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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 24, 1975

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 154

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

BARMORE CONSTRUCTION, 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:

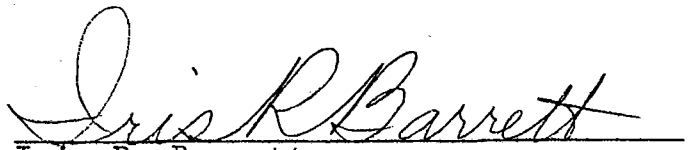
Commissioner of Labor  
Commonwealth of Kentucky  
Attention: Michael D. Ragland  
Executive Director for  
Occupational Safety and Health

Earl M. Cornett, General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Peter J. Glauber  
Assistant Counsel

Mr. Wm. Gooch, Company Safety Officer (Certified Mail #467111)  
1807 Cargo Court  
Post Office Box 99397  
Louisville, Kentucky 40299

Mr. Bob Ash (Certified Mail #467112)  
Barmore Construction, Inc.  
Post Office Box 575  
Bowling Green, Kentucky 42101

This 24th day of October, 1975.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC # 154

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

BARMORE CONSTRUCTION, INC.

RESPONDENT

\*\*\* \* \* \* \* \*

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

Hon. Diane Schneider, Kentucky Occupational Safety and Health  
Review Commission, Capital Plaza Tower, Attorney for the  
Review Commission

Hon. William Gooch, Barmore Construction Company, P.O. Box 575,  
Bowling Green, Kentucky, representing Barmore Construction  
Company (said company not being represented by an attorney)

\* \* \* \* \*

An inspection was made on April 29, 1975, by the Kentucky  
Department of Labor, Division of Occupational Safety and Health,  
at a place of employment located at 1509 Chestnut Street, Bowling  
Green, Kentucky, and on the basis of the inspection it was alleged  
in a Citation dated May 15, 1975, that Respondent violated the  
provisions of KRS Chapter 338 (Kentucky Occupational Safety and  
Health Act of 1972) in the following respects, which was alleged  
to be other than a serious violation:

There were several Citations issued against Respondent and only one (1) Citation was protested, that being Citation No. 2, Item No. 1, which alleged a violation of 29 CFR 1926.25 (a) (as adopted by 803 KAR 2-030), a description of the alleged violation being as follows:

"Scrap lumber with protruding nails and other debris was not kept cleared from the driveway leading to the agriculture and mechanical laboratories where employees were working."

"This is a repeat violation of Item No. 1 of Citation No. 1 issued December 23, 1974."

The date by which the alleged violation was to be corrected was June 3, 1975.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above - April 29, 1975.
2. Citation issued May 15, 1975, listing three (3) Citations, two (2) alleging a repeated other than serious violation of the Acts and Standards, and one (1) alleging six (6) other than serious violations of the Acts and Standards.
3. Proposed penalty for the contested standard herein in question was \$190.00 and the abatement date was June 3, 1975.
4. Notice of Contest was received May 29, 1975, contesting the above named item.
5. Notice of Receipt of Contest mailed June 4, 1975.
6. Certification of Employer Form received June 9, 1975.
7. Complaint received June 10, 1975. No formal answer filed but no complaint was made of same by the Department, either prior to the proceedings or during the hearing.
8. Case assigned to Hearing Officer August 15, 1975; hearing scheduled and held August 28, 1975, at 9:00 a.m. at the

District No. 3, Bureau of Highways Office, Bowling Green, Kentucky.

The aforesaid hearing was held under the provisions of KRS 338.071 (4), one of the provisions dealing with the safety and health of employees which authorized 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 procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such 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, having considered same, together with the exhibits filed and the 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.

#### FINDINGS OF FACT

Jurisdiction of the Parties in the subject matter and due and timely notice of the hearings is found by the Hearing Officer.

Respondent was in violation of the Citation herein in question, and the record adequately reflects this by preponderance of the evidence.

The penalty for this Item, however, appears to be unreasonable and not appropriate based on the facts as they are included in the transcript.

#### CONCLUSIONS OF LAW

The Complainant has furnished the Hearing Officer with proof of the violation of the section reflecting the protested charge and such charge is found to be a repeated violation.

As indicated in an earlier case before the Review Commission, Commissioner of Labor of Kentucky -v- Quality Home Repair Service, KOSHRC Docket No. 39, which in assessing civil penalties, the Review Commission stated "due consideration must be given to 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." This is a repeated violation. There are mitigating factors found on behalf of the Respondent, Barmore Construction Company. The cramped confined quarters, the relatively minor nature of the transgression herein found and all the facts and circumstances including, but not limited to, the size of the business of the employer being charged, the gravity of the violation, the

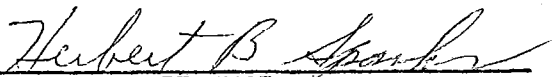
good faith of the employer, and the history of previous violations herein lead the Hearing Officer to the opinion that this is an appropriate case for different weight to be given to the penalty criteria used by the Commission of Labor.

Under these circumstances, it does not appear that the purposes of the Act would be fulfilled nor that justice would be served by assessing a penalty in the proposed amount, thus the penalty for this violation should be reduced to One hundred (\$100.00) dollars.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the Citation herein in question charging a repeated nonserious violation shall be and the same is hereby SUSTAINED, and the proposed penalty of One hundred ninety (\$190.00) dollars shall be and the same is hereby reduced to One hundred (\$100.00) dollars.

This violation must be corrected without delay, but no later than fifteen (15) days from the date of this Recommended Order.

  
HERBERT B. SPARKS  
HEARING OFFICER - KOSHRC

Dated October 24, 1975

Decision No. 181