

*Done*



174 (245)

JULIAN M. CARROLL  
GOVERNOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

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

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

March 9, 1976

*KOSHRC  
Decision +  
Order No. 245*

KOSHRC # 174

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JOS. S. BOWLING CO., INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

The Recommended Order of Hearing Officer Herbert B. Sparks, dated January 19, 1976, is presently before this Commission for review.

Respondent herein was charged with a violation of 29 CFR 1926.152(f)(2), which was dismissed on Complainant's Motion, and with a serious violation of 1926.28(a), carrying a proposed penalty of \$550, for failure to provide personal protective equipment. After a hearing on the facts, the Hearing Officer ordered dismissal of 1926.152(f)(2), sustained 1926.28(a), and reduced the latter penalty to \$150.

Having reviewed the record herein, this Commission is in unanimous agreement with the dismissal of 1926.152(f)(2) and the order of the Hearing Officer to that effect is hereby AFFIRMED.

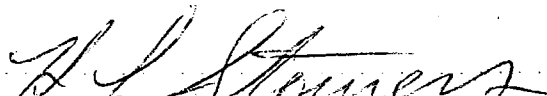
As to the contested serious violation of 1926.28(a) which is at issue, the Commission finds that it must disagree with the conclusions of the Hearing Officer regarding the reduction of the proposed penalty from \$550 to \$150, largely on the basis of more recent and compelling case precedent. The Hearing Officer's Recommended Decision indicates that he based the penalty reduction on the Bradford Roofing and Installation Co. case

(CCH Para. 19,836), which he considered to be the controlling legal precedent for the case at hand. In Bradford, the company's low injury record and continuous safety program earned it a reduction of the \$500 penalty to \$150, on a violation identical to the instant case. Applying this conclusion to the facts in this matter, the Hearing Officer determined that the Bowling Company's good safety record and intent to abide by OSHA standards qualified them for a reduction as well.

The Review Commission finds that it must disagree with this conclusion in the light of its own recent precedent. In Commissioner of Labor, Commonwealth of Kentucky vs. Sofco Erectors, Inc., KOSHRC #144, this Commission held that where an employee was working on a beam 50 feet high without personal protective equipment, in violation of 1926.28(a), the penalty of \$500 was properly proposed. This result was not disturbed even in light of Respondent's good faith, prompt abatement, and overall intent to comply.

Nor do we think that the facts at hand warrant a reduction in penalty to \$150 as recommended by the Hearing Officer. The seriousness of the violation has been well established in the record, and it would deflect the purposes of the Act to reduce the penalty in this instance, where a resultant injury would be gravely serious if not actual death.

For these reasons, it is the unanimous order of the Review Commission that that part of the Hearing Officer's decision reducing the proposed penalty to \$150 be REVERSED, and the original proposed penalty of \$550 is hereby REINSTATED. All other findings of the Hearing Officer not inconsistent with this Decision are hereby AFFIRMED.

  
H. L. Stowers, Chairman

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

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

Dated: March 9, 1976  
Frankfort, Kentucky

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

The Honorable Frank P. Doheny, Jr., (Certified Mail # 456155)  
Woodward, Hobson & Fulton  
Suite 1805-29  
Kentucky Home Life Building  
Louisville, Kentucky 40202

Joseph S. Bowling Co., Inc. (Certified Mail #456156)  
2033 Hahn  
Louisville, Kentucky 40217

This 9th day of March, 1976.

  
Iris R. Barrett  
Executive Director

*Done*

174 (214)



JULIAN M. CARROLL  
~~WENDELL H. FORD~~  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
December  
Order No. 214*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge Street  
FRANKFORT, KENTUCKY 40601  
PHONE (502) 564-6892

January 19, 1976

H. L. STOWERS  
CHAIRMAN  
MERLE H. STANTON  
MEMBER  
CHARLES B. UPTON  
MEMBER

KOSHRC # 174

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JOS. S. BOWLING CO., 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:

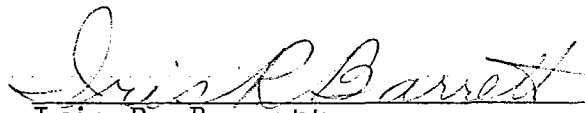
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Thomas M. Rhoads  
Assistant Counsel

he Honorable Frank P. Doheny, Jr., (Certified Mail #456092)  
Woodward, Hobson & Fulton  
Suite 1805-29  
Kentucky Home Life Building  
Louisville, Kentucky 40202

Joseph S. Bowling Co., Inc. (Certified Mail #456093)  
2033 Hahn  
Louisville, Kentucky 40217

This 19th day of January, 1976.

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

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC # 174

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

JOS. S. BOWLING CO., INC.

RESPONDENT

\* \* \*

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

Hon. Frank Doheny, Woodward, Hobson and Fulton, Suite 1805-29,  
Kentucky Home Life Building, Louisville, Kentucky 40202,  
Attorney for Jos. S. Bowling Co., Inc.

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An inspection was made on June 19, 1975, by the Kentucky  
Department of Labor, Division of Occupational Safety and Health,  
at a place of employment located in Jefferson County, Kentucky,  
at or near the University of Louisville Belknap Campus, Louisville,  
Kentucky, and on the basis of the inspection, it was alleged in a  
citation dated June 27, 1975, that Respondent violated the provisions  
of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1974)

1972) in the following respects, one such violation deemed to be other than serious and one serious violation.

There was several citations originally issued against Respondent, and only two citations were initially protested, that being citation #1 (Item #2), which alleged a violation of 29 CFR 1926.152 (f) (2) (as adopted by 803 KAR 2-030), a description of the alleged nonserious violation being as follows:

*C. 1 Item 2*  
"A valve on the kerosene tank on the tar kettle was leaking and it was not being disposed of promptly and safely."

*C. 2*  
It was also alleged that there was a serious violation, that being a citation alleging a violation of 29 CFR 1926.28 (a) (as adopted by 803 KAR 2-030), a description of the alleged serious violation being as follows:

"An employee standing on a three (3) foot wide ledge at the north side of the west wing of the Natural Science Building was hoisting materials with a hand derrick. A lifeline, safety belt, and lanyard was not worn by the employee to protect him from a fall of approximately 50 feet to the ground below."

The dates by which the alleged above violations were to be corrected were July 9, 1975.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above - June 19, 1975.
2. Citation issued June 27, 1975.
3. Proposed penalty for the contested standards was \$34.00 and \$550.00, respectively, and the abatement dates for both were July 9, 1975.

4. The Notice of Contest was received July 11, 1975, contesting the two above named items.
5. Notice of Receipt of Contest was mailed July 19, 1975.
6. Certification of Employer Form was received July 21, 1975.
7. Complaint was received July 18, 1975. A formal answer was filed. The answer was received July 28, 1975.
8. The case was assigned to a Hearing Officer on August 20, 1975; the hearing was originally scheduled for Friday, September 26, 1975 at 10:00 a.m. The hearing was re-scheduled and was held on September 29, 1975 at 1:00 p.m.
9. A deposition was taken of the Compliance Officer, Stanley Montgomery, on August 29, 1975 at 10:00 a.m., pursuant to an order by the Commission granting Complainant's request for taking of said deposition. Said order being dated August 20, 1975.

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 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 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 hearing is found by the Hearing Officer.

The Complainant moved, and his motion was granted, to dismiss the nonserious violation alleging a violation of 1926.152 (f) (2). A stipulation stating that the safety hazard involved was only of a de minimis nature with no real possibility of the leaking kerosene ever causing any ignition is made a part of the record. As to the remaining alleged violation of the citation herein in question, the record adequately reflects a violation of this citation by a preponderance of the evidence.

The proof would show that an employee of the Respondent-Employer, a Mr. Edwards, was standing on a three (3) foot wide ledge, approximately fifty (50) feet above the ground, and was hoisting materials with a hand derrick. There was no protection being provided this employee and no safety belts, lanyards, or other personal protective gear was at the location. The violation could be easily ascertained by looking at the physical evidence that was introduced in the formal photograph by the Complainant.

The employee had his left arm around a support for the hand derrick. He was using his right hand to hoist up materials. In this instance a five gallon barrel was being hoisted from the ground approximately fifty (50) feet below to the employee wherein he would take it from the hand derrick and swing it over a four (4) foot wall standing behind him and depositing said materials on the deck of the roof. It was also standard practice to do this in the business that Jos. Bowling was carrying on. It was ascertained by the Compliance Officer that the employees did it as a matter of practice and it was "just the way it was done".

#### CONCLUSIONS OF LAW

The exact language herein involved with this standard is Standard # 1926.28--Personal Protective Equipment (a). The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates a need for using such equipment to reduce the hazards to the employees.

There is no question as to the potentiality of a fall of fifty feet to the ground below without the use of safety belts or lanyards being exposure to a hazardous condition. It is also believed that the violation of the standard herein in question would have to be considered serious in that there would be a "substantial probability that death or serious harm could result from the condition."

It is believed that the proposed penalty of \$550.00 for this violation of 1926.28 (a) is extremely high.

In Bradford Roofing and Installation Company (19,836), it was found that for a failure to provide safety belts for roofers working within inches of a fifty foot drop, a penalty of \$500.00 which was proposed was too high. In this case the proposed penalty was reduced to \$150.00 since the employer had a continuous safety program and a clear prior history. The company's injury record was low and all worksites were regularly inspected to check compliance with OSHA regulations.

It is believed that this case is good precedent for the case herein in question in that Bowling has a good safety record and is striving to abide by OSHA requirements. It is also noted from the testimony of the employer that abatement of this situation has taken place and the use of lifelines and lanyards and personal protective equipment has been installed and is being utilized. This situation can be distinguished from Langer Roofing and Sheet Metal, Inc. v. Secretary of Labor, U.S. Department of Labor; Occupational Safety and Health Review Commission (nos. 74-1645 and 75-1203) decided November 20, 1975 by Court of Appeals for Seventh Circuit.

In the Langer case, the question presented was whether the Review Commission properly held Langer in violation of 29 CFR 1926.500 (d) (1) on undisputed evidence that its employees at two separate construction sites were working on flat roofs more than six feet above ground without a standard railing or equivalent protection against falls. The Court in dismissing the citations

observed that the "Secretary construes the word 'floor' as used in 1926.500 (d) (1) to encompass roofs that are used as working surfaces" and that the "Secretary's interpretation does not accord with normal usage".

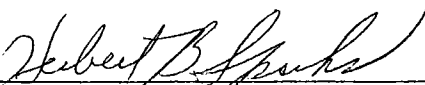
In the case at hand, we are concerned with an entirely different regulation that imposes a duty on the employer to require the wearing of appropriate personal protective equipment. We're not concerned herein with guarding of the perimeter nor with the expanding of the definition of "floor" to encompass "roofs". In short, the Langer case had different facts and with different regulation and is not precedent for the question presented here.

Under the circumstances of above, it does not appear that the purpose of the Act would be fulfilled or that justice would be served by assessing the penalty in the proposed amount, thus the penalty for this violation should be reduced to \$150.00.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein in question charging a nonserious violation of 1926.152 (f) (2) be dismissed, and that the citation herein in question charging a serious violation of 1926.28 (a) shall be and the same is hereby sustained, and the proposed penalty of \$550.00 shall be and the same is hereby reduced to \$150.00.

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

  
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HERBERT B. SPARKS  
HEARING OFFICER - KOSHRC

Dated January 19, 1976

Decision No. 214