

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #1168

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

BRISTOL STEEL & IRON WORKS, INC.

RESPONDENT

**DECISION AND ORDER
OF REVIEW COMMISSION**

Before SHIELDS, Chairman; RUH and BRADEN, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Shirley A. Cunningham, Jr., issued August 26, 1985, dismissed the citation for an alleged willful violation of 29 CFR 1926.105(a) and proposed penalty of \$8000.

Although an evidentiary hearing was conducted on October 17, 1984, the hearing officer made no findings of fact and conclusions of law regarding the merits of the subject citation.

On October 1, 1985, an Order Granting Petition for Discretionary Review issued, and on October 29, 1985, this Commission issued its Order Reinstating Citation.

This Commission has reviewed the entire record in this case, including the hearing transcript, exhibits and briefs of the parties.

FINDINGS OF FACT

On July 4, 1984, two of Respondent's employees were working on the south top chord of a bridge being erected across the Ohio River at Ashland, Kentucky. The two ironworkers were stringing safety cable along a just-connected portion of the south top chord. At this location near the middle of the river, they were working approximately 63 feet above the south bottom chord and approximately 132 feet above the water.

The two ironworkers were walking along these two feet wide steel beams between side flanges that were 18 inches in height. They were threading the ends of safety cable already in place on the previously erected beams through fenceposts on the new section and connecting the cable together.

Although each of Respondent's employees was issued a safety rope or lanyard to use with his safety belt, the two employees were not tied off while they were stringing the safety cable, nor was a safety net provided.

The task of stringing the cable required approximately one hour to accomplish.

Once the safety cable was in place, Respondent's employees tied off by attaching their lanyards to the cable before completing the bolt-up of these sections.

CONCLUSIONS OF LAW

The cited standard requires employers to provide safety nets when workplaces are more than 25 feet above the ground or other surface where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Our decision hinges on the meaning of the term "impractical."

In the decision-making process, this Commission and its hearing officers often consult the published occupational safety and health decisions of the Federal Review Commission, Administrative Law Judges and the Federal Courts. Although these decisions are not binding upon this body, they do involve essentially the same standards, duties and obligations and are, therefore, persuasive and advisory. J. A. Jones Construction Co., KOSHRC #571 (1980).

In the case of L. R. Willson & Sons, Inc., 685 F.2d 644 (D. C. Cir. 1982), 1982 CCFI OSHD 1126,178, the U. S. Court of Appeals determined that the inability to use safety belts at all times does

not render such fall protection impractical unless the inability covers a significant period of the work day.

The evidence in the case now before this Commission establishes that safety belts and lanyards were provided to and used by Respondent's employees. Although the two employees were unable to tie off for the period of time necessary to string the safety cable, we do not find the use of safety belts and lanyards to be impractical. Under these circumstances, Respondent was not required to provide safety nets.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the citation charging a willful violation of 29 CFR 1926.105(a) is **VACATED**.

William H. Shields, Chairman

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Carl J. Ruh, Commissioner

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Charles E. Braden, Commissioner

DATE: June 3, 1986

DECISION NO. 1596

Copy of the foregoing Order has been served on the following parties in the manner indicated:


Hon. Kenneth J. Costelle Messenger Mail)
Assistant Counsel
Labor Cabinet
Office of General Counsel
U. S. 127 South
Frankfort, KY 40601

Hon. W. Challen Walling (Cert. Mail #P283 321 877)
Penn, Stuart, Eskridge & Jones
207 Piedmont Avenue
P. O. Box 2009
Bristol, VA 24203-2009

Mr. Ron Crockett (First Class Mail)
Bristol Steel & Iron Works
P. O. Box 471
Bristol, VA 24203-0471

This 3' day of June, 1986.

Kenneth Lee Collova
Executive Director
KOSH REVIEW COMMISSION
Airport Bldg., Louisville Rd.
Frankfort, KY 40601
PH: (502) 4-6892



Sue Ramsey
Executive Assistant

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY-AND-HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

VS.,

BRISTOL STEEL & IRON WORKS, INC.

KOSHRC # 1168

COMPLAINANT

RESPONDENT

NOTICE OF
ORDER OF DISMISSAL OF CONTEST
AND
ORDER OF MISCOMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure Recommended Order of Dismissal 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 submit a petition for discretionary review by this Commission. The petition must be received by the Commission in its offices in Frankfort on or before the 25th day following the date of this notice. Statements in opposition to petition for discretionary review may be filed during the review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, this matter now tests jurisdiction solely in this Commission, and it is hereby ordered that unless this Order of Dismissal is called for review and consideration by a member of this Commission within 40 days of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision of Fact, Conclusion 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 Reviews has been directed by one of the Review Commission members.

Copy of this Notice and Order has been served on the following:

KOSHRC DOCKET
NUMBER 116V

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ORDER

BRISTOL STEEL AND
IRON WORKS, INC.

RESPONDENT

This matter is before the Commission because of a motion to dismiss made during the hearing in this action on October 17, 1984.

The Respondent's Motion to Dismiss is based first on the pre-inspection activities of the CSHO that were directed drive-by searches and procedures and; secondly, on the fact that withdrawal of the first citation 'in a prior case acts as a waiver and a consent to the course of conduct taken by the Respondent in reliance upon that withdrawal.

Therefore, after consideration of the entire record and extensive independent research and study of , , relevant authority; IT IS HEREBY ORDERED that Respondent's '- 'Ntotion to Dismiss is granted and the citations herein sreC'hereby dismissed for the reasons set out in Respondent's motion and supporting Memorandum.

DATE: August 26, 1985
DECISION NO. 1457

TRLEY ALLEN CUNNI ti.. m. /

lion. Kenneth J. Costelle
Assistant Counsel
Labor Cabinet
Office of General Counsel
U. S. 127 Soitth
Frankfort, KY 40601

(Messenger Mail)

Hon. W. Challen Walling
Penn, Stuart, Eskridge & Jones
207 Piedmont Avenue
P. O. Box 2009
Bristol, VA 24203

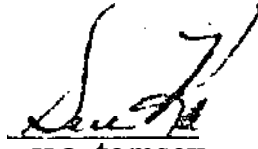
(Cert. Mail #P587 662 832)

Mr. ' Ron Crockett
Bristol Steel & Iron Works
P. O. Box 471
Bristol, VA 24203-0471

(First Class Mail)

This A¹¹-day of August, 1985.

Kenneth Lee Coflova
Executive Director
KOSli REVIEW COMMISSION
Airport Bldg., Louisville Rd.
Frankfort, KY 40601
PH: (502) 564-6892


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Executive Ass3sta

NOTE: This Recommended Order was previously issued by the
hearing officer, in error. (See KOS/I Review CommisSion,
Rules of Procedure, Section 47(2).)