

*None*



155 (253)

JULIAN M. CARROLL

**WENDELL FORD**

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

*KOSHRC  
Decision +  
Order # 253*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge Street  
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March <sup>26</sup> 1, 1976

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 155

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SCHRIEBER SHEET METAL & ROOFERS, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

UPTON and STANTON, Commissioners:

A Recommended Order of Hearing Officer John T. Fowler, Sr., dated December 2, 1975, is before the Commission for review.

The question presented for review is whether the presence of Respondent's employees on an unguarded flat roof approximately 37 feet high constitutes exposure and thereby a violation under 29 CFR 1926.500(d)(1). This standard, under a subsection titled, "Guarding of open-sided floors, platforms, and runways," requires guarding by a standard railing "or the equivalent" on every "open-sided floor or platform 6 feet or more above adjacent floor or ground level." Respondent argues that the specific wording of this regulation does not apply to the installation of roofs, that installation of guarding would increase the hazard, and that Respondent, as a subcontractor, had no right, duty or authority to alter work conditions by installing perimeter guarding.

After a hearing on these matters, Hearing Officer Fowler concluded that 1926.500(d)(1) does control the installation of roofs, that Respondent should have applied for a variance if he feared compliance would increase the hazard, and that Respondent's status as a subcontractor without authority to install guarding is a defense only as to nonserious violations.

Upon review of the law in this matter, especially case precedent, and the manner in which this law was applied to the specific conditions as they existed at Respondent's worksite, the Review Commission finds the determinations of the Hearing Officer sound. That part of the Hearing Officer's Recommended Decision affirming the citation is, therefore, AFFIRMED.

This Commission can find no cause, however, for a reduction of the proposed \$600 penalty to \$250. In this case, employees were working sufficiently close to an unguarded edge to be exposed to a fall which would result in death or serious injury. Evidence at hearing revealed no computational or other error by the Department of Labor in arriving at the proposed penalty of \$600. Nor can we find, in the face of the obvious hazard to employees, any other reason to disturb that result, and hereby REVERSE that part of the Hearing Officer's decision which reduced the proposed penalty to \$250. The original penalty of \$600 is hereby REINSTATED by order of this majority, and all other findings of the Hearing Officer not inconsistent with this opinion are affirmed.

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

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

STOWERS, Chairman. CONCURRING in part and DISSENTING in part:

I must respectfully DISSENT from that part of the majority decision which reinstates the original \$600 proposed penalty. I find that the Hearing Officer gave fair and proper weight to Respondent's defenses herein, leading him to reduce the penalty to \$250. With that decision, and with all findings and conclusions of the Hearing Officer, I fully CONCUR.

  
H. L. Stowers, Chairman

Dated: March 26, 1976  
Frankfort, Kentucky

DECISION NO. 253

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: Peter J. Glauber  
Assistant Counsel

Honorable Kenneth L. Schriber (Certified Mail #456148)  
General Counsel  
Schriber Sheet Metal and Roofers, Inc.  
915 South Perry Street  
Dayton, Ohio 45402

Honorable Charles Young (Certified Mail #456149)  
Attorney at Law  
712 3rd National Building  
Dayton, Kentucky 45402

This 27th day of March, 1976.

  
Iris R. Barrett  
Executive Director

*Done*



JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOS HRC  
Decision +  
Order #197*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

December 2, 1975

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 155

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SCHRIEBER SHEETMETAL & ROOFERS, 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:

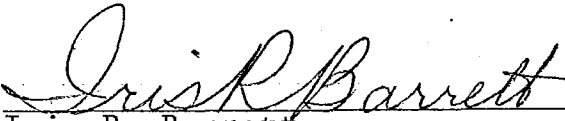
Commissioner of Labor  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland

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

Honorable Kenneth L. Schriber (Certified Mail #456022)  
General Counsel  
Sheet Metal and Roofers, Inc.  
915 South Perry Street  
Dayton, Ohio 45402

Honorable Charles Young, Attorney (Certified Mail #456023)  
712 3rd National Bldg.  
Dayton, Kentucky 45402

This 2nd day of December, 1975.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY  
AND HEALTH REVIEW COMMISSION

KOSHRC NO. 155

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

SCHRIBER SHEETMETAL & ROOFERS, INC. RESPONDENT

\* \* \* \* \*

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

Hon. Kenneth L. Schriber, General Counsel for the Respondent, 915 South  
Perry Street, Dayton, Ohio 45402.

Hon. Charles Young, Attorney, Trial Counsel for the Respondent, 712 3rd  
National Building, Dayton, Ohio 45402.

Hon. Diane M. Schneider, Attorney for KOSH Review Commission,  
Frankfort, Kentucky.

FOWLER - Hearing Officer

\* \* \* \* \*

As a result of an inspection on May 13, 1975, by the Department of  
Labor, at a place of employment operated by the Respondent, Schriber Sheetmetal  
& Roofers, Inc., located at the Florence Industrial Park in Florence, Kentucky,  
it was alleged in a Citation issued May 23, 1975, that Respondent violated the  
provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act  
of 1972) in the following respect, which was alleged to be a serious violation.

The Citation stated that the Respondent company was in violation of 29 CFR 1926.500 (d) (1) more particularly described in the Citation as follows:

"An open-sided floor, the roof of the high bay, approximately thirty-seven (37) feet above the adjacent ground level was not guarded by a standard railing, or the equivalent, where the employees were installing the materials for a built-up roof."

The proposed penalty for the serious violation alleged was \$600.00 and the abatement date was set for June 4, 1975.

The Respondent company contested the Citation in all respects and a hearing was subsequently held.

The pertinent procedural information and dates are as follows:

1. Inspection of the aforesaid premises was May 13, 1975.
2. Citation issued for the violation of 29 CFR 1926.500 (d) (1) was issued May 23, 1975.
3. The proposed penalty for the alleged serious violation was \$600.00 and the abatement date was set for June 4, 1975.
4. Notice of Contest was received on May 30, 1975, contesting the one Item cited.
5. Notice of Contest with copy of Citation and proposed penalty was transmitted to the KOSH Review Commission on June 4, 1975.
6. Notice of Receipt of Contest was mailed June 4, 1975.
7. Certification of Employer Form was received on June 10, 1975.



8. Complaint received on June 10, 1975. Answer filed on June 25, 1975

9. The case was assigned to a Hearing Officer on August 18, 1975; hearing scheduled and held on September 5, 1975, at District #6, Bureau of Highways Office, Covington, Kentucky.

10. The Receipt of the Transcript of the Testimony of the hearing was received on October 20, 1975, and the Parties were allowed not more than 15 days from the date of the Receipt of the Transcript in which to file Briefs.

11. Motion was filed by the Complainant to allow an extension of time for filing of the Brief which was granted with rebuttal time also granted to the Respondent in the event a Reply Brief was needed.

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 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 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 and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty.

As is stated in the pertinent information, the parties submitted Briefs within the time allowed by the Hearing Officer, including an extension ----- because of failure of a Complainant counsel to receive a Transcript of the Evidence

and both parties did file Briefs which cited their positions in the law suggested to be applicable by both counsel, in depth.

The testimony of the witnesses who testified revealed little difference in the facts and the main purport of the defense of the action was concentrated on the proposition that the regulation did not apply to the installation of roofs and that even if it did apply the precautions necessary to be taken by installation of guard rails, subjected employees to a greater hazard than they would have been subjected to without any guard rails, and that the Respondent was a sub-contractor and therefore, had no right, duty, or authority to alter the place of work and should not be required to create a condition over which it, in fact, had no control by installing of safety guard rails.

The matter was thoroughly and ably presented by both counsel in their Briefs and the presentation of the testimony and their statements to the Hearing Officer, and after hearing the testimony of the witnesses, and after having read and examined the evidence and considered same, together with the Stipulations and Representations of the parties and the Briefs of the parties of file, it is concluded that substantial evidence on the record considered as a whole supports the following Findings of Fact.

#### FINDINGS OF FACT

1. Employees of the Respondent company were working on a roof deck installing an insulated built-up roofing system.

2. That the surface on which the employees of Respondent were installing a built-up roof was approximately 37' from the adjacent floor or ground level.

3. That said Respondent's employees were working on the roof edge of the White Motor Company in Florence, Kentucky, on road U. S. 25.

4. That no standard guard rail or equivalent existed around the perimeter of the flat roof where Respondent's employees were working at the time of the inspection. --

5. That some 700' of portable guard rails were purchased and installed immediately after the Citation and prior to the completion of the job.

6. That no request for a variance of the regulations was requested by the Respondent under KRS 338.153.

7. That Respondent made extraordinary efforts to remedy the lack of guard rails when the Citation was issued.

8. That the alleged violation was a serious violation.

9. That the condition for which the Citation was issued has been abated, and was abated immediately.

#### CONCLUSIONS OF LAW

It is concluded by the Hearing Officer as a matter of law, (1) that 29 CFR 1926.500 (d)(1) under the latest decisions of the Federal Review Commission applies to roofs. The case of S. D. Mullins, Inc., OSHRC Docket 459 so held in a 2-1 decision. This decision is currently under appeal to the 5th Circuit Court of Appeals, docketed November 14, 1973, number 73-3705 (CCH-Employment


Safety and Health Guide (ESHG) paragraph 16,803. Pending this appeal the highest and latest authority is S. D. Mullins, and decisions of the Federal Review Commission following that rationale; (2) that Respondent had the obligation of applying for a variance under KRS 338.153, if, in the opinion of the Respondent, compliance with the regulation would increase the hazard to employees, was unable to be complied with, or would cause damage to existing structure (See Commissioner of Labor vs. Melbourn, KOSHRC #41); (3) that the defense of the Respondent that it did not have the expertise or the authority to alter the roof perimeter, being a sub-contractor, applies, as of this date, only to non-serious violations. This has been recognized by the Department of Labor in Kentucky by its memo of October 23, 1975 (also see Anning-Johnson Company et al vs. Peter J. Brennan, Secretary of Labor (7th Circuit, May 1975 CCH Employment Health Guide 19,684); (4) that the Respondent is in violation of 29 CFR 1926.500 (d)(1) as cited; (5) that the compliance division of the Department of Labor is bound by certain recommended penalties and credits, but that the Review Commission, or its Hearing Officer, is not so bound; (6) that the differences in the interpretation of the applicability of 29 CFR 1926.500 (d)(1) by the Federal Review Commission and the appeal pending in the 5th Circuit Court of Appeals, which may clarify such applicability, indicate, as a conclusion that the penalty for such violation should be reduced. That, because of an honest difference in such interpretation it is indicated that the Respondent could have been acting in good faith, believing itself to be in compliance with the regulations and their administrative interpretations; (7) that the Respondent's penalty should be

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reduced to \$250.00 for the violation which has been determined to be a serious violation, because of the aforesaid conclusions.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the Citation issued against the Respondent and the abatement date are sustained and affirmed except for the penalty for such violation, and the penalty for such violation is set at \$250.00.

  
JOHN T. FOWLER, SR.  
Hearing Officer - KOSHRC

Dated: December 2, 1975  
Frankfort, Kentucky

DECISION NO. 197