Decision

145 (2701)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC Decision & Order No. 270

May 6, 1976

KOSHRC # 145

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

WILLIAM A. POPE COMPANY — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

UPTON, Commissioner, for the MAJORITY:

A Recommended Order of Hearing Officer Roger D. Riggs, dated Feb. 12, 1976, is presently before this Commission for review.

Respondent, in its various pleadings and briefs filed with the Review Commission, has taken repeated exception to certain procedural actions of the Hearing Officer, in addition to its basic disagreement with the subject citation under 29 CFR 1926.500(d)(1). Respondent claims a denial of due process resulted basically from two elements: 1) the Hearing Officer's refusal to disqualify and remove himself from the case; and 2) the Hearing Officer's decision to go forward with the Sept. 16, 1975 hearing in spite of Respondent's telephoned request 4 days earlier, on Sept. 12, to reset the hearing.

Procedurally, Respondent has excepted to and has sought Commission review of the following specific events:

1. Sept. 25, 1975: Respondent filed Motion for Rehearing, denied Oct. 11 by Mr. Riggs; Oct. 20 resubmitted this Motion to Review Commission as "interlocutory appeal," denied Oct. 22, on grounds that Review Commission would not interfere in Hearing Officer's Order until the issue was raised on post-hearing review;

2. Oct. 20: Respondent filed Motion for Extension of Time to Brief after learning briefs were due Oct. 31.

3. Oct. 31: Respondent filed Motion Requesting Hearing Officer to Withdraw, after receiving no response to its Oct. 20 Motion to extend time.

4. Nov. 1: Motion to Extend Time was overruled by Hearing Officer, who issued a blanket extension to all parties until Nov. 12 for briefs.

5. Nov. 15: Pope's Motion Requesting Hearing Officer to Withdraw was overruled.

The facts surrounding Respondent's request to re-set the Sept. 16 hearing are found to be as follows:

The hearing, after several re-schedulings, had been set for Sept. 16, and parties were notified August 28 of the re-setting.

Respondent telephoned the Hearing Officer on Friday, Sept. 12, 1975, to ask for a postponement for business reasons and learned the Hearing Officer would not be in the office until Monday, September 15. Respondent then called counsel for the Department of Labor to learn if Labor would have any objection to a postponement, and upon finding none, proceeded to make an agreement with Labor that the Sept. 16 hearing would not be held. Respondent then put this information in a letter to the Hearing Officer, requesting that Mr. Riggs telephone Respondent on Monday, Sept. 15 if there was any objection to the postponement. Mr. Riggs received the letter Monday, Sept. 15, attempted repeatedly to telephone Respondent's office with his objection to the "agreement," but was not able to reach Respondent that day, as it was an office holiday for Respondent's firm. The Hearing Officer then proceeded with the hearing on Sept. 16. Counsel for Labor had telephoned the Hearing Officer to learn of his decision regarding the parties' "agreement" and was therefore present at the hearing. Counsel for Respondent did not appear, but a Project Manager and the Office Manager were present to represent Pope Company.

Respondent now pleads a denial of due process on the grounds of the Hearing Officer's refusal to re-set the hearing at Respondent's request, claiming Respondent was thus unable to properly represent the rights of Pope Company.

This Commission has seriously considered these contentions of the Respondent, but all such procedural objections must of necessity be placed within the framework of the controlling

Rules of Procedure promulgated pursuant to KRS 338.071 and 338.081. According to Section 31 of these Rules, "(a) Postponement of a hearing ordinarily will not be allowed. (b) Except in the case of an extreme emergency or in unusual circumstances, no such request will be considered unless received in writing at least three (3) days in advance of the time set for the hearing." (Emphasis added).

The first and over-arching premise is that postponement of hearings is not encouraged and indeed "will not be allowed." Secondly, it is within the discretion of the Hearing Officer to determine an "extreme emergency" based on the petitioner's contentions, and the Hearing Officer herein apparently did not view as an emergency the fact that Respondent's attorney "was presently in Chicago for business reasons, and his schedule was such that it would be impossible for him to attend the rescheduled hearing...."

Here, the entire chain of allegedly discriminatory events appears to have begun with Respondent's own action of merely telephoning, 4 days ahead of hearing, to request postponement. Not finding the Hearing Officer in, Respondent then arbitrarily placed the burden of making a return contact on the Hearing Officer. It is held to be well-settled in legal practice that requests for extension of time are precisely that--requests, and while the attorneys may negotiate time and date to their needs, final approval of such arrangements is reserved to the judge. Nor is the burden of giving notice to be placed on the judge when it is a party who requests some last-minute rearrangement. Here, it appears that the Hearing Officer at least tried to comply with Respondent's counsel's request to call, but failed to make contact after repeated calls and then returned the responsibility for notice back to the parties. Counsel for Pope has argued that Respondent's due process should have been worth the cost of a subsequent telegram from the Hearing Officer, but that argument could well be directed to Pope's counsel, since the sending of a telegram by Respondent's counsel on Sept. 12, instead of merely a phone call, would have both fulfilled Sec. 31 of the Rules and prevented the subsequent chain of events.

Thus, it is the holding of this Commission that Respondent's counsel had no authority to "assume" the postponement of the hearing, nor to rely on his "agreement" with Complainant's counsel without the approval of the Hearing Officer. Therefore, Mr. Riggs' decision to deny Respondent's request for a new hearing date is held to be well-supported in both OSHA and procedural law, and it cannot be disturbed.

It is further held that, based at least in part on the foregoing, no denial of due process resulted from the Hearing

Officer's refusal to disqualify himself, since there has been no clear showing of prejudice. The actions and orders of the Hearing Officer of which Respondent asks review were the product of Mr. Riggs exercising the lawful powers and discretion granted him under the Rules of Procedure, pursuant to KRS 338.071 and 338.081. This Commission finds none of the Hearing Officer's subject actions and orders defective, and they must therefore stand as issued.

As to the subject citation under 1926.500(d)(1), it is the majority decision of this Commission, based on clear evidence in the record, that the Department of Labor sustained its burden of proof in establishing a violation of that standard, and that employee exposure was incontrovertibly shown. It is therefore held that the Hearing Officer's decision as to that and all the contested citations in this case be AFFIRMED. It is further held that all conclusions and findings of the Hearing Officer not inconsistent with this decision are hereby affirmed.

Charles B. Upton

Charles B. Upton, Commissioner

/s/ Merle H. Stanton

Merle H. Stanton, Commissioner

STOWERS, CONCURRING IN PART AND DISSENTING IN PART:

I concur with all elements of the majority opinion as written, with the exception of the holding regarding Citation 1. It is my dissenting opinion that the exigencies of moving the subject crane under the beams entailed, indeed necessitated, the removal of whatever guardrails may have existed. If at that stage any employee exposure to a falling hazard existed, it may have been proper to have cited the employer under a standard requiring protective equipment such as 1926.28(a). However, no such citation was made, and as I consider it unreasonable and impossible to have required guardrails in that situation, I feel that an improper citation was made, and therefore no violation on the part of Respondent actually existed.

It is further my opinion that the housekeeping violation, Item #5, was not properly sustained by Complainant, and should be dismissed.

DATED: May 6, 1976
Frankfort, Ky.

/s/ H. L. Stowers

H. L. Stowers, Chairman

DECISION NO. 270

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: Peter J. Glauber
Assistant Counsel

The Honorable Philip L. Lustbader (Certified Mail #467292)
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Twelfth Floor - Packard Building
Philadelphia, Pa. 19102

The Honorable Gerald P. McConomy (Certified Mail #467293)
Secretary, William A. Pope Company
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Twelfth Floor - Packard Building
Philadelphia, Pa. 19102

William A. Pope Company (Certified Mail #467294)
Post Office Box 681
Maysville, Kentucky 41056

This 6th day of May, 1976.

Iris R. Barrett

Iris R. Barrett, Executive Director

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145(220)

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC Decision & Order No. 220

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

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

February 12, 1976

KOSHRC # 145

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

WILLIAM A. POPE 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. Statements in opposition to petition for discretionary review may be filed during 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, 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 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, 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 directed 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 (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

The Honorable Philip L. Lustbader (Certified Mail #456112)
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Twelfth Floor - Packard Building
Philadelphia, Pa. 19102

The Honorable Gerald P. McConomy (Certified Mail #456113)
Secretary, William A. Pope Company
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Twelfth Floor - Packard Building
Philadelphia, Pa. 19102

William A. Pope Company (Certified Mail #456114)
Post Office Box 681
Maysville, Kentucky 41056

This 12th day of February, 1976.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #145

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

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

WILLIAM A. POPE COMPANY — RESPONDENT

* * * * * *

Hon. Peter J. Glauber, Frankfort, Kentucky for Complainant

Mr. George Chapman, Project Manager, and Mr. Ken Downing, Office Manager, William A. Pope Company for Respondent

RIGGS, Hearing Officer

On March 17, 1975 an inspection took place at a work location six miles west of Maysville, Kentucky on Highway 8 at Charleston Bottoms Station Coal Power Plant. 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 and five non-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 serious violation of 29 CFR 1926.500 (d) (1) (adopted by 803 KAR 2:030) and described the alleged violation as:

> A platform twenty (20) feet long by twelve (12) feet wide mounted on top of the rewind wheels of a P & H one hundred (100) ton overhead crane approximately one hundred(100) feet above the adjacent ground level was not guarded by standard railing where two (2) employees were installing downspouts.

The citation required immediate abatement and proposed a penalty of $600.00.

Citation Number 2, Item Number 1 charged a non-serious violation of 29 CFR 1926.450 (a)(1) (adopted by 803 KAR 2:030) and described the alleged violation as:

> An adequate ladder was not provided to give employees safe access to a platform mounted on top of the rewind wheels of a P & H one hundred (100) ton overhead crane.

The citation required immediate abatement and a penalty of $90.00 was proposed.

Citation Number 2, Item Number 2 charged a non-serious violation of 29 CFR 1926.450(a)(9) (adopted by 803 KAR 2:030) and the alleged violation was described as:

> The side rails of a ladder used to gain access to a platform mounted on top of the rewind wheels of a P & H one hundred (100) ton overhead crane did not extend thirty-six (36) inches above the landing nor were grab rails installed to provide a sure grip for the employees moving to or from the point of access.

The citation demanded immediate abatement and a penalty of $90.00 was proposed.

Citation Number 2, Item Number 3 alleged a violation of 29 CFR 1926.500 (b)(8) (adopted by 803 KAR 2:030) which was described as:

> A floor hole approximately eleven (11) inches long by five (5) inches wide in the operating floor into which employees could accidentally walk was not guarded by either a standard railing with standard toeboard on all exposed sides or a floor hole cover secured against accidental displacement.

The date by which the alleged violation must be corrected was stated as April 17, 1975 and no penalty was proposed.

Citation Number 2, Item 4 alleged a violation of 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) and the description stated:

> An open-sided floor at the operating floor level approximately fifty (50) feet long and approximately forty (40) feet above the adjacent floor level was not guarded by standard railing and standard toeboard.

The date by which the alleged violation was to be corrected was April 17, 1975 and no penalty was proposed.

Citation Number 2, Item 5 alleged a violation of 29 CFR 1926.25(a) and described the alleged violation as:

> A catwalk platform at level 715 had scrap lumber, pipe, several chain hoists and several lengths of chain that were not kept cleared from the work area.

The date by which the alleged violation must be corrected was stated as April 17, 1975 and no penalty was proposed.

On May 5, 1975, the Department of Labor received a letter from respondent stating employers intention to contest the alleged violations and proposed penalties. On May 15, 1975 the

Department of Labor issued a Complaint alleging the violations as previously stated and proposing said penalty amounts.

The Review Commission received a certification from respondent on May 14, 1975 stating that the names and addresses of the local unions representing affected employees are:

Operating Engineers Local Union #181
924 Greenup Avenue
Ashland, Kentucky 41101

Laborers International Union Local #189
631 Lawrence Street
P.O. Box 998
Lexington, Kentucky

Journeymen Pipefitters Local Union #392
Room 200
1228 Central Parkway
Cincinnati, Ohio 45210

Plumbers & Gasfitters Local Union #59
1015 Vine Street
Cincinnati, Ohio 45202

Carpenters Union Local #437
2138 Gallia Street
Portsmouth, Ohio

Hearing was held on September 16, 1975 at the Maysville Area Vocational Education Center, 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. A platform twenty feet long by twelve feet wide mounted on top of the rewind wheels of an overhead crane approximately one hundred feet above the adjacent ground level was not guarded by standard railing or any other railing where two employees were working.

2. Where the situation proved impractical to have side rails extending thirty six inches above the landing there were no grab rails installed on the ladder leading to said landing to provide a sure grip for employees moving to or from the point of access.

3. In order to move the above referenced crane it was necessary to remove all objects which extended more than a few inches above the floor of the platform referred to in paragraph number one (1) above.

4. It was necessary to climb upon certain equipment in order to gain access to the ladder leading from the ground

level to the platform referred to in paragraph number one (1) above.

5. 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 as described in paragraph number one (1) above.

6. It is found that the employer knew or should have known, by exercise of due diligence, that such conditions existed as those described in paragraph number one (1) above.

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

CONCLUSIONS OF LAW

Respondent has argued that Complainant did not carry its burden of proof concerning the alleged serious violation. Respondent cites the two major issues as (1) whether or not a standard railing existed and (2) whether the employees in question were installing downspouts. Complainant argues that the issue is simply whether or not the particular statute was violated and whether or not such was proved by the evidence.

It appears that the important issues of consideration here are: (1) Was the employer properly on notice as to what standard he had allegedly violated in order that he might properly defend his position, and (2) whether Complainant proved that Respondent was in violation of the statute or regulation.

Whether or not standard railing existed is of little significance if the railings were not in fact being utilized. It

was shown by photographs and testimony of Mr. Potter that railings were not being used on the date of inspection and that there were no railings to be found in the near vicinity. Mr. Garrett testified that the company never used a hand or guard rail up to the time of this inspection, and that he had been working there since February of 1975 (the inspection having taken place on March 17, 1975).

Truly, as Respondent points out, it would have been only proper that Complainant bring on the two employees who were working in the area on the day of the inspection to testify. However, even with the heresay evidence of what Mr. Potter said these men told him stricken from the record, it appears that there is sufficient evidence to show a violation of the cited standard.

As to the actual work activity engaged in by the men on the platform on the date of the inspection, it appeared clearly that Respondent was well aware of the situation surrounding the violation. Whether the workers were "installing downspouts" or "removing scaffolding", the fact remains that they engaged in work on the platform without standard railings or any other device to protect them from falling. Additionally, Respondent knew the standard for which he was cited as it was specified in the citaion.

With respect to Item Number 2 of Citation Number 2 concerning the adequacy of the ladder to the platform above, Respondent argues that Complainant was speaking of the bottom of the ladder while Respondent viewed the citation as one concerning the top of the ladder since it spoke of "access to a platform". Reading the standard and the citation, obviously the key to the wording in both is "safe access" and would apply to the entire ladder

and its construction. If, as Mr. Garrett testified, it was necessary to engage in acrobatics and contortions in order to mount the ladder, the violation to which this item of the citation referred was obvious.

Unquestionably, the requirement of extension of the ladder 36 inches above the landing was not practical here, but the alternative of "grab rails" was not available on this ladder, thus, the violation occurred.

The unique situation as to unavailability of storage space for tools while in use does not permit sustaining the housekeeping citation according to the proof presented. (Vacated)

As to the penalties, the $600 proposed for the serious violation appears to be quite excessive considering the possibility that there was dismantling going on and that the men were caught in an unusual situation rather than a normal work activity. Certainly in either case, a violation occurred but Complainant's case is not sufficient to eliminate all doubt that this might have been an occasional rather than a daily occurrance. Further, the work situation is not one which lends itself easily to the use of guard railing and the uniqueness of the circumstances should be considered in assessing a penalty. For these reasons the penalty should be reduced to $200.00.

As to the proposed penalties for Items 1 and 2 of Citation Number 2, the proper criteria were considered arriving at the penalty amounts except that the 50 per cent was not given; thus, the penalty for each should be reduced to $45.00.

There is no substance to any argument of lack of due process since Respondent was given adequate notice of hearing and the opportunity to be heard. The fact that Respondent's attorney found it more important to attend to (still unexplained) personal business rather than to apply himself to the preparation of his client's case does not show sufficient cause to postpone a hearing at the inconvenience and great expense of the other party.

RECOMMENDED ORDER

IT IS ORDERED that the Citation Number 1 shall be and the same hereby is AFFIRMED and the penalty therefor hereby is REDUCED to $200.00; Citation Number 2, Items 1 and 2 shall be and the same hereby are AFFIRMED and the penalties therefor shall be REDUCED to $45.00 for each; Citation Number 2, Item 5 shall be and the same hereby is DISMISSED.

ROGER D. RIGGS, HEARING OFFICER
KOSHRC

Decision No. 220

Dated: February 12, 1976

Frankfort, Kentucky