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JULIAN M. CARROLL

~~WENDELL H. FORD~~

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

August 4, 1975

H. L. STOWERS

CHAIRMAN

MERLE H. STANTON

MEMBER

CHARLES B. UPTON

MEMBER

KOSHRC # 112

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DETZEL CONSTRUCTION

RESPONDENT

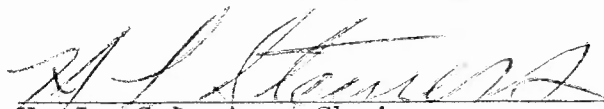
DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

Upon receiving Complainant's Petition for review of Hearing Officer Roger Riggs' Recommended Order, Chairman H. L. Stowers directed that this Commission review that order. Mr. Riggs ordered that the citation be dismissed and the penalty vacated, ruling that 29 CFR 1910.28(a) (as adopted by OSH 12-2), the standard under which the employer was cited, is "inexcusably vague and thus unenforceable."

It is the finding of this Commission that the standard is not unenforceably vague. As long as the standard affords a reasonable warning of the proscribed conduct in light of common understanding and practices it is not unconstitutionally vague. The Hearing Officer's Recommended Order is hereby REVERSED and the citation and the penalty are hereby reinstated. In all other respects not inconsistent with this Order the findings of the Hearing Officer are affirmed.


H. L. Stowers, Chairman

Dated: August 4, 1975
Frankfort, Kentucky

DECISION NO. 146

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

/s/ Merle H. Stanton
Merle H. Stanton, Commissioner

112 (146)

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

Mr. Michael J. Schneider (Certified Mail #469051)
Safety Officer
Detzel Construction
1231 Draper Street
Cincinnati, Ohio 45214

Detzel Construction (Certified Mail #469052)
Box 262
Jeffersonville, Indiana 47130

This 4th day of August, 1975.


Iris R. Barrett
Executive Director



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

June 16, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 112

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DETZEL CONSTRUCTION

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. Michael J. Schneider (Certified Mail #469012)
Safety Officer
Detzel Construction
1231 Draper Street
Cincinnati, Ohio 45214

Detzel Construction (Certified Mail #469013)
Box 262
Jeffersonville, Indiana 47130

This 16th day of June, 1975.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #112

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

DETZEL CONSTRUCTION

RESPONDENT

* * * * *

Hon. Thomas M. Rhoads, Frankfort, Kentucky for Complainant
Mr. Jim Johnson, Vice President of Detzel Construction, Louisville,
Kentucky, for Respondent
RIGGS, Hearing Officer

On December 13, 1974, an inspection took place at the approaches to the Big Four Railroad Bridge located at 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 one serious violation and one other than serious violation of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

Citation Number 1. Alleged Non-Serious Violation

Complainant alleged that Respondent violated 29 CFR 1926.28

(a) (as adopted by OSH 12-2) and the description of the alleged violation was:

An employee exposed to vehicular traffic on the Third Street Ramp was not wearing a garment marked with or made of reflectorized or highly visible material.

The date by which the alleged violation must be corrected was stated as January 8, 1975 and no penalty was proposed.

Citation Number 2, Alleged Serious Violation

It was alleged that Respondent violated 29 CFR 1926.105(a) (as adopted by OSH 12-2) and a description of the alleged violation was:

Safety nets were not provided to protect employees at the west approach of the Big Four Railroad Bridge southeast of the intersection of Campbell Street at River Road when the unguarded twenty (20) foot wide work platform was approximately forty-five (45) to fifty (50) feet from the ground where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, and safety belts was impractical.

The date by which the alleged violation must be corrected was stated as January 8, 1975. A penalty of \$600.00 was proposed.

On January 20, 1975, the Department of Labor received a letter from respondent stating employer's intention to contest the alleged serious violation. On February 4, the Department of Labor issued a complaint, alleging the serious violation as previously noted and proposing said penalty amount. On February 19, the Review Commission received the employer's letter in answer to the complaint. Thereafter notice of hearing was promptly sent to the parties by the Review Commission. On January 29, 1975 the Review Commission received a certification from respondent that no affected employee is represented by an authorized employee representative and that the Notice of Contest had been posted as required by the Act.

Hearing was held on March 18, 1975 in the office of the Department of Labor, Legal Arts Building in 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.

At Hearing, Complainant was permitted to amend his Citation and Complaint since there was no objection from Respondent. The amendment reflected an allegation that Respondent had violated the Kentucky Act adoption of 29 CFR 1926.28(a) which reads:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits, 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. At the work location described in the citation and complaint there were no safety belts, safety lines, safety nets, catch platforms, temporary floors, ladders, or scaffolds being

utilized by certain employees of Respondent while working at a level of forty-five (45) to fifty (50) feet from the ground.

2. The employer did have available an extensive array of safety devices and equipment.

3. The employer-respondent appeared to have a well developed safety program as a part of its work policies.

CONCLUSIONS OF LAW

The Employer here was charged in the Amended Complaint with a violation of a standard which reads: "The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to employees." This wording initially appears in the Act at 29 CFR 1910.28(a) (as adopted by OSH 12-2).

Upon reading this statement alone the employer is not on notice as to what he must do to be in compliance. He neither knows what hazard is contemplated nor what personal protective equipment is required. Such a standard is inexcusably vague and thus unenforceable.

Limiting review to Citation No. 2 appears appropriate since it does not appear that error would result from not reviewing Citation No. 1.

RECOMMENDED ORDER

The citation for the violation as alleged in the Amended Complaint shall be and the same hereby is DISMISSED with prejudice and the proposed penalty of \$600.00 hereby is VACATED.



ROGER D. RIGGS
HEARING OFFICER, KOSHRC

Dated: June 16, 1975

Decision No. 129