

Diane

138 (179)



JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision #
Order # 179*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 21, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC #138

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SMITH AND SILLIMAN MASONRY COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Lloyd Graper,
dated August 13, 1975, is before the Commission for review.

Having thoroughly reviewed all elements of the record
before it, no error being found therein and for other good cause
shown, it is the unanimous order of this Commission that the
findings of the Hearing Officer in this case be and they hereby
are AFFIRMED in all respects not inconsistent with this opinion.

H. L. Stowers
H. L. Stowers, Chairman

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

DATED: October 22, 1975
Frankfort, Ky.

/s/ M. H. Stanton
M. H. Stanton, Commissioner

DECISION NO. 179


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
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. Charles G. Silliman (Certified Mail #467105)
Smith and Silliman
Masonry Contractors
2903 Englewood Avenue
Louisville, Kentucky 40220

This 22nd day of October, 1975.


Iris R. Barrett, Executive Director

Diane



138 (174)

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

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

August 13, 1975

KOSHRC # 138

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SMITH AND SILLIMAN MASONRY COMPANY

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. Charles G. Silliman (Certified Mail #469057)
Smith and Silliman
Masonry Contractors
2903 Englewood Avenue
Louisville, Kentucky 40220

This 13th day of August, 1975.


Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 138

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

SMITH AND SILLIMAN MASONRY COMPANY

RESPONDENT

* * * * *

Hon. Peter J. Glauber, Assistant Counsel, Department of Labor,
Frankfort, Kentucky, Attorney for Complainant.

Mr. Raymond J. Smith and Mr. Charles G. Silliman, Partners, Louisville,
Kentucky, Respondents appearing in person.

GRAPER, Hearing Officer.

An inspection was made on March 6th and 7th, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located at First and Gray Streets, Louisville, Kentucky, described as masonry work. On the basis of such inspection, a citation was issued containing two items. One item was not contested, and the other item, which charged a violation of 29 CFR 1926.451(d)(7) and proposed a penalty of \$31.00, was contested. The alleged other than serious violation was described as:

The tubular welded frame scaffold at the north side of the building approximately 16 feet above the ground and 35 feet horizontally was not secured to the building at any point.

A seven day abatement date was proposed.

A Notice of Contest was received on April 7, 1975. This, together with a copy of the Citation and the Notice of Proposed Penalty, was transmitted to the Kentucky Occupational Safety and Health Review Commission which received it on April 8, 1975. A Notice of Receipt of Contest was mailed on April 9, 1975. A Certification of Employer form indicating that no affected employee is represented by an authorized employee representative was received on April 14, 1975. A Complaint was received on April 8, 1975. On May 6, 1975, the case was assigned to the Hearing Officer and, on the same date, a hearing was scheduled for May 22, 1975, at the Department of Labor, Special Fund, Legal Arts Building, 3rd Floor, 7th and Market Streets, Louisville, Kentucky. Notice of Hearing was mailed on that date and pursuant thereto a hearing was held under the provisions of KRS 338.071(4) one of the provisions 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 the hearings. Under the provisions of KRS 338.081, hearing authorized by the provisions of such 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.

At the hearing, the parties stipulated as to the fact that the scaffold in question was approximately 16 feet above the ground and 35 feet horizontally and was not secured to the building at any point. Upon the foregoing and the exhibits of the Complainant, it is concluded that the substantial evidence on the record considered as a whole supports the following findings of fact:

FINDINGS OF FACT

It is found as a fact, upon the stipulation of the parties, that the tubular welded frame scaffold in question was not secured to the building or structure at intervals of approximately 35 feet horizontally and 16 feet vertically.

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

CONCLUSION OF LAW

29 CFR 1926.451(d)(7) provides: "To prevent movement, the scaffold shall be secured to the building or structure at intervals not to exceed 30 feet horizontally and 26 feet vertically." Respondent takes the position that it must exceed both the horizontal and vertical dimensions in order to be in violation. Respondent also indicates that the purpose of the regulation is to prevent movement and that you do not get movement in the scaffold laterally. You get it in height, and until you reach 26 feet, you do not get any movement. Twenty-six feet vertically is four sections of scaffold. Thirty feet horizontally is four sections of scaffold.

Complainant relies solely on the standard which it believes provides that the scaffold should be secured to the building or

structure at intervals not to exceed 30 feet horizontally or 26 feet vertically. Complainant, by way of analogy, refers to CFR 1926.451(b)(4) which provides: "All pole scaffolds shall be securely guyed or tied to the building or structure. Where the height or length exceeds 25 feet, the scaffold shall be secured at intervals not greater than 25 feet vertically and horizontally." This standard specifically refers to height or length exceeding 25 feet. The cited standard refers to 30 feet horizontally and 26 feet vertically.

Respondent, an experienced masonry contractor, indicated that you get movement when you reach 26 feet vertically. If the standard was interpreted as Respondent proposes, a tubular welded frame scaffold could be 200 feet vertically and 7-1/2 feet horizontally and not be required to be tied to the building or structure. One does not have to be an experienced masonry contractor to see the danger inherent in this. While the drafters of the cited standard used the connective word "and", the popular use of the words "or" and "and" is loose and frequently inaccurate, and because of this, the courts may and should change "and" to "or" and vice versa, whenever such conversion is required, inter alia, to effectuate the obvious intention of the Legislature and to accomplish the purpose or object of a statute or regulation. Duncan v. Wiseman Baking Company, Ky., 357 S.W. 2d 694.

In this case, since it is the policy of this state to assure, so far as possible, safe and healthful working conditions to every employee and to preserve this state's human resources, there is reasonable justification to regard "and" as "or" in the standard under consideration in order to accomplish its purpose. This has the effect of requiring that the tubular welded frame scaffold be secured to the building or structure at intervals not to exceed 30 feet horizontally or 26 feet vertically. *no diff from literal brackets*

As to Citation Number 1, Page 1 of 1, Item number 2, the Commissioner has met his burden of proof as to the Citation. The proposed penalty was not in contest. For this reason, the citation, the proposed penalty of \$31.00, and the proposed abatement date of one week should stand.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation, the proposed penalty of \$31.00 and the proposed abatement date of one week shall be and the same hereby are sustained.


LLOYD GREPER
HEARING OFFICER, KOSHRC

DATED: August 13, 1975
Frankfort, Kentucky

Decision No. 149