

Done



110 (158)

JULIAN M. CARROLL
GOVERNOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

September 3, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision +
Order No. 158*

KOSHRC # 110

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

R. H. METZCAR & SON, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Roger D. Riggs,
dated June 30, 1975, is before the Commission for review. The
findings of the Hearing Officer in this case shall be and hereby
are affirmed in all respects not inconsistent with the following
Opinion.

The Review Commission, upon thorough review of the record
before it hereby AFFIRMS all citations and abatement dates as sus-
tained by the Hearing Officer, and further orders that the two
\$550. penalties attaching to Citations #1 and #2 shall be and they
hereby are REINSTATED as initially proposed by the Department of
Labor.

H. L. Stowers

H. L. Stowers, Chairman

/s/ Charles B. Upton

Charles B. Upton, Commissioner

Date: September 3, 1975
Frankfort, Kentucky

DECISION NO. 158

/s/ Merle H. Stanton

Merle H. Stanton, Commissioner

This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Earl Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

Mr. J. R. Metzcar
R. H. Metzcar & Son, Inc.
400 Station Avenue
Cincinnati, Ohio 45215

(Certified Mail #467053)

This 3rd day of September, 1975.


Iris R. Barrett, Executive Director

Dine

110 (134)



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 30, 1975

JULIAN M. CARROLL

~~WENDELL FORD~~

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

H. L. STOWERS

CHAIRMAN

MERLE H. STANTON

MEMBER

CHARLES B. UPTON

MEMBER

KOSHRC # 110

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

R. H. METZCAR & SON, INC.

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice 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, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 30 days of this date, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law, 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:

Commissioner of Labor
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Earl M. Cornett
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

Mr. J. R. Metzcar
R. H. Metzcar & Son, Inc.
400 Station Avenue
Cincinnati, Ohio 45215

(Certified Mail #469028)

This 30th day of June, 1975.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #110

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

R. H. METZCAR & SON, INC.

RESPONDENT

* * * * *

Hon. Thomas Rhoads, Frankfort, Kentucky for Complainant

Mr. Cliff Reamers, Louisville, Kentucky for Respondent

RIGGS, Hearing Officer

On December 6, 1974 an inspection took place at a construction site located at 4522 Algonquin Parkway, Louisville, Kentucky. As a result of the inspection of respondent's work location, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued two citations to respondent charging serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

The standard allegedly violated was 29 CFR 1926.500 (d)(1) (as adopted by OSH 12-2) (now 803 KAR 2:030) and the description of the alleged violation was:

Four employees were working on the top of two sludge tanks, which were 20 feet in diameter and were not guarded by standard railings to protect them from a fall of 34 feet to the ground below.

A penalty of \$550.00 was proposed and the date by which the alleged violation must be corrected was January 6, 1975.

The second citation alleged a violation of 29 CFR 1926.500 (f)(1)(iv) and 29 CFR 1926.500 (d)(2) (each adopted by OSH 12-2) (now 803 KAR 2:030) and the descriptions of these alleged violations were:

The railing guarding the 24 inch wide runway across a four (4) foot span, leading from the building doorway to the top of the south sludge tank, was not standard in that it was weak and not capable of withstanding a load of 200 pounds applied in any direction. This runway was 34 feet above the ground and was used by four (4) employees.

A 24-inch wide runway, across a three (3) foot span, used as access to the top of the north sludge tank from the top of the south sludge tank, was not guarded by a standard railing. Four (4) employees were using this runway which was 34 feet above the ground.

A penalty of \$550.00 was proposed and an abatement date of January 6, 1975 was proposed.

On January 15, 1975, the Department of Labor received a letter from respondent stating employer's intention to contest the alleged violations. Thereafter the Department of Labor issued a complaint, alleging the violations as previously noted and proposing said penalty amounts.

The Notice of Receipt of Contest was promptly sent to the parties and a letter certifying that the notice had been duly posted was received by the Review Commission on January 27, 1975. Respondent

further stated in his certification that the name and address of the local union representing affected employees is:

International Brotherhood of Boilermakers
Local Union #40
2807 Bardstown Road
Louisville, Kentucky

Hearing was held on March 11, 1975 at the hour of 2:00 p.m. in the office of the Department of Labor in the Legal Arts Building, Louisville, Kentucky under the provisions of KRS 338.071 (4), a section of Chapter 338 of the Kentucky Revised Statutes dealing with the safety and health of employees. This statute authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of said Chapter and to adopt and promulgate rules and regulations concerning the procedural aspects of its hearings. By virtue of the provisions of KRS 338.081, hearings authorized by the provisions of this Chapter may be conducted by a Hearing Officer appointed by the Review Commission to represent the Commission in this manner. Following the hearing of an appeal, or on review of the decision of the Hearing Officer by its own motion, the Review Commission may sustain, modify, or dismiss a citation or penalty.

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

FINDINGS OF FACT

1. By stipulation it was agreed that four employees were working on the top of two sludge tanks, which were 20 feet

in diameter and were not guarded by standard railings to protect them from a fall of 34 feet to the ground below.

2. By stipulation it was agreed that the railing guarding the 24-inch wide runway across a four (4) foot span, leading from the building doorway to the top of the south sludge tank or silo, was not standard in that it was weak and not capable of withstanding a load of 200 pounds applied in any direction. Said runway was 34 feet above the ground and was used by four (4) employees.

3. By stipulation it was agreed that a 24-inch wide runway, across a three-foot span, used as access to the top of the north sludge tank or silo from the top of the south sludge tank or silo was not guarded by a standard railing. Four (4) employees were using this runway which was 34 feet above the ground.

4. It is found that a substantial probability of death or serious physical harm could result from conditions such as those which existed at respondent's worksite and described above.

5. It is found that the employer knew or should have known, by exercise of due diligence, that such conditions existed.

On the basis of the foregoing the Hearing Officer makes the following:

CONCLUSIONS OF LAW

Civil penalties were made a part of the Act to assure a safe workplace for employees by inducing employers to comply with the standards therein; penalties were not provided for the purpose of economic punishment of the employer. This viewpoint must be used as a base in considering the criteria of the employer's history,

the size of the business, good faith of the employer, and the gravity of the violation.

The Review Commission is not obliged to apply the strict formulas prescribed by the Department of Labor in the Department's effort to enforce the law with the utmost consistency. Where appropriate, the Review Commission may allocate greater or lesser weight to the various criteria in arriving at a penalty.

This employer does not come before the Commission condemning the Act as a hindrance to his work activities but recognizes the purpose of the Act and readily admits the potential danger to his employees. In addition, the employer took immediate action to abate the condition and to complete abatement at the earliest possible moment. Certainly, abatement after being found in violation is not always a proper criteria for consideration of an appropriate penalty. But in this instance, along with the positive attitude reflected by the employer in stating his position, such is clearly reflective of the employer's good faith.

Under these circumstances it does not appear that the purposes of the Act would be fulfilled nor that justice would be served by assessing penalties in the proposed amounts, thus the penalties for each violation should be reduced to \$300.

RECOMMENDED ORDER

IT IS ORDERED that the proposed penalty for Citation Number 1 shall be and the same hereby is REDUCED to \$300; and the

proposed penalty for Citation Number 2 shall be and the same hereby is REDUCED to \$300. The proposed abatement time is hereby AFFIRMED.



ROGER D. RIGGS
HEARING OFFICER, KOSHRC

DATED: June 30, 1975
Frankfort, Kentucky

Decision No. 134