of an answer are dispensed with.

3. As to the alleged non-serious violation titled Item 1, it is undisputed that two men were working without wearing personal protective equipment while exposed to hazardous conditions.. By way of avoidance, respondent argues that it has discharged its obligation by issuing its employees a safety manual; by obtaining from its employees a signed statement that they will abide by respondent's rules and regulations or be subject to dismissal; and by furnishing its employees with safety belts and lanyards to tie themselves off.

An employer does not necessarily discharge his obligation merely by cautioning his employee of a hazardous condition and ordering him to take prescribed action to secure against accident. The employer may have to insist that the

employee put into effect the safety directions, stand by to see that this is done, or pull the worker off the job. An employer must necessarily enforce his safety rules. It is a matter of common knowledge that many workers are careless about matters affecting their personal safety. Seeing to it that workers use the protective equipment made available to them by the employer is the employer's legal obligation.

The essential question here is whether or not the respondent has strictly enforced its safety program. Did it in fact insist that it be observed, and did it back up its insistence with reprimands and discharges?

Respondent has made no attempt to utilize the governing statutes which empower it to require the attendance of witnesses and the production of evidence under oath. None of the persons present at the scene other than the Compliance Officer offered any testimony as to what degree of enforcement of respondent's safety program actually did occur on the job site. Absent such a showing there is no basis for making a determination that respondent, as an employer, did all it could reasonably be expected to do under the circumstances. The Compliance Officer, as an agent of the Commissioner of Labor, as to this non-serious violation, gave effect to the criteria prescribed by statute and gave them the proper weight under the circumstances. As to this item, the Commissioner has met his burden of proof and the citation, the penalty assessed, and the abatement date should stand.

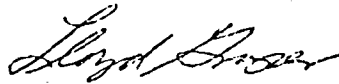
4. As to the alleged non-serious violation titled Item 3, there was a lack of probative evidence upon which to determine that the plank in question was actually used for access to the scaffold. In all proceedings initiated by a notice of contest, the burden of proving the case rests with the Commissioner of Labor and, as here, proof that is speculative or conjectural in nature is not satisfactory. Because of this the citation and proposed penalty of \$31.00 for the non-serious violation titled Item 3 should be vacated.

5. As to the alleged non-serious violation titled Item 4, the Compliance Officer sought to charge respondent with a violation of 29CFR 1926.451 (i)(11) as amended on November 29, 1972, but he, nevertheless, described the alleged violation in terms of 29 CFR 1926.451(i)(11) prior to its amendment. The earlier version provided for guardrails or their equivalent. The later version provided for guardrails made of lumber or other material providing equivalent protection. Since the tensile strength of rope under specified circumstances is the equivalent of other materials, the earlier version does not bring into play another attribute of a material like wood, its rigidity, in viewing its equivalence. Judging the employer's compliance with the standard in the context of what a reasonable person of ordinary prudence would do under the circumstances, respondent would be justified in deeming rope an equivalent of a guardrail under the earlier version. Respondent would not be justified in deeming rope equivalent protection to lumber under the amended version. Since the Compliance Officer

omitted the word lumber from the description of the alleged violation, it must be concluded that both the citation and the proposed penalty of \$31.00 for the non-serious violation titled Item 4 should be vacated.

RECOMMENDED ORDER

IT IS ORDERED that the citation, the proposed penalty of \$68.00, and the proposed immediate abatement date for the non-serious violation titled Item 1, shall be and the same hereby are SUSTAINED; that the citation, the proposed penalty of \$31.00, and the abatement date for the non-serious violation titled Item 3 shall be and the same hereby are VACATED; and that the citation, the proposed penalty of \$31.00 and the abatement date for the non-serious violation titled Item 4 shall be and the same hereby are VACATED.



LLOYD GRAPER  
Hearing Officer, KOSHRC

DATED: April 16, 1974  
Frankfort, Kentucky

Decision No. 12

Commissioner of Labor of Kentucky  
Attention: Honorable Michael D. Ragland  
OSHA Coordinator


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

Power Systems, Inc.  
1211 East Tower Road  
Schaumburg, Illinois 60172

Attention: W. H. Griffin, Sr.  
Safety Director

Power Systems, Inc.  
Kentucky Utilities Green River Power Plant  
Highway 431  
Central City, Kentucky 42330

This 16th day of April, 1974.

  
Iris R. Barrett, Executive Director