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150 (232)

JULIAN M. CARROLL

~~WENDY H. HARRIS~~

GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision  
Order No. 232*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge Street  
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

February 24, 1976

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 150

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

EDWARDS & WEBB CONSTRUCTION CO., INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

The Recommended Order of Hearing Officer Roger D. Riggs, dated November 18, 1975, is presently before this Commission for review. Specifically at issue is his proposed reduction of the \$550 penalty attaching to Citation #1, Item #1, down to \$350.

Upon thorough review of the entire record herein, it is found that the evidence supports the imposition of the full \$550 penalty. It is therefore the unanimous order of the Review Commission that that part of the Recommended Order reducing the \$550 penalty to \$350 be and it hereby is REVERSED. It is the further order of the Commission that the \$550 penalty attaching to Citation #1, Item #1 be REINSTATED as proposed by the Department of Labor, and the Hearing Officer's decision is AFFIRMED in all other respects not inconsistent with this opinion.

*H. L. Stowers*  
\_\_\_\_\_  
H. L. Stowers, Chairman

KOSHRC # 150

(Decision and Order of Review Commission)

Charles B. Upton  
Charles B. Upton, Commissioner

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

Dated: February 24, 1976  
Frankfort, Kentucky

DECISION NO. 232

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  
Frankfort, Kentucky 40601  
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

Honorable P. Joseph Clarke (Certified Mail # 456109)  
Attorney at Law  
120 North Third Street  
Danville, Kentucky 40422

Mr. M. C. Webb, President (Certified Mail # 456110)  
Edwards & Webb Construction Co., Inc.  
Post Office Box 223  
Danville, Kentucky 40422

This 24th day of February, 1976.

  
\_\_\_\_\_  
Diane M. Schneider, Attorney  
KOSH REVIEW COMMISSION

*Dione*

150 (192)



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

November 18, 1975

JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision  
Order No. 192*

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 150

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

EDWARDS & WEBB CONSTRUCTION  
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.

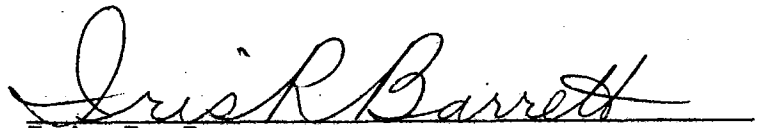
Copy of this Notice and Order has been served by mailing or personal delivery on the following:

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. M. C. Webb, President (Certified Mail #456460)  
Edwards and Webb Construction Company, Inc.  
Post Office Box 223  
Danville, Kentucky 40422

This 18th day of November, 1975.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC #150

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

EDWARDS & WEBB CONSTRUCTION COMPANY, INC.

RESPONDENT

\* \* \* \* \*

On April 14, 1975 an inspection took place at a bridge construction site of Edwards & Webb Construction Co., Inc. located at New U.S. 23 Bridge in South Shore, Kentucky. As a result of the inspection of respondent's construction location, the Kentucky Department of Labor, Division of Occupational Safety and Health, issued a citation to respondent charging a serious violation of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972), in the following respect:

The standards allegedly violated were 29 CFR 1926.500 (d)(1), 29 CFR 1926.28(a), and 29 CFR 1926.105(a). The description of the alleged violation was:

Employees were permitted to work on an opensided bridge arm used as a work platform approximately eight (8) inches wide and approximately thirty-five (35) feet above the adjacent ground level without the protection of standard railings, personal protective equipment (i.e Life Lines and Belts) or Safety Nets. Employees were also permitted to work on the open-sided bridge approximately

fifty (50) feet above the adjacent ground level without the protection of standard railings, personal protective equipment or nets.

The date by which the alleged violation was to be corrected was stated as May 1, 1975.

On May 9, 1975, the Department of Labor received a letter from respondent stating employer's intention to contest the alleged serious violation. May May 22, the Department of Labor issued a complaint, alleging the serious violation as previously noted and proposing said penalty amount. Thereafter notice of hearing was promptly sent to the parties by the Review Commission. On May 20, 1975 the Review Commission received a certification from respondent that the name and address of the local union representing affected employees is United Steel Workers of America, 379 Waller Avenue, Lexington, Kentucky and that the Notice of Contest had been posted as required by the Act.

Hearing was held on August 26, 1975 in the Circuit Courtroom, Boyle County Courthouse, Danville, 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, 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. There was no standard rail, or the equivalent thereof, provided for an open sided floor or platform which was 6 feet or more above ground level.

2. No safety-belts, lifelines, or other types of personal protective equipment which would protect the exposed employees from the danger of a fall were being utilized on the date of the inspection.

#### DISCUSSION AND CONCLUSIONS OF LAW

The compliance officer testified that the men were working at a level of 35 to 50 feet without the wearing of personal protection. His estimate of this height was not based upon an accurate measurement but simply upon his viewing the situation. Respondent offered testimony that the height of the bridge from water level varies greatly as the river rises and falls. Further, Complainant expressed a charge of three alleged violations. But no proof was presented as to the allegation concerning safety



nets; nor was any testimony presented by complainant concerning whether there were or were not guard rails. The photographs presented did not appear to show any guard rails. Through photographs and testimony of Mr. Hulette, it did appear, however, that there were employees working without safety belts and lifelines at heights which afforded a hazard of falling to serious harm.

In addition to the above stated observations concerning proof of the alleged violations, it is noted that there is little or no supportive information presented by Complainant for proposing the imposition of a penalty of \$550.00. The Compliance Officer testified that it is "customary" for the Department of Labor to fine \$1000 for every alleged serious violation, then "we have penalty adjustment factors". The Compliance Officer said the factors are "good faith, size and history," and stated the percentages ~~he~~ applied. However, Complainant did not choose to explain why \$1000 was used as a base figure. No explanation was given of the meaning or application of the three "factors" he used. The CSHO did not say why he applied the expressed percentages to reduce the proposed penalty. There is, therefore, no clear expression as to the reasoning behind the penalty as suggested in the citation.

In addition to the criteria which the Compliance Officer apparently considered, the Hearing Officer feels that circumstances brought to light by respondent's witness should have been considered in imposing a penalty. First, though Mr. Hulette is certainly a qualified Compliance Officer, there does appear to be some

question as to the height at which the employees were working. And by failure to accurately measure the distance on the date of the inspection, there is no way to ever know the exact distance.


Secondly, the regular supervisor of the employees on the bridge was prevented from being on the job on the inspection date, thus, they were likely not operating in their normal manner.

Finally, since the Compliance Officer charged the Respondent with the violation of three separate provisions of the Act it is impossible to determine whether he gave weight to any one or more of the alleged violations in proposing the penalty, or whether he would have proposed this penalty if he recognized violations of only one or two provisions.

It is thus concluded that according to the evidence, a serious violation of 29 CFR 1926.28(a) and 29 CFR 1926.105(a) (both adopted by 803 KAR 2:030) did occur. Considering the points stated hereinabove as to the flaws of proof in support of the proposed penalty and the testimony of Respondent's witness the penalty should however, reluctantly be reduced to \$350.00.

RECOMMENDED ORDER

The citation for violation of 29 CFR 1926.28(a) and 29 CFR 1926.105(a) shall be and the same hereby is SUSTAINED: and the penalty shall be and the same hereby is REDUCED TO \$350.00.

  
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 ROGER D. RIGGS  
 HEARING OFFICER, KOSHRC

Decision No. 192

Dated: November 18, 1975  
 Frankfort, Kentucky