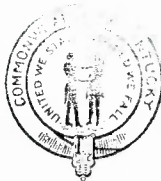


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149 (203)

JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC
Decision +
Order No. 203

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

December 10, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 149

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY ERECTING &
ENGINEERING COMPANY, INC.

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 October 27, 1975, is before the Commission for review.

In this matter, the Hearing Officer applied certain
findings of good faith and low probability of accident in
arriving at his decision to reduce the proposed penalty for a
serious violation of 1926.28(a) from \$550.00 to \$275.00.

Having reviewed all elements of the file and the
total record of evidence herein, the Review Commission finds
the application of the above factors to the facts herein in-
sufficient to sustain a finding of reduced penalty. It is
therefore the unanimous order of this Commission that that part
of the Hearing Officer's Recommended Decision reducing the pro-
posed penalty to \$275.00 be and it hereby is REVERSED. It is

further ordered that the original penalty of \$550.00 as proposed by the Department of Labor be REINSTATED, and that all other findings of the Hearing Officer not inconsistent with this decision be and they hereby are AFFIRMED.


H. L. Stowers, Chairman

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

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

Date: December 10, 1975
Frankfort, Kentucky

DECISION NO. 202

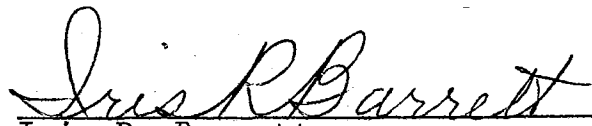
This is to certify that copy of this Decision and Order has been served by mailing or personal delivery on the following:

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: Peter J. Glauber
Assistant Counsel

Mr. J. P. Hancock, Vice President (Certified Mail #456041)
Kentucky Erecting & Engineering Co.
Post Office Box 1536
330 Boxley Avenue
Louisville, Kentucky 40209

This 10th day of December, 1975.



Iris R. Barrett
Executive Director

Done



JULIAN M. CARROLL



GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 183*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

October 27, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 149

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY ERECTING &
ENGINEERING COMPANY, 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.

149 (183)

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: Peter J. Glauber
Assistant Counsel

Mr. J. P. Hancock, Vice-President (Certified Mail #467114)
Kentucky Erecting & Engineering Co.
Post Office Box 1536
330 Boxley Avenue
Louisville, Kentucky 40209

This 27th day of October, 1975.


Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 149

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

KENTUCKY ERECTING &
ENGINEERING COMPANY, INC.

RESPONDENT

* * * * *

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

Mr. J. H. Hancock, Vice President, Kentucky Erecting & Engineering Co., Louisville, Kentucky, for Respondent.

GRAPER, Hearing Officer.

An inspection was made on April 15, 16, and 17, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health, of a place of employment located at Clay and Meriwether Streets, Louisville, Kentucky, whereat the respondent was engaged in structural steel erection. On the basis of such inspection, it was alleged in a Citation issued April 25, 1975, that respondent violated a provision of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in that respondent was alleged to have committed a serious violation as follows:

The standard, regulation or section of KRS Chapter 338 allegedly violated was 29 CFR Part 1926.28(a), adopted by reference by 803 KAR 2.030. A description of the alleged violation is: "An employee sitting on an eight (8) inch wide horizontal steel beam that was approximately forty (40) feet above the ground at the north, south, east and west centerline was not equipped with a lifeline, safety belt, or lanyard. Safety nets were not provided." The date by which the alleged violation must be corrected was within one week. By Notification of Proposed Penalty dated April 25, 1975, a penalty of \$550.00 was proposed.

A Notice of Contest, contesting the penalty but not the violation, was received from the respondent employer on May 9, 1975. It, together with a copy of the Citation and the Notification of the Proposed Penalty was transmitted to the Kentucky Occupational Safety and Health Review Commission on May 12, 1975, and received by it on May 13, 1975. A Notice of Receipt of Contest was mailed on May 14, 1975, and a Certification of Employer form indicating that the name and address of each local union representing affected employees is Bridge, Structural & Ornamental Iron Workers Local #70, 1273 S. Shelby, Louisville, Kentucky, was received on May 28, 1975. A Complaint was received on May 15, 1975. On June 3, 1975, the case was assigned to the Hearing Officer and, on the same date, a Notice of Hearing was mailed.

Pursuant to such Notice, a hearing was held on Wednesday, June 18, 1975, at the Department of Labor, Special Fund, Legal Arts Building, 3rd Floor, 7th & Market Streets, Louisville, Kentucky, under the provisions of KRS 338.071(4), one of the provisions of Chapter 338 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 its 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.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits and the stipulations, and the representations of the parties, it is concluded that the substantial evidence on the record considered as a whole supports the following findings of fact:

FINDINGS OF FACT

1. Upon the admission of the respondent, it is found that the violation described by complainant in its Citation did exist.

2. It is also found that the respondent did, in fact, furnish safety belts to all of its employees and that this employee's failure to use a safety belt may have been due to this employee's thoughtlessness, since other employees were using safety belts.

3. It is also found that, based upon this employer's past safety record, and this employee's own experience, that the probability of an accident was small.

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

CONCLUSIONS OF LAW

1. As indicated in earlier cases before the Review Commission (Commissioner of Labor of Kentucky vs. Quality Home Repair Service, KOSHRC Docket No. 39 and Commissioner of Labor, Commonwealth of Kentucky vs. Marks Manufacturing Company, KOSHRC Docket No. 140), in assessing civil penalties, due consideration must be given the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. In applying the penalty criteria, the Review Commission has a much freer hand than does the Commissioner of Labor. Seeking uniformity, the Commissioner of Labor has established formulas with little room within them for facts which, in equity and good conscience, would justify different treatment.

The Review Commission, which functions to do justice on a case by case basis is not so bound, and, providing it considers the penalty criteria in arriving at the amount of penalty to be assessed, it may, in a particular contest, give different weight to them than they are given by a formula of the Commissioner of Labor.


As to the serious violation charged, the Commissioner of Labor has met his burden of proof and the Citation should stand. As to the penalty proposed, however, special circumstances warrant giving different weight to the penalty assessment criteria than was used in proposing such penalty.

In this case, because of the good faith of the employer in furnishing safety belts to each of its employees and its specific

directions for their use, together with employee sanctions for not using them, and the fact that the gravity factor should be tempered by the fact that the probability of an accident was small, it would appear that the ends of both the Act and justice would be served by reducing the penalty proposed from \$550.00 to \$275.00.

RECOMMENDED ORDER

IT IS ORDERED that the Citation charging a serious violation and the one week abatement date shall be and the same hereby are sustained and IT IS FURTHER ORDERED that the penalty therefore shall be and the same hereby is reduced from \$550.00 to \$275.00.


LLOYD GRAPER
Hearing Officer, ROSHRC

DATED: October 27 , 1975
Frankfort, Kentucky

Decision No. 183