



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision &  
Order No. 340*

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 13, 1976

MERLE H. STANTON  
CHAIRMAN

HERBERT L. STOWERS  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC #158

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MIDWESTERN CONSTRUCTION, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners.

STANTON, Chairman:

The Recommended Decision of Hearing Officer Herbert B. Sparks issued in this matter on July 14, 1976, is now before this Commission, a Petition for Discretionary Review having been filed by both the Complainant and Respondent, granted by this Commission pursuant to the Rules of this Commission.

Complainant asks that that portion of the Recommended Order that vacated a citation under 29 CFR 1926.451(d)(10) (as adopted by 803 KAR 2:030) be reversed and that the citation and penalty be affirmed.

Respondent takes exception to a finding by the Hearing Officer that there was a repeat violation of 29 CFR 1926.451(a)(2) (as adopted by 803 KAR 2:030) and the penalty assessed by the Hearing Officer.

Relative to the citation under 29 CFR 1926.451(a)(2) (as adopted by 803 KAR 2:030) this citation was for a repeat violation in that unstable objects, such as loose brick or concrete blocks, shall not be used to support scaffolds or planks. The record shows this respondent was cited under this same section following a January 27, 1975, inspection. The citation herein in

question alleged that one leg of the material scaffold south of the bell tower being erected had one leg resting on a concrete block and pieces of 2 x 10 lumber. One employee was observed on this scaffold, and Exhibit Photograph No. 1 shows that violation.

It is the finding that the Complainant has proved all elements necessary in finding a repeat violation by this respondent of this standard.

The Hearing Officer has found that there was not a violation of 29 CFR 1926.451(d)(10) (as adopted by 803 KAR 2:030) and that this and the proposed penalty should be vacated on the basis that the standard was not in effect at the time of the citation.

When Kentucky was approved to operate its own Occupational Safety and Health Plan, under the aegis of the Federal Government, it was with the directive that the Kentucky plan must be "as effective as" the Federal Plan. Many instances can be cited in the various state plans where the Federal Government has declined to approve certain provisions, regulations, or laws. But these regulations must first be adopted and operable before consideration of their effectiveness is determined by the Federal Government.

Each state may adopt its own standards as long as the "as effective as" criteria is met; it may adopt in toto the Federal standards; or it may adopt the Federal standards with modifications. However, as long as the changes are properly and legally adopted, they are in effect and control citations issued thereunder. In this instance following approved procedures, Kentucky through its Standards Board made a change, through administrative regulation or additional provision in the Federal Standard 29 CFR 451(d)(10) in that a sentence was inserted which provided:

"Cross braces used on 6 foot 6 inch tubular welded frame scaffolds may be substituted for the quadrails described above when the braces are erected continuously along the working level of the scaffold."


When this change was reviewed by the Federal Government, it was found to have weakened the guarding requirements; and thereafter by proper action this provision was deleted and the standard was again identical to the Federal. However, it was still the law in Kentucky while in effect. Had it been more stringent than the Federal provision, it would have been approved and probably still be in effect, but either way it was a valid regulation in Kentucky at the time of this citation.

The evidence adduced herein clearly demonstrates respondent was in violation of this standard, since the cross bracing used still did not conform to this standard and no other bracing was utilized as required. An employee was found to be working on the scaffold without adequate guard rail or cross bracing protection and was exposed to a hazard of falling thirty-two feet, constituting a serious violation as cited.

It is therefore the finding and Order of this Commission that the Hearing Officer's finding of a violation of 29 CFR 1926.451 (2) and the penalty assessed by him is sustained.

It is the further finding and Order of this Commission that the standard 29 CFR 1926.451(d)(10), as amended by 803 KAR 2:030, was in effect at the time of this citation, and the citation was properly issued. It is the further finding and Order that respondent was in violation of this standard and the citation as charged is hereby sustained and the penalty of \$850.00 is sustained.

All other findings of the Hearing Officer in this matter not inconsistent with this decision are hereby affirmed.

  
Merle H. Stanton, Chairman

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

STOWERS, Commissioner, CONCURRING in part and DISSENTING in part:

I concur with the majority opinion in that I agree that citations 2 and 3 should be upheld and that the penalties should be assessed in the proposed amount. However, I respectfully propose that citation 1, item 1 and its attendant penalty should have been vacated and that the proposed penalty accompanying citation 1, item 2 should also have been vacated.

It has been established in Kentucky and Federal law that an employer is not responsible for the brief, isolated acts of its employees. See Quality Construction, KOSHRC 190, and Champlin Petroleum Co., OSHRC Docket 12,692, CCH OSHD Para. 19,981. It is my feeling that the facts of this case indicate that the alleged

violation of 1926.100(a), citation 1, item 1, was a brief and isolated occurrence. The two employees seen without hard hats were without them only briefly while they were engaged in work in which the hats may have fallen off. It is also established that employees must furnish a hard hat as a condition of employment and that employees have been terminated for not wearing a hard hat. Therefore, I respectfully submit that citation 1, item 1, and its attendant penalty should have been vacated because it was an isolated occurrence.

Regarding citation 1, item 2, I agree with the majority opinion that the Complainant met the requisite burden of proof to sustain the citation. It was admitted at the hearing that the planks on the scaffold did extend more than twelve inches over the scaffold thereby giving rise to a violation of 1926.451(a)(14). However, it appears to me that this condition was both a safe and necessary one. Necessary because it was the only way in which a scaffold could be placed on all four sides of the bell tower and safe because the planks were wired to the scaffold to prevent tilting. It, therefore, is my opinion that the citation should be affirmed, but that the proposed penalty of \$53.00 should be vacated.

  
H. L. Stowers, Commissioner

Dated: October 13, 1976

Frankfort, Kentucky

DECISION NO. 340

*Done*



158 (302)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

July 14, 1976

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Secretary  
Order No. 302*

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 158

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MIDWESTERN 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. 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

Hon. Thomas J. Conder (Certified Mail #976125)  
Wood, Goldberg, Pedley & Stansbury  
2800 First National Tower  
Louisville, Kentucky 40202

Hon. Robert H. Rice (Certified Mail #976126)  
Attorney at Law  
2800 First National Tower  
Louisville, Kentucky 40202

Mr. Kenneth L. Greenwood, Vice-Pres. (Certified Mail #976127)  
Midwestern Construction, Inc.  
Post Office Box 5231  
Louisville, Kentucky 40205

This 14th day of July, 1976.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

KOSHRC # 158

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

MIDWESTERN CONSTRUCTION, INC.

RESPONDENT

\* \* \* \* \*

Hon. Peter J. Glauber, Attorney at Law, Department of Labor,  
Capital Plaza, Frankfort, Kentucky, for Complainant

Hon. Thomas J. Conder, Attorney at Law, Wood, Goldberg, Pedley  
& Stansbury, 2800 First National Tower, Louisville, Kentucky  
40202, Attorney for Respondent

\* \* \* \* \*

Inspection was made on May 1, 1975, at a place of employment located in Jefferson County, Kentucky, at or near Hurstbourne Lane, north of I-64, Middletown, Kentucky, and on the basis of that inspection it was alleged in citations dated May 15, 1975 that the Respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in the following respects:

There were two alleged nonserious violations, those being:

An alleged violation of 29 CFR 1926.100(a) (as adopted by 803 KAR 2-030) in that two employees passing bricks and mortar up the bell tower scaffold were not wearing hard hats.

There was also an alleged violation of 29 CFR 1926.451(a)(14) (as adopted by 803 KAR 2-030) in that the following two by ten (2X10) scaffold planks on the bell tower scaffold extended

over their end supports more than twelve (12) inches;

(a) At the third level of the south side of the scaffold four (4) planks extended approximately five (5) feet over their end supports.

(b) At the fourth level of the South side of the scaffold four (4) planks extended approximately five (5) feet over their end supports.

(c) At the fifth level of the South side of the scaffold three (3) planks extended approximately seven (7) feet over the West support and three (3) feet over the East support.

(d) The three (3) levels at the North side of the scaffold consisted of five (5) planks that extended approximately five (5) feet over their end supports.

There was also an alleged repeated violation of 1926.451(a)

(2) (as adopted by 803 KAR 2-030) in that:

The materials scaffold South of the bell tower scaffold had one (1) leg resting on a concrete block and pieces of two by ten (2X10).

There was also an alleged serious violation of 1926.451(d)(10)

(as adopted by 803 KAR 2-030) in that:

The first two (2) levels of the South side of the bell tower scaffold were not adequately guarded in that:

(a) The platform at the first level was approximately 17 feet long and five (5) feet wide, 19-1/2 feet above the ground and eight (8) feet above the material scaffold. The side away from the bell tower, the ends, and the five (5) foot sections on the east and west sides, where the scaffold planks overhung the end supports, were not provided with guardrails midrails, or toe-boards to protect the employees below. An employee was passing bricks and mortar to the second level with no wire mesh installed to protect the employee on the material scaffold. Cross bracing was provided for the seven (7) foot scaffold section next to the bell tower.

(b) The platform at the second level was approximately 17 feet long and four (4) feet wide, 26 feet above the ground and fifteen and one-half (15½) feet above the material scaffold. The side away from the bell tower, the ends, and the approximate five (5) foot sections on the East and West sides, where the scaffold planks overhung the end supports, were not provided with guardrails, midrails, or toeboards to protect employees



from a fall to the ground or the material scaffold below. An employee was passing bricks and mortar to the third level with no wire mesh installed to protect the employee on the first level and the material scaffold. Cross bracing was provided for the seven foot scaffold section next to the bell tower. And, the platform at the third level of the bell tower scaffold was not adequately guarded in that:

(c) The platform was approximately 18 feet long on the East and West sides and thirteen feet long on the North and South sides. The platform was approximately five (5) feet wide on the East, South and West sides and approximately seven (7) feet wide on the North side. The North and East sides were 32½ feet above the ground. The south side was 32½ feet above the ground and 21 feet above the material scaffold. The West side was 17 feet above a classroom roof. The back of the North side of the platform had cross bracing installed on the scaffold section, but the five (5) foot scaffold plank overhang on the East and West sides was not provided with a guardrail, midrail or toeboard. The back of the East side of the platform was not provided with a guardrail, midrail or toeboard to protect the bricklayer working on this side from a fall to the ground. The back of the South side of the scaffold had cross bracing installed on the seven (7) foot scaffold section, but this cross bracing was approximately two (2) feet behind the back of the scaffold. The three (3) foot scaffold plank overhang on the East side and the seven (7) foot scaffold plank overhang on the West side were not provided with a guardrail, midrail or toeboard. The back of the West side of the platform was not provided with a guardrail, midrail or toeboard. And; the materials scaffold at the south side of the bell tower was eleven and one-half (11½) feet above the ground. The platform was five (5) nine (9) foot two by tens (2X10) covered with plywood. An employee mixing mortar on this platform was not protected against a fall by guardrails, midrails or toeboards on the East and South sides.

The dates by which the alleged violations were to be corrected were as to the first alleged nonserious immediately upon receipt of the citation, and as to the remaining alleged violations May 27, 1975.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above - May 1, 1975.
2. Citation issued May 15, 1975.
3. The proposed penalty for the contested standards herein in question was \$53.00 each for the two alleged other

than serious violations; \$170.00 for the alleged repeated violation; and \$850.00 for the alleged serious violation.

4. Notice of Contest was received June 6, 1975.
5. Receipt of Contest was mailed June 10, 1975.
6. Certification of Employer form was received June 16, 1975.
7. Complaint was received June 19, 1975.
8. Answer was received July 8, 1975.
9. Case was assigned to a Hearing Officer August 15, 1975.
10. Notice of hearing was scheduled for Thursday, September 4, 1975 in Louisville, Kentucky, however, that hearing was not held due to the fact that the Compliance Officer for the Complainant herein was attending school out of state.
11. A deposition for Complainant of the Compliance Officer, Mr. Montgomery was held eventually on October 31, 1975.
12. The hearing was held on March 11, 1976 at 10:00 a.m. at the Kentucky Occupational Safety and Health Review Commission, 104 Bridge Street, Frankfort, Kentucky.
13. Transcript was received April 21, 1976.
14. Briefs were filed and Notice of Receipt of Briefs were mailed May 24, 1976.

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 hearing. Under the provisions of KRS 338.081, the hearing was authorized by the 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 the citation or penalty.

After hearing the testimony of the witnesses, having considered same, together with the exhibits filed and stipulations and representations of the parties, it is concluded that the substantial evidence of the record considered as a whole supports the following Findings of Fact.

#### DISCUSSION OF CASE

The time of the issuance of the citation, the protest by the Respondent, the filing of Complaint, and the filing of Answer have all be stipulated.

It was the testimony of the Compliance Officer that on or about January 27, 1975, he made an inspection pursuant to his job duties of Midwestern Construction, the Respondent herein, and that Item 4 of the citation that was issued pursuant to that inspection was an alleged violation of 1926.451(a)(2) in that a tublar welded frame scaffold was five feet above the ground on the East side of the building. The scaffold was supported by pieces of brick and wood approximately six inches high. There was no proposed penalty for that alleged violation.

It was also the testimony of the Compliance Officer that on May 1, 1975, he made the inspection herein in question, and the inspection took place in Middletown, Kentucky, and it revolved around where Respondent was working on construction of a church. It was also his testimony that it was a general scheduled inspection.

It was the testimony of the Compliance Officer that after the preliminary opening conference and the necessary formalities, that

he found an alleged violation of 29 CFR 1926.100(a) (as adopted by 803 KAR 2-030). It was his testimony "at the time of the inspection there were two employees passing small buckets of mortar from different levels of the scaffold and these employees were not wearing hard hats or protective equipment at the time of the inspection" (Transcript, Page 10).

As to the alleged violation of 29 CFR 1926.451(a)(14) concerning the scaffold planks extending over end supports not less than six inches and not more than twelve inches, it was the testimony of the Compliance Officer that there were "all tolled five levels to the scaffold, five working levels".

The Compliance Officer pointed to Photograph No. 4 which was introduced in his deposition as showing clearly and distinctly the work platform that shows the planks extending well beyond the twelve inch maximum allowed by the standard. He also pointed to Photograph No. 5 to show the extent to which the boards were out again, and he pointed to Photograph No. 9 to indicate his allegations of the violation of the standard herein in question.

As to the alleged violation of 29 CFR 1926.451(a)(2), the standard is concerned with the footing or anchorage for scaffolds being necessarily sound, rigid and capable of carrying the maximum intended load without settling or displacement, and unstable objects such as barrels, boxes, loose brick, or concrete blocks shall not be used to support scaffolds or planks. It was his contention that Photograph No. 1 indicated a material scaffold showing one leg resting on a piece of wood and also a concrete block. It was also his testimony that this was used for the support on the South side

of the bell tower (Transcript, Page 15). It was also his testimony that he noticed one employee on this material scaffold.

As to the alleged violation of 29 CFR 1926.451(d)(10), it was his testimony that the first violation here was the material platform which was approximately 11 feet 6 inches above the ground. The employee was exposed to a fall from the South and East sides of eleven feet six inches to the ground. There was no protection available whatever on the sides for this employee (Transcript, Page 16). He sought to show this through Photograph No. 6 and particularly the lower left-hand corner of same. It was his testimony that "this material platform consisted of five two by tens and there was an employee standing on the edge passing brick to what would be the fourth level". He pointed to Photograph No. 6 and said "this shows the materials platform which is the one in the lower left-hand corner". There was a materials platform extending back of the scaffolding on the South side of the bell tower. This material platform consisted of five two by tens and there was an employee standing on the edge passing the brick to what would be the fourth level. In Photograph No. 3 one can see employees on the materials platform at the various levels passing bricks up above (Transcript, Page 16).

As to there being no guardrail or midrail, it was his testimony "as far as this goes, for the materials platform there was no guardrail on the back of the materials platform. At the front of the materials platform, between that and the working platform for the bricklayers, there was crossbracing which, on these scaffolds, which was six foot six inches. Crossbracings are recognized as adequate

protection. Again, the materials platform at the fourth level was four two by tens and again are shown in Photograph No. 3, there is an employee standing on this level passing brick upward. The best view of this, in Photograph No. 4, one can see where the crossbracing was installed on the inside buck between the bell tower and the materials platform, but the back side was open. At the fifth level there was a brick layer on this platform which was 32½ feet above the ground and on the West side there was a bricklayer coming within two feet of the end of this platform with no protection provided. This can be seen in Photograph No. 7 and the bricklayer is working there laying brick at the bell tower and you can just barely make out his mortar bowl there right at the edge of the work platform. He additionally pointed to Photograph No. 3 showing an employee on the materials platform, one on the third level of the bell tower scaffold and neither of these employees have hard hats on (Transcript, Page 20).

In stating as to why he believed that the alleged violation of 1926.451(d)(10) was a serious violation it was his "understanding that a serious violation is where death or serious physical harm could result if the employees are exposed to this condition. Now, the fall of 32½ feet to the ground, as well as the 19½ feet in either one of these falls, I believe it could cause serious physical harm and possibly death". He went into some depth in explaining as to how he arrived at the proposed penalties herein in question, explaining the use of the various OSHA forms 12 and 10 involved and how the recommendations were arrived at.

It was his testimony that he took, after considering the various factors involved, fifteen (15) percent of the unadjusted penalty for

the nonserious, and got adjusted penalties of \$197.00 and \$85.00. He gave a fifty (50) percent abatement credit for each nonserious violation. Therefore, for the two \$107.00 penalties for the two alleged other than serious violations, he arrived at a \$54.00 abatement credit, and the final proposed penalties were \$53.00 for Items 1 and 2. As to Item 3, the alleged repeat, the adjusted penalty was \$85.00 which was reflected fifteen (15) percent off the original proposed penalty of \$100.00. Since he believed it to be a repeated violation, it required under his compliance manual that the penalty be doubled, therefore he arrived at \$170.00 total figure for the alleged repeated violation. As to the serious violation, it was his testimony that the only adjustment given for a serious violation was a fifteen (15) percent adjustment factor. This adjusted down to \$850.00 and the final proposed penalty was \$850.00.

Upon cross-examination, the Respondent's counsel ascertained that zero percentage was given for good faith whereas a maximum percentage would have been twenty (20) percent for good faith.

At the hearing, the first witness called by the Complainant was Mr. Joseph T. Kelly, the supervisor of the Compliance Officer and he testified basically to the way scheduling was accomplished and the fact that he had made no changes basically in his Compliance Officer's report concerning this case.

The Respondent called as its first witness, Mr. Joseph Corbett, who is an officer in Respondent-Company. It was the testimony of Mr. Corbett that time and laborwise on this particular project, the biggest headache was the brick work on the bell tower which was a matter of days. It was a few days for one bricklayer and approximately

three thousand brick were laid on the bell tower. One bricklayer was involved. Mr. Corbett testified as to the earlier inspection in January and certain telephone calls he had with OSHA compliance people in Frankfort, that he basically felt the citations there were so insignificant and for that reason they did not contest them.

As to the alleged hard hat violation, it was the testimony of Mr. Corbett that there was a standing order that all their employees would wear hard hats not only to meet OSHA compliance, but also to meet insurance requirements, and there was a regular safety bulletin at the beginning of each job and each foreman was advised of this policy and each man on the job. (Transcript, Page 21). In fact, the Respondent's witness, Mr. Corbett, testified that they had sent people home just because they did not have a hard hat on, and that the basic instruction given employees was "hard hats must be worn at all times."

It was the testimony as to the extension beyond twelve inches of the planks which were used as the floor for the scaffold, the scaffold boards themselves, Mr. Corbett testified that "the tower itself was located close enough to the building that we could not scaffold the tower on all four sides because there were only about three feet between the tower and the building", that the Respondent had to make some kind of provision to have a walkway so the men could work. Due to the fact that they could not get any scaffold frames in this small hole, they built a scaffold frame on each side of the tower and ran their scaffold boards between the two scaffold sections. Normally, they had to extend their boards past the twelve inch limit or they could not put any scaffold there at all. It was



his belief that the regulation herein in question was so that a man could not walk out on the end of the scaffold and have the back end of it kicked up and fall. To insure that this would not happen, every single board on this tower frame scaffolding was wired down. Mr. Corbett further testified that scaffolding herein in question was tubular welded steel pipe. It was tied together with crossbraces, and once the scaffolding was tied front and back with crossbraces, it was very stable if it is on a stable base, which in this case it was. The scaffold boards themselves were placed above the scaffold frames to make a working platform and/or material platform.

As to the remaining item concerning the citation referring to the absence of guardrails on the scaffold, it was his testimony that crossbracing made it relatively a safe scaffold at every level. There was no part of the working platform that was not braced that wasn't being loaded with a forklift. It was basically the testimony of Mr. Corbett that there were no unsafe conditions at all in the construction of the tower on the entire job.

Upon cross-examination it was ascertained that employees had been terminated for not wearing the hard hats (Transcript, Page 40).

It was also the testimony of this witness upon cross-examination (Transcript, Page 42) that there was no denying that the planks did extend over the twelve inch limit. They had to with the nature of the size of the tower and its location and the proximity of the low area of the building. There was no other way they could scaffold that tower, because their scaffold frames were five foot wide and seven feet long and the tower was approximately five foot square. It was also his testimony that the company never applied for a variance on this particular standard.

Mr. Richard Gimlet, Field Superintendent for the Respondent, testified for the Respondent also.

It was the testimony of Mr. Conder that the materials scaffold setting on the alleged unstable base was in fact as stable as the structure would allow. There is no indication that there was a wide non-use of hard hats being a standard practice with Respondent herein in question.

However, there was a violation that was uncontroverted that took place on the day of the inspection, and the Department of Labor has sustained its burden and there is sufficient proof to prove a violation of the standard 29 CFR 1926.100(a) (as adopted by 803 KAR 2-030).

In light of the Respondent's position and its policy concerning hard hats, it is believed that the proposed penalty is inadequate and would be unnecessary and would not support the means and purposes of the Act, and therefore it is recommended that this proposed penalty of \$53.00 be reduced to \$25.00.

The Department of Labor has sustained its burden as to the alleged violation of 20 CFR 1926.451(a)(14) as adopted by 803 KAR 2-030. Each single board on the tower frame was wired down to the scaffold frame (Transcript, Page 24).

No variance was sought or received by Respondent (Transcript, Page 24).

In light of the efforts made by the Respondent to tie in the boards that were overhanging with wire, it is believed that a maximum good faith effort has been presented by the Respondent, and that the proposed penalty should be reduced to \$25.00.

The Department of Labor has sustained its burden as to the alleged repeat violation of 29 CFR 1926.451(a)(2) as enacted by 803 KAR 2-030, which requires that footing or anchorage of scaffold shall be sound, rigid and capable of carrying maximum intended loads, without the settling or displacement. It further states that unstable objects such as barrels, boxes, loose bricks, concrete blocks, shall not be used to support scaffolds or planks. The original violation shows that Item 4 under the inspection of January 27, 1975, citation being issued February 18, 1975 there was "scaffolds supported by pieces of brick and wood approximately six foot high". The second inspection which is the subject of this contest, charges a second violation of this standard. The citation herein in question alleged that one leg of the material scaffold south of the bell tower had one leg resting on a concrete block and pieces of two by ten. One employee was observed on the material scaffold. Photograph No. 1 shows the alleged violation. It is believed that the purposes of the Act would best be served by sustaining the proposed penalty of \$170.00.

It is Complainant's argument that the alleged serious violation of 29 CFR 1926.451(d)(10) and a proposed penalty of \$850.00 should be sustained. It is Complainant's argument that crossbraces used on six foot six inch tubular welded frame scaffolds were allowed to be substituted for guardrails "when the braces are erected continuously along the working level of the scaffold" (Emphasis added). The Complainant also points out in his brief that this standard was in effect only six months and had to be changed back to the way it was originally written, because it was found to be not as effective as

the standard now in effect. For Respondent to have this citation dismissed, Complainant contends, the Respondent should be found to be in full compliance with the standard then in effect.

The Complainant's review of the testimony shows that the scaffold was tubular welded frame scaffolding, and it is Complainant's contention that if this scaffolding is determined to be six foot six inch tubular welded frame scaffolding, it still must be found that crossbracing was not erected continuously along the working level of the scaffold. Because crossbracing was not erected continuously along the working level of the scaffold, it is Complainant's contention that the \$850.00 serious penalty should be sustained.

It is Respondent's position regarding this matter, that the scaffolding in question was "double crossbraced". The Respondent points out that this presents in effect, a method of both support and protection for tubular steel framing of the size and type used by Midwestern.

Reference is made to the testimony of Mr. Satterwhite, on behalf of the Department (Transcript, Page 70) to the effect that a change in the standard had taken place following the recommendations of the Contractors Association. Mr. Satterwhite verified this and the effective date of the change in question appears in the statutes. The change mentioned by Mr. Satterwhite in pages 70-73 of the transcript, was in effect from January through September of 1975 during which time this inspection was made, so in fact, the section that the Department cited the Respondent under "was not" in effect at the time as the Department alleged in its Complainant. Eventually, this section, 1926.451(d)(10) was changed back to the Federal standard

but after the inspection, which is the subject of this hearing.

The change in question relates to the use of crossbracing which admittedly was present on the scaffolding used by Midwestern in its construction as an adequate substitute for guardrails and midrails in that they both served the same purpose. In addition the changes relate that toeboards are not required for the loading and unloading of a scaffold that is being done by the use of a forklift. Both Mr. Corbett and Mr. Gilmet testified that both a forklift and a crane had been used from time to time for loading (Transcript, Pages 28 & 59).

The final item mentioned in the violation is the absence of wire mesh between the level where the bricklayer was working, and any traffic area through which an employee might pass. Mr. Corbett testified that the wire mesh would have prevented the loading and unloading of the scaffolding in question. This Hearing Officer agrees that a reasonable interpretation of the standard would seem to require that the wire mesh is meant for the protection of individuals who are working below, or within range of another individual, when the first employee did not know the second employee's activity, or would not have been on the lookout. All the testimony presented, as well as the photographs, indicate that the individuals who appear in the photographs are all working together. Respondent submits that there is no employee exposure in the nature of a recognizable hazard to the employee, and therefore no violation of the standard by the employee.

The Hearing Officer is greatly concerned with the use of the standard herein in question and the fact that an \$850.00 penalty is

recommended for a standard that was realistically not even in effect at the time of the citing.

In light of the foregoing, the following Conclusions of Law are concluded by the Hearing Officer as a matter of law.

CONCLUSIONS OF LAW

1. There was a violation of 29 CFR 1926.100(a), that it is a nonserious violation, and the proposed penalty is inappropriate and a penalty of \$25.00 is justified under the facts of this case.

2. That there was a violation of 29 CFR 1926.451(a)(14) (as adopted by 803 KAR 2-030), that it is a nonserious violation, and a penalty of \$25.00 is justified under the facts of this case.

3. That there was a repeat violation of 29 CFR 1926.451(a)(2) (as adopted by 803 KAR 2-030), and the proposed penalty of \$170.00 is appropriate and is hereby sustained.

4. That there was not a violation of 29 CFR 1926.451(d)(10) (as adopted by 803 KAR 2-030), and the proposed penalty of \$850.00 should be vacated.

In conformity with the above, the Hearing Officer makes the following recommendation.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation issued against the Respondent herein alleging a violation of 1926.100(a) shall be and the same is hereby sustained, and the penalty is reduced to \$25.00 and the same is hereby sustained.

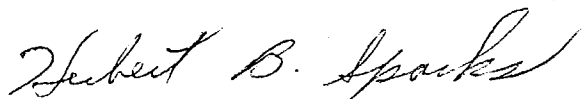
IT IS ORDERED AND ADJUDGED that the citation issued herein against the Respondent alleging a violation of 29 CFR 1926.451(a)(14) shall be and the same is hereby sustained and the penalty shall be

reduced to \$25.00 and the same is hereby sustained.

IT IS ORDERED AND ADJUDGED that the citation herein issued against Respondent alleging a repeat violation of 29 CFR 1926.451(a) (2) shall be and the same is hereby sustained, and the penalty of \$170.00 shall be and the same is hereby sustained.

IT IS ORDERED AND ADJUDGED that the citation herein alleging a serious violation of 1926.451(d)(10) shall be and the same is hereby vacated along with the proposed penalty of \$850.00.

Abatement date is set for a period not in excess of thirty (30) days from the date of this Recommended Order.



HERBERT B. SPARKS  
HEARING OFFICER

Dated: July 14, 1976  
Frankfort, Kentucky

DECISION NO. 302