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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

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Decision +
Order No. 258

June 8, 1976

KOSHRC # 172

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOUTHERN MASONRY COMPANY, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of March 19, 1976, is before this Commission for review.

Respondent has raised one threshold issue which must be considered before the merits of the case can be discussed; that is, the failure of the Compliance Officer to sign his deposition. Counsel for Respondent has raised the objection that the deposition is therefore inadmissible, and should be striken from the evidentiary record. The Hearing Officer concluded that no prejudice to Respondent was shown to have resulted from the lack of subscription, and the deposition remained in the record. The Review Commission concurs in this holding and hereby affirms it without further comment.

This Commission has repeatedly spoken to the issue of failure of the Department of Labor Compliance Officers to take careful and complete measurements on worksites in the course of inspection. The popular but inexact method of "eyeballing" distances and measurements, and then relying upon one's years of experience to determine actual figures, is to be absolutely discouraged. Such figures will continue to be evidentially void when used to sustain the Department of Labor's burden of proof against a Respondent. More importantly, this Commission will

continue to reject such imprecise methods as going contrary to the fair and efficient application of occupational safety and health law in Kentucky.

In light of the above, we must agree with the Hearing Officer's recommended decision to vacate certain of the initial citations for failure to adduce sufficient evidence. As to the balance of the Hearing Officer's Recommended Order, we can find no errors in the application of the law to those facts and have no reason to distrub the result reached therein.

It is therefore ordered that all holdings of the Hearing Officer and other elements not inconsistent with this decision be and they hereby are affirmed.

H. L. Stowers, Chairman

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

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

Dated: June 8, 1976
Frankfort, Kentucky

DECISION NO. 288

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
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 Joseph H. Terry (Certified Mail #976018)
Middleton, Reutlinger & Baird
501 South Second Street
Louisville, Kentucky 40202

Mr. W. E. Mitchell, President (Certified Mail #976019)
Southern Masonry Co., Inc.
4395 Poplar Level Road
Louisville, Kentucky 40213

Iris R. Barrett
Executive Director

Done

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC Decision & Order No. 250

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 Bridge Street
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

March 19, 1976

12 (250)

KOSHRC # 172

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOUTHERN MASONRY 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. 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.

KOSHRC # 172

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: Thomas M. Rhoads
Assistant Counsel

Honorable Joseph H. Terry (Certified Mail #467244)
Middleton, Reutlinger & Baird
501 South Second Street
Louisville, Kentucky 40202

Mr. W. E. Mitchell, President (Certified Mail #467245)
Southern Masonry Co., Inc.
4395 Poplar Level Road
Louisville, Kentucky 40213

This 19th day of March, 1976.

Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 172

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

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

SOUTHERN MASONRY COMPANY, INC. — RESPONDENT

* * * * * * * * * *

Hon. Thomas Rhoads, Assistant Counsel, Department of Labor, Frankfort, Kentucky 40601, for Complainant.

Hon. Joseph H. Terry, Attorney, Middleton, Reutlinger & Baird, Attorneys, 501 South Second Street, Louisville, Kentucky 40202, Attorney for Respondent.

FOWLER - Hearing Officer

* * * * * * * * * *

Jurisdiction of the subject matter and parties is admitted.

It is further admitted by the pleadings, that on or about December 23, 1974, the Respondent company was issued two citations, one alleging an other than serious violation of the Act and Standards, and the other alleging a serious violation of the Act and Standards. It is further agreed that these citations were contested by the Respondent employer and that the Hearing Officer's Recommended Decision was sustained and the citation and proposed penalty in each item affirmed. Neither of these violations were appealed and the Recommended Decision became final.

It is further admitted that on or about February 18, 1975, Respondent was issued one citation alleging three other than serious violations of the Act and Standards. Item No. 2 of this citation was not contested within 15 working days and pursuant to KRS 338.141 (1), thus became a final Order of this Review Commission and not subject to review.

It is further agreed that on or about June 18, 1975, Respondent was issued four citations, one alleging ten other than serious violations of the Act and Standards, two citations, both alleging a repeated other than serious violation and one citation alleging a serious violation of the act and standards.

The Items contested herein were originally as follows:

Items 1, 3 and 5 of the citation of June 18, 1975, which was issued as a result of an inspection made May 29, 1975, of a place of employment located at 553 South Second Street, Louisville, Kentucky, in which the Respondent, Southern Masonry Company, Inc., was working in the construction and erection of the YMCA Building at that address.

Item No. 1 was an alleged violation of 29 CFR 1926.550(a)(9).

"The Grove crane at the center of the east side of the building did not have the accessible areas within the swing radius of the rear of the rotating super structure barricaded to prevent employees from being struck or crushed by the crane."

Item No. 3 was an alleged violation of 29 CFR 1926.100(a).

"The operator of the Grove crane was not wearing a hard hat."

Item No. 5 was an alleged violation of 29 CFR 1926.700(d)(8).

"The wheels of the ready-mix truck at the northeast side of the building were not blocked when discharging on a slope."

The abatement dates were immediate for Item 5 and June 27, 1975, for Item 1 and 3.

At a deposition held October 31, 1975, the Department, through its representative, Mr. Rhoads, conceded that Southern Masonry was not in violation as alleged in Items 1, 3, and 5 and moved that those Items be dismissed. Based on that Motion and on the lack of introduction of proof regarding the violations, that the Motion to dismiss those is sustained and is contained in the Recommended Order hereinafter reported.

The remaining Items in contest are as follows:

Citation No. 2, which was issued June 18, 1975, as a result of the same inspection of May 29, 1975, and alleges a repeat non-serious violation of the previous citation of February 18, 1975, and is more particularly described as follows:

> Citation No. 2, an alleged violation of 29 CFR 1926.451(a)(2)
>
> "Two (2) legs of the free standing scaffold on the first floor at the north side of the building were supported by concrete blocks. One (1) leg in the center of the north side of the scaffold was over a stairway. The base provided for this scaffold consisted of plywood sheets over two (2) by sixes (6's). The leg in the center was on the plywood sheets but not over the two (2) by six (6) and so unstable that a concrete block was put on the base of the leg to keep it from wobbling."

The abatement date was set for June 27, 1975, and a proposed penalty of $214.00 was made.

The next Item in contest was Citation No. 3, issued as a result of the same inspection and alleged a repeat non-serious violation of the inspection of December 11, 1974, and is more particularly described as follows, being an

alleged violation of 29 CFR 1926.451(d)(10).

> "The material platforms on the scaffolds at the east and north wall of the handball court were not provided with guardrails or midrails. Two (2) employees on these scaffolds were exposed to a fall of twelve (12) feet to the concrete floor."

Abatement date was set for June 27, 1975, and a proposed penalty of $298.00 was made.

The other contested Item was citation No. 4, which was an original citation alleging a serious violation as a result of the same inspection of May 29, 1975, and the citation of June 18, 1975, and is more particularly described as follows:

> Being an alleged violation of 29 CFR 1926.28(a),
>
> "Two (2) employees were laying blocks from a scaffold approximately 40 feet long at the east wall of the handball court. The work platform for these employees was 24 inches wide with a five (5) foot wide material platform slightly higher at the rear of the work platform. The wall the employees were putting up extend above the level of the work platform approximately 16 inches high and was seven and one-half (7-1/2) inches wide. Nets were not provided nor were lifelines, safety belts, and lanyards being worn to protect employees from a fall of approximately 50 feet to the ground below."

The abatement date for citation No. 4 was set for June 27, 1975, and the proposed penalty was $850.00 for the alleged serious violation.

Thus, to simplify the matter, we have in contest two alleged repeat violations and one original alleged serious violation.

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.

The pertinent procedural information is as follows:

1. Inspection, May 29, 1975, by the Department of Labor, premises at 553 South 2nd Street, in the construction of the YMCA Building by the Respondent's employees.

2. Citation issued June 18, 1975, listing the violations above referred to.

3. The abatement dates and proposed penalties are set forth above.

4. The Notice of Contest was received July 7, 1975, contesting the items above referred to.

5. Notice of Contest with copy of Citations and proposed penalty was transmitted to the Review Commission on July 10, 1975.

6. Notice of Receipt of Contest was mailed July 14, 1975, and Certification of Employer Form received July 21, 1975.

7. Complaint was received July 24, 1975, and Answer was filed August 6, 1975.

8. The hearing was assigned to a Hearing Officer on August 18, 1975; the original hearing was scheduled for September 16, 1975, and was passed to November 11, 1975, at which time the hearing was held.

9. Receipt of the Transcript of the Evidence was January 14, 1976.

10. Parties were permitted to file Briefs and the period in which the parties were required Briefs was extended to include February 26, 1976, and both parties have filed Briefs in the action.

Prior to the hearing, there was a Motion made and an Order entered for the taking of a deposition of one Stanley Montgomery, the said Montgomery being represented as a Compliance Officer who had formerly served as such with the Department of Labor and was currently out of the State of Kentucky. The Order for the taking of the deposition was signed and his deposition was taken October 31, 1975, and is filed in the record.

The Respondent, prior to the trial, made an application for the issuance of a Subpoena Duces Tecum which was sustained over the objection of the Department and the relevancy of the Subpoena was taken up at the hearing and was disposed of by the Hearing Officer at the hearing.

In order to dispose of that matter first, the Subpoena required the Department to bring with it all statistics showing the number of construction work sites inspected in the Louisville area since the effective date of the KOSH program, the number of masonry contractors inspected during that period, the names of the masonry contractors inspected during that period, the number of times each contractor had been inspected and the number of citations each had received for scaffolding violations during that same period of time, and two copies of each Compliance Officer's Compliance Manual and/or Field Manual used by the Division since its inception, along with any documents from the Federal Occupational Safety and Health Administration approving the use of same.

The Department, by its compliance Chief Officer, Mr. Bob Lindon, appeared at the hearing and testified under oath that the Department was unable to comply with the request for the Subpoena Duces Tecum since their records were not set up to obtain that information. Respondent's counsel was permitted to question the witness to ascertain the availability of the information and was further permitted to inspect the records in Frankfort to see if he could obtain from the records the information he sought. It was the ruling of the Hearing Officer that the Department had substantially complied with the Subpoena Duces Tecum and had satisfactorily explained that the information was not available and, therefore, could not be produced in the way Respondent had requested.

At the hearing in chief on November 11, 1975, Respondent, by counsel, raised an objection to the introduction of the evidence of Stan Montgomery, taken by deposition on October 31, 1975, on the basis that the deposition had not been subscribed by the witness and sworn to by him, nor had the person taking the deposition stated that they were not of counsel or attorney to any of the parties nor interested in the proceeding.

Section 40 of the Rules of Procedure in effect at the time provide the method by which depositions shall be taken and do provide for the signature and oath of the person whose deposition is taken. Your Hearing Officer determines that the Motion, which he considers to be a Motion to suppress the deposition, was timely made in that it was made at the hearing on November 11, 1975, after the deposition was taken October 31, 1975, and the Hearing Officer overruled the

Motion for the time being, but permitted counsel to brief the question of the admissibility of the deposition.

There is no question but what the deposition was not signed and therefore, it did not comply with the requirements of Rule 40 of the Kentucky Occupational Safety and Health Review Commission. The Department of Labor did not file the deposition in the proper fashion, nor did they attempt to correct the situation by having the witness swear to the testimony at a later date and, therefore, did present the deposition in improper fashion and not in accordance with the rules. The Department of Labor, better than anyone else, should have known of the existence of this peculiarity within the rules of the Review Commission.

Your Hearing Officer, however, feels that the rules are procedural and that it is essential that substantial justice be accomplished and further, that Rule 42 provides that the hearings insofar as practicable be governed by the rules of evidence applicable to the Courts of the Commonwealth of Kentucky, that the deposition should be admitted and the Motion to Suppress is overruled. In taking this position, your Hearing Officer determines that the Respondent has claimed no harm as a result of this failure to comply with the rules, nor has any harm been shown as a result of such failure and that in the absence of some showing of harm or prejudice it would not be appropriate to dismiss the action based on the failure to meet the technical requirements of a rule which does not conform to the general rules of evidence in the State of Kentucky and which has recently been amended to more closely conform to the accepted rules of evidence in effect of the Courts of the Commonwealth.

Accordingly, the Motion to Suppress the deposition is overruled and the deposition is considered as evidence in this case.

DISCUSSION OF THE CASE

The first question addressing the Commission is the alleged violation of 29 CFR 1926.451(a)(2).

The testimony of the Compliance Officer was that the scaffold was unstable and swaying and a picture was introduced to show the condition of the footing of the scaffolding. The Respondent's testimony was that the scaffold was not unstable and that swaying was not an indication of an unstable or dangerous condition. Respondent cites Schumann Brothers, Reported at OSHA (CCH §16,242) in support of its position and the Schumann Brothers case states that swaying in itself is no violation.

However, there is other testimony in regard to this alleged violation which leads your Hearing Officer to the conclusion that the scaffold was unstable, the picture referred to as Complainant #1, seems to verify the unstable condition, so much so that the concrete block was placed on the top of the leg of the scaffold and it is the opinion of the Hearing Officer that the Department has sustained the burden of proof sufficient to warrant the citation for the above standard.

The next standard alleged to have been violated is 29 CFR 1926.451(d)(1(
A discussion of the facts of this violation show that the standard is intended to apply to all scaffolds that are more than 10 feet above the ground or floor.

The testimony of the Compliance Officer was that he estimated the height to be some 12 feet. No measurements were made and he stated that the scaffold in question appeared to be more than 10 feet above the ground and that no guardrails were provided for it.

The Respondent's witness testified that the scaffold was made of tubular metal, which is apparent from the photograph, and that the sections that were on the job were 5 foot sections and that they consisted of 2 sections being put together forming a scaffold of 10 feet above the ground or floor. Testimony was further introducted that there were no 6 foot sections of tubular welded scaffolding on the job and the only positive testimony concerning the size of the scaffold came from Respondent's witness indicating it to be 10 feet. The Compliance Officer merely estimated or was under the impression, that they were 6 foot portions and in view of the fact that no measurements were taken, it appears that the Department of Labor has failed to carry the burden of proof in regard to this alleged violation.

The next question which must be determined is whether or not the violations alleged and referred to in the preceding paragraphs were "repeat" violations under the meaning of the Act.

There was a discussion and explanation of the procedure utilized by the Kentucky Department of Labor to determine repeat violations, and the substance of the testimony seems to be that if the Respondent had been previously cited for the same violation and knew of it, or should have known of it by the

exercise of ordinary care, then it is a repeat violation. The differentiation was made between a place with a fixed establishment and a place which did not have a fixed establishment, but which had work connected with various projects at different places. As I understand it, the procedure used by the Department of Labor was that if the Respondent knew, or could reasonably have been expected to know of the previous violation and had not corrected it, that another violation of the same standard and regulation would constitute a repeat violation.

The Respondent questions the guidelines used by the Department of Labor stating that they are arbitrary and discriminatory against the construction business and that they provide for different standards to apply to different persons. In accordance with the Subpoena Duces Tecum referred to above, Complainant produced OSHA Program Directive No. 200 and quoted the directive which reported to show the method by which a violation is considered to be a repeat. The directive stated that employers that engaged in businesses having no fixed establishment (construction, paintings, and excavating) will be evaluated on an area-wide basis or on the basis of the employers organizational unit for a similar citation as a basis of a repeat violation. Respondent takes the position that the general industry business having fixed establishments will not be subject to repeat violations on the same standard as a construction industry which has businesses in no fixed establishment. The argument of Respondent is that this means that if a violation is found on one construction site of an employer and later found on another construction site of that employer (the same employer)

regardless of the circumstances involved and whether or not supervision of one site might aware of the previous violation on another, the employer is cited for repeat violation. Respondent cites, Donald Harris, Inc., OSHD §19,699 [OSHRC Docket No. 10434] in which the Administrative Judge for the Federal Review Commission found that the Secretary of Labor's guidelines for considering whether a violation is repeated was arbitrary because of its treatments of employers differently, depending upon whether or not they had fixed work sites. The decision also notes that the violation must happen more than once in a manner which "flaunts the requirements of the act".

Also of interest is General Electric, OSHD §19,567, [OSHRC Docket No. 2739] which again states that a repeat violation must happen "more than once in a manner which flaunts the requirement of the act".

These decisions are persuasive, however, the Hearing Officer feels that it is incumbent to apply common sense in the application of the standards. It appears that Southern Masonry Company is a construction company which had previously been cited for work at a place of employment located in a different location in Louisville for the same standard of which it is now alleged to have violated. The company has one place of business, undoubtedly where its principal office is located, and probably has many construction sites at which its employees are working. The foreman on the various sites undoubtedly would be different and the type of work being done would also probably differ. It seems, however, that Southern Masonry Company had previously been cited and certainly was on notice by reason of its subsequent appeal of one of the violations, that certain violations

were alleged and it would be a lack of the application of common sense and good business practice, to assume that the main office, or management, did not know of the previous citations and violations. The Department of Labor has introduced proof to show that the Respondent knew, or should have known, of the existence of previous and prior violations of the same act and are charged with the knowledge that these were and are repeat violations, where applicable under this opinion.

The next citation which must be dealt with is the alleged violation of 29 CFR 1926.28(a). This is very troublesome to your Hearing Officer, because I am not positive that the standard was capable of being adhered to. Counsel for both the Complainant and Respondent have filed excellent Briefs concerning all of these matters, and in regard to this violation the Respondent relys primarily on Isaacson Structural Steel Company, OSHD §19,592 [OSHRC Docket No. 1731, decision April 30, 1975. Petitioner relys heavily on Hoffman Construction Company, OSHD §19,275 [OSHRC Docket No. 644.

Both cases appear to be very similar to the case at hand and arrive at different conclusions. The Isaacson Structural Steel case [§19,592] is a two to one decision in which Commissioner Cleary has written a rather lengthy dissenting opinion.

With all due respect to the Commission, I feel that the dissenting opinion is a more effective rationale for deciding this case than the majority opinion. Commissioner Cleary, in his dissent differentiates between lifelines

and safety belts, and makes the point that safety belts need not be secured above the point of operation whereas lifelines are required under 29 CFR 1926.104(b), to be secured above the point of operation to an anchorage or structural member capable of supporting a minimum weight. There is no requirement that a safety belt be secured above the point of operation under the standards. That specifically applies to lifelines and the term, safety belt and lifelines have separate meanings under 29 CFR 1926.107.

The principal and troublesome question involved in this is whether or not it would have been possible to protect the employees working in the fashion described in the testimony, with protective devices such as safety belt, nets, etc. It is well recognized that if it is impossible to adhere to the standard, that of course, the Respondent is not required to do so. It does appear from the testimony that there was no place above the worker where he might attach a lifeline. Whether or not he could have attached a safety belt to some point below or at the level at which he was working is not brought out.

The facts are admitted that there was no safety belt, no lifeline, no net at the place of employment, but the defense is that the people working in that area were at the top of the construction and there was no place at which to affix such safety equipment. This certainly poses a dilemma for both enforcement and the employer.

It is my belief that the seriousness of the alleged violation is admitted, and it is further admitted that no safety equipment was in use, thus

requiring the Respondent to assume the burden of proof that it was impossible to have used such safety equipment. In view of the above cases, I find that the Respondent has not proven that it was impossible to have provided safety belt equipment for use on that occasion.

The only other question raised is the excessiveness of the fines and I find no merit in the argument of the Respondent as to the excessiveness of the imposed fines.

A reading of the Transcript of the Evidence and the deposition of the witness, together with the testimony adduced at the trial and hearing of this case, in addition to a reading of the Briefs and the authorities cited therein by respective counsel, and independent research done by the Hearing Officer, it is concluded that the evidence as a whole supports the following Findings of Fact.

FINDINGS OF FACT

1. That the Department of Labor satisfactorily answered the Subpoena Duces Tecum by showing that it was impossible to have produced the information requested by the Subpoena and that under the circumstances, they produced such information as was available under their record keeping system.

2. That the Department of Labor did not comply with the rules insofar as the taking of the deposition of Stan Montgomery on October 31, 1975, for the reason that the deposition of the said Montgomery was not signed and sworn to by him in accordance with Section 40 of the rules of this Commission.

3. No proof was introduced concerning citation 1, Items 1, 3, and 5 and a Motion to dismiss those citations made by the Department should be sustained, and Items a, b, and c of the Complainant's Complaint should be accordingly dismissed.

4. That the Department of Labor had sufficient proof to sustain the burden in regard to citation No. 2, referred to in Complainant's Complaint paragraph 8(d), together with the proposed fine of $214.00.

5. The Department of Labor failed to prove that the scaffold in question exceeded 10 feet in height and, therefore, failed to prove the application of the citation No. 3, referred to in paragraph 8(e) of the Complaint.

6. The Department introduced sufficient proof to carry the burden insofar as the serious violation alleged in citation 4, paragraph 8(f) of the Complaint and the fine for the serious violation of $850.00.

7. That the violation of citation No. 2, paragraph 8(b) of the Complaint was under the facts a repeat violation.

8. That the fines recommended for both of the violations sustained herein are held to be reasonable.

9. As a corollary matter, it is found that the Department of Labor has filed only the original of their Brief herein, whereas Section 46 of the rules of this Commission provide that the original and two copies shall be furnished for the use of the Commission.

CONCLUSIONS OF LAW

It is concluded by the Hearing Officer, as a matter of law;

1. That the Rules of Procedure of this Commission are directory only and procedural, and that they may, and should be, interpreted to accomplish substantial justice. It is also concluded that in this action the deposition question under Section 40 of the rules is permitted to be filed because Respondent has shown no harm or prejudice as a result of the failure to comply with the rule in requiring the deponent's signature on the deposition.

2. That the use of a concrete block, under the circumstances in this case, is an unstable object and a violation of 29 CFR 1926.451(a)(2), and the swaying of the scaffold, while not conclusive in itself, does relate to the footing or anchorage for the scaffold and in the instant case is a violation as aforesaid.

3. That Respondent was not in violation of 29 CFR 1926.451(d)(10), as alleged by the Department of Labor, because the violation applys to scaffolds over 10 feet in height and the facts do not justify a conclusion that the height of the scaffold exceeded 10 feet.

4. That the criteria used by the Department of Labor concerning "repeat violations", as applied in this case, are proper and are not discriminatory to the construction business. It is further held that notice to the home office of a construction company, is constructive notice to all of its location sites at which it is carrying on, or will carry on, building activities. It is further found that

Donald Harris, Inc., OSHD §19,699 [OSHRC Docket No. 10434] is not controlling this instance, since a repeat violation, of the character described in this citation does, flaunt the requirements of the Act.

5. That in regard to the alleged violation of 29 CFR 1926.28(a), the case of Hoffman Construction Company, §OSHA 19,275, OSHRC Docket No. 644, and the dissenting opinion in Isaacson Structural Steel, OSHD §19,592, [OSHRC Docket No. 1731] are applicable and that having established and admitted that a situation exists which prima facially, is in violation of the standard, that the burden is on the Respondent to show that it was impossible to provide the protection afforded by the standard and regulation, or that it would be more hazardous to apply the standard than not to apply it, and the conclusion reached in this case is that the Respondent did not carry that burden to show the impossibility of compliance or the hazardous condition which Respondent claims would be caused by the application of the standard.

6. That the formula used by the Department of Labor in arriving at the proposed penalties was fair, in compliance with their procedures, and not excessive or discriminatory.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that Items contained in citation Items 1, 3, and 5, as stated in paragraph 8(a), 8(b), and 8(c) of Complainant's Complaint are hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that citation No. 2, as referred to in the Complaint, paragraph 8(d), may be and the same is hereby sustained, together with the penalty of $214.00.

IT IS FURTHER ORDERED AND ADJUDGED that the citation issued against the Respondent stated a citation number 3, as shown in paragraph 8(e) of the Complaint, may be and the same is hereby vacated, and the proposed penalty of $298.00 is also hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that the citation issued against the Respondent, as citation No. 4, alleging the serious violation as contained in paragraph 8(f) of the Complaint may be and the same is hereby sustained, together with the proposed penalty of $850.00.

Abatement dates for the citations sustained herein shall be as soon as is possible, not to exceed 30 days from the effective date of this Order.

JOHN T. FOWLER, SR.
Hearing Officer

Dated: March 19, 1976
Frankfort, Kentucky

DECISION NO. 250