144 (230)

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC Decision + Order No. 236

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 Bridge Street
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

March 2, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 144

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOFCO ERECTORS, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

The Recommended Order of Roger D. Riggs, dated October 23, 1975, is presently before this Commission for review.

The Hearing Officer erroneously cited the general industry standard, 29 CFR 1910.500(d)(1), in sentence No. 1 of his Findings of Fact, on page 3 of his Recommended Order. It is found, therefore, that No. 1 of the Hearing Officer's Findings of Fact should be and hereby is CORRECTED to read "a violation of 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:020) would be withdrawn."

As to the two contested citations and penalties which are at issue, the Commission finds that it must disagree with the conclusions of the Hearing Officer both factually and with his ultimate recommendations. Citation 1 charged a violation of 29 CFR 1926.28(a), for failure to provide personal protective equipment to an employer working on a beam approximately 50 feet high. Respondent's argument that there may be several interpretations of what comprises personal protective equipment fails when it is seen that Respondent offered no other interpretation. On page 59 of the Transcript, Respondent admitted the possibilities to be "either safetylines and safety belts or

scaffolding or neither." According to the transcript at various places, Respondent apparently chose "neither" to comply with the standard, even though a fall from a height of 50 feet would likely result in death or serious physical injury. Statements by the Respondent's foreman on pages 46 and 47 of the Transcript; by the Department of Labor Compliance Officer on pp. 14, 15, 17, 31, 34 and 35; and by a building trades steward present at the inspection on p. 38 all appear to directly establish that Respondent's employee was on a beam without benefit of a safety belt, or any other personal protective alternative.

Nor does there appear to be good and sufficient reason to vacate the proposed penalty on Citation 1. It is found that the penalty assessment criteria were properly applied by the Department of Labor, and we can find no cause to disturb that result.

Citation 2, charging a violation of 1926.25(a) for housekeeping also presents the issue of employee exposure. The Hearing Officer vacated this citation upon failure to find employees present; however, statements on p. 42 of the Transcript, in answer to Question 7, establish that Sofco employees were present on the ground floor in the debris-filled area on the date of inspection. A great deal of evidence also seemed to appear throughout the record to establish that even though a possible alternate stairway/access route did exist, most of the employees regularly used the cluttered, often more accessible route at some time, perhaps many times in a workday. The mere existence of an alternate, uncluttered route is in no way sufficient to vitiate the citation.

For the above-stated reasons, it is the unanimous ORDER of this Commission that the Recommended Decision of the Hearing Officer be and it hereby is REVERSED. It is further ordered that Citations 1 and 3, and the $500 proposed penalty for Citation 1, be and they hereby are REINSTATED. All other findings of the Hearing Officer not inconsistent with this decision are hereby affirmed.

H. L. Stowers, Chairmen

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

Dated: March 2, 1976
Frankfort, Kentucky

DECISION NO. 236

/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 (Messenger Service)
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

SOFCO Erectors, Inc. (Certified Mail #456131)
10333 Wayne Avenue
Cincinnati, Ohio 45215

Mr. Robert F. Tackacs (Certified Mail #456132)
Safety Engineer
John T. Cantlon & Associates, Inc.
920 Michigan Avenue
Post Office Box 119
Columbus, Ohio 42316

The Honorable James K. L. Lawrence (Certified Mail #456133)
(Attorney for Sofco Erectors, Inc.)
FROST & JACOBS, Attorneys at Law
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

This 2nd day of March, 1976.

Iris R. Barrett
Executive Director

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JULIAN M. CARROLL
GOVERNOR
IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 Bridge Street
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

March 2, 1976

H. L. STOWERS
CHAIRMAN
MERLE H. STANTON
MEMBER
CHARLES B. UPTON
MEMBER

KOSHRC # 144

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOFCO ERECTORS, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

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The Hearing Officer erroneously cited the general industry standard, 29 CFR 1910.500(d)(1), in sentence No. 1 of his Findings of Fact, on page 3 of his Recommended Order. It is found, therefore, that No. 1 of the Hearing Officer's Findings of Fact should be and hereby is CORRECTED to read "a violation of 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:020) would be withdrawn."

As to the two contested citations and penalties which are at issue, the Commission finds that it must disagree with the conclusions of the Hearing Officer both factually and with his ultimate recommendations. Citation 1 charged a violation of 29 CFR 1926.28(a), for failure to provide personal protective equipment to an employer working on a beam approximately 50 feet high. Respondent's argument that there may be several interpretations of what comprises personal protective equipment fails when it is seen that Respondent offered no other interpretation. On page 59 of the Transcript, Respondent admitted the possibilities to be "either safetylines and safety belts or

scaffolding or neither." According to the transcript at various places, Respondent apparently chose "neither" to comply with the standard, even though a fall from a height of 50 feet would likely result in death or serious physical injury. Statements by the Respondent's foreman on pages 46 and 47 of the Transcript; by the Department of Labor Compliance Officer on pp. 14, 15, 17, 31, 34 and 35; and by a building trades steward present at the inspection on p. 38 all appear to directly establish that Respondent's employee was on a beam without benefit of a safety belt, or any other personal protective alternative.

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For the above-stated reasons, it is the unanimous ORDER of this Commission that the Recommended Decision of the Hearing Officer be and it hereby is REVERSED. It is further ordered that Citations 1 and 3, and the $500 proposed penalty for Citation 1, be and they hereby are REINSTATED. All other findings of the Hearing Officer not inconsistent with this decision are hereby affirmed.

H. L. Stowers, Chairmen

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

Dated: March 2, 1976
Frankfort, Kentucky

DECISION NO. 236

/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 (Messenger Service)
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

SOFCO Erectors, Inc. (Certified Mail #456131)
10333 Wayne Avenue
Cincinnati, Ohio 45215

Mr. Robert F. Tackacs (Certified Mail #456132)
Safety Engineer
John T. Cantlon & Associates, Inc.
920 Michigan Avenue
Post Office Box 119
Columbus, Ohio 42316

The Honorable James K. L. Lawrence (Certified Mail #456133)
(Attorney for Sofco Erectors, Inc.)
FROST & JACOBS, Attorneys at Law
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

This 2nd day of March, 1976.

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

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

October 23, 1975

KOSHRC # 144

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOFCO ERECTORS, 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
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

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

SOFCO Erectors, Inc. (Certified Mail #467109)
10333 Wayne Avenue
Cincinnati, Ohio 45215

Mr. Robert F. Tackacs (Certified Mail #467110)
Safety Engineer
John T. Cantlon & Associates, Inc.
920 Michigan Avenue
P. O. Box 119
Columbus, Ohio 42316

This 23rd day of October, 1975.

Iris R. Barrett

Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #144

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

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

SOFCO ERECTORS, INC. — RESPONDENT

* * * * * * * * * * * *

Hon. Thomas M. Rhoads, Attorney at Law, Frankfort, Kentucky, for Complainant

Mr. Robert F. Takacs, Columbus, Ohio, for Respondent

On March 20, 1975 an inspection took place at Charleston Bottoms Station Power Plant located at Maysville, Kentucky. As a result of the inspection of respondent's operations, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued three citations to respondent charging two serious and one other than serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

Citation Number 1 charged a violation of 29 CFR 1926.28(a) (now 803 KAR 2:030) and was described as:

> An employee erecting steel on the third floor in the power plant was not wearing the appropriate personal protective equipment,

> lifeline and safety belt, while being exposed to a fall of approximately fifty (50) feet.

A penalty of $500.00 was proposed and it was stated that the alleged violation must be corrected immediately.

Citation Number 2 charged a violation of 29 CFR 1926.500(d)(1) which described the alleged violation as:

> An open sided floor, the operating floor, approximately fifty (50) feet long and approximately forty-two (42) feet high, was not guarded by a standard railing and toeboard on all exposed sides.
> This is a repeated violation of citation (1) item number two (2) issued October 10, 1974.

A penalty of $70.00 was proposed and a date of April 24, 1975 was stated as the date by which the alleged violation must be corrected.

Citation Number 3 charged a violation of 29 CFR 1926.25(a) and described the alleged violation as:

> The housekeeping on the ground level of the power plant was not being kept in as clean as possible condition; scrap lumber and other debris were scattered throughout this area.

No penalty was proposed and a date of April 24, 1975 was stated as the date by which the alleged violation must be corrected.

On March 1, 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. On June 5, 1975 the Review Commission received the employer's answer denying all allegations and violations.

The proper notices were promptly sent to the parties and a letter certifying that the notice had been duly posted was received

Hearing was held on June 17, 1975 in the office of Maysville Area Vocational Technical School in Maysville, 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 the allegation charging a violation of 29 CFR 1910.500 (d)(1) (as adopted by 803 KAR 2:020) would be withdrawn.

2. Housekeeping on the ground level of the plant was poor in that scrap lumber and other debris were scattered about.

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

CONCLUSIONS OF LAW

In order that an employer be found in violation of any provision of the Act two things must be shown: (1) that the condition constituting a violation exists and (2) that his employees are exposed to the hazard resulting from this condition. It appears that there was a substantial amount of clutter and debris on the ground level of the work site. However, it was proved that there was a reasonable means of access to the upper floor work stations without the necessity of going through the cluttered area. Also the compliance officer admitted (TR. p. 19 and 23) that he does not know whether any of the individuals working in the cluttered area were Sofco employees.

Turning to the alleged serious violation, the compliance officer, throughout his entire testimony, appeared to be quite unsure of conditions and events surrounding this allegation. When questioned by the Department of Labor he stated not that the employee was not wearing a safety belt but that "I could not see a lifeline nor could I see one that was attached anywhere." Only after extensive leading questions did the Compliance Officer ever directly state that the employee was not wearing a safety belt or lifeline. Even using his notes he could not recall how he determined that the man was a Sofco employee. Mr. Gatewood's sincere effort to testify as honestly as he knew how portrayed that he believed but did not know for sure whether the man was protected by a safety belt and lifeline.

RECOMMENDED ORDER

Citations Numbered 1, 2, and 3 shall be and the same hereby are DISMISSED; and the proposed penalties of $500.00 for Citation Number 1 and $70.00 for Citation Number 2 shall be and the same hereby are VACATED.

Roger D. Riggs, Hearing Officer
KOSHRC

Decision No. 180

Dated: October 23 , 1975
Frankfort, Kentucky

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144 (179)

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

October 23, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

Koah Lee
Decision &
Order #179

KOSHRC # 144

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOFCO ERECTORS, 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
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

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

SOFCO Erectors, Inc. (Certified Mail #467109)
10333 Wayne Avenue
Cincinnati, Ohio 45215

Mr. Robert F. Tackacs (Certified Mail #467110)
Safety Engineer
John T. Cantlon & Associates, Inc.
920 Michigan Avenue
P. O. Box 119
Columbus, Ohio 42316

This 23rd day of October, 1975.

Iris R. Barrett

Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #144

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

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

SOFCO ERECTORS, INC. — RESPONDENT

* * * * * * * * * * * * *

Hon. Thomas M. Rhoads, Attorney at Law, Frankfort, Kentucky for Complainant

Mr. Robert F. Takacs, Columbus, Ohio, for Respondent

On March 20, 1975 an inspection took place at Charleston Bottoms Station Power Plant located at Maysville, Kentucky. As a result of the inspection of respondent's operations, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued three citations to respondent charging two serious and one other than serious violations of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respects:

Citation Number 1 charged a violation of 29 CFR 1926.28(a) (now 803 KAR 2:030) and was described as:

> An employee erecting steel on the third floor in the power plant was not wearing the appropriate personal protective equipment,

lifeline and safety belt, while being exposed to a fall of approximately fifty (50) feet.

A penalty of $500.00 was proposed and it was stated that the alleged violation must be corrected immediately.

Citation Number 2 charged a violation of 29 CFR 1926.500(d)(1) which described the alleged violation as: $70.00

> An open sided floor, the operating floor, approximately fifty (50) feet long and approximately forty-two (42) feet high, was not guarded by a standard railing and toeboard on all exposed sides.
> This is a repeated violation of citation (1) item number two (2) issued October 10, 1974.

A penalty of $70.00 was proposed and a date of April 24, 1975 was stated as the date by which the alleged violation must be corrected.

Citation Number 3 charged a violation of 29 CFR 1926.25(a) and described the alleged violation as: no pen.

> The housekeeping on the ground level of the power plant was not being kept in as clean as possible condition; scrap lumber and other debris were scattered throughout this area.

No penalty was proposed and a date of April 24, 1975 was stated as the date by which the alleged violation must be corrected.

On March 1, 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. On June 5, 1975 the Review Commission received the employer's answer denying all allegations and violations.

The proper notices were promptly sent to the parties and a letter certifying that the notice had been duly posted was received

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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 the allegation charging a violation of 29 CFR 1910.500 (d)(1) (as adopted by 803 KAR 2:020) would be withdrawn. wrong Cit #2 = 1926.500(d)(1)

2. Housekeeping on the ground level of the plant was poor in that scrap lumber and other debris were scattered about.

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

CONCLUSIONS OF LAW

In order that an employer be found in violation of any provision of the Act two things must be shown: (1) that the condition constituting a violation exists and (2) that his employees are exposed to the hazard resulting from this condition. It appears that there was a substantial amount of clutter and debris on the ground level of the work site. However, it was proved that there was a reasonable means of access to the upper floor work stations without the necessity of going through the cluttered area. Also the compliance officer admitted (TR. p. 19 and 23) that he does not know whether any of the individuals working in the cluttered area were Sofco employees.

Turning to the alleged serious violation, the compliance officer, throughout his entire testimony, appeared to be quite unsure of conditions and events surrounding this allegation. When questioned by the Department of Labor he stated not that the employee was not wearing a safety belt but that "I could not see a lifeline nor could I see one that was attached anywhere." Only after extensive leading questions did the Compliance Officer ever directly state that the employee was not wearing a safety belt or lifeline. Even using his notes he could not recall how he determined that the man was a Sofco employee. Mr. Gatewood's sincere effort to testify as honestly as he knew how portrayed that he believed but did not know for sure whether the man was protected by a safety belt and lifeline.

RECOMMENDED ORDER

Citations Numbered 1, 2, and 3 shall be and the same hereby are DISMISSED; and the proposed penalties of $500.00 for Citation Number 1 and $70.00 for Citation Number 2 shall be and the same hereby are VACATED.

Roger D. Riggs, Hearing Officer
KOSHRC

Decision No. 180

Dated: October 23 , 1975
Frankfort, Kentucky