

Done

JULIAN M. CARROLL
GOVERNOR



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge St.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 5, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision +
Order No. 242*

175(242)

KOSHRC # 175

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CREATIVE DISPLAYS, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

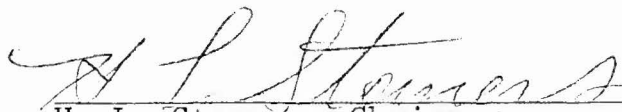
Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

STOWERS and UPTON, Commissioners:

A Recommended Order of Hearing Officer Lloyd Graper,
dated January 6, 1976, is before the Commission for review.

It appearing that the findings of the Hearing Officer
were well-supported in occupational safety and health law as it
was applied to the instant facts, and the evidence appearing ad-
equate to bear out those conclusions, it is the majority decision
of the Review Commission that the decision of the Hearing Officer
be and it hereby is AFFIRMED.

It is further ordered that the citation charging a violation of 29 CFR 1926.28 (a) and its proposed penalty of \$500 be and they hereby are DISMISSED. 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

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

DATED: March 5, 1976
Frankfort, Kentucky

DECISION NO. 242

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: 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

Mr. Albert F. Rostal (Certified Mail #456414)
Creative Displays, Inc.
Post Office Box 134
Lexington, Kentucky 40501

Creative Displays, Inc. (Certified Mail #456415)
Post Office Box 2398
Tuscaloosa, Alabama 35401

This 5th day of March 1976.


Iris R. Barrett, Executive Director

Siene
Dec. 2004



175 (2004)

JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

December 11, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 175

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CREATIVE DISPLAYS, INC.

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission, and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 30 days of this date, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law, and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been filed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

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

Honorable Earl M. Cornett
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

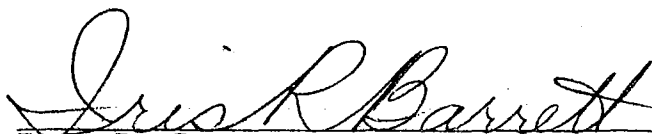
Mr. Albert F. Rostal
Creative Displays, Inc.
Post Office Box 134
Lexington, Kentucky 40501

(Certified Mail #456381)

Creative Displays, Inc.
Post Office Box 2398
Tuscaloosa, Alabama 35401

(Certified Mail #456382)

This 11th day of December, 1975.


Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 175

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

CREATIVE DISPLAYS, INC.

RESPONDENT

* * * * *

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

Mr. Albert Rostal, Lexington, Kentucky, for Respondent.

GRAPER, Hearing Officer.

An inspection was made on July 1, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located at the Woodhill Shopping Center, Lexington, Kentucky, whereat respondent was installing a sign. On the basis of such inspection, two Citations were issued on July 1, 1975. Citation Number 1 charged respondent with a serious violation of the provisions of KRS Chapter 338 (Relating to Kentucky Occupational Safety and Health in the following respects:

The standard, regulation or section of KRS Chapter 338 allegedly violated was 29 CFR Part 1926.28(a) as adopted by reference with certain modifications by 803 KAR 2:030. A description of the alleged violation is: "Two (2) employees were permitted to work on a platform thirty-nine (39) feet above the ground level, and two (2) other employees were permitted to work approximately forty-four (44) feet above the ground level on a two by six (2" x 6") inch channel iron without personal protective equipment (e.g.) safety belts and life lines." The date by which the alleged violation must be corrected was within one week. By Notification

of Proposed Penalty dated July 1, 1975, a penalty of \$500.00 was proposed.

Citation Number 2 charged respondent with five other than serious violations for which no penalties were proposed. Respondent did not contest Citation Number 2.

A Notice of Contest was received from the respondent employer on July 14, 1975. It, together with a copy of the Citations and the Notification of the Proposed Penalty was transmitted to the Kentucky Occupational Safety and Health Review Commission on July 15, 1975, and received by it on July 17, 1975. On the same date, a Notice of Receipt of Contest was mailed and a Certification of Employer form dated July 18, 1975, indicating that no affected employee is represented by an authorized employee representative was received on July 21, 1975. A Complaint was received on July 25, 1975. On August 22, 1975, the case was assigned to the Hearing Officer and, on the same date, a Notice of Hearing was mailed.

Pursuant to such Notice of Hearing, a hearing was held on Wednesday, September 24, 1975, at 10:00 a.m. (EDT), at the District #7, Bureau of Highways Office, 763 New Circle Road, Lexington, Kentucky, under the provisions of KRS 338.071(4), one of the provisions of Chapter 338 of the Kentucky Revised Statutes 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 the procedural aspect of its hearings. Under the provisions of KRS Chapter 338.081, hearing authorized by the provisions of such Chapter may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal, the Review Commission may sustain, modify, or dismiss a citation or penalty.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits and the stipulations and the 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

1. 29 CFR Part 1926.28(a) provides that: "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 the need for using such equipment to reduce the hazards to the employees." Since it is undisputed that the employees in question were not wearing personal protective equipment, at issue, then is the question of whether or not the operation undertaken by the respondent exposed its employees to hazardous conditions.

2. The operation undertaken by the respondent was the erection of a large outdoor display sign. The sign structure consists of five verticle members about 60 feet in height and 16 inches in width from the front to the back. After these verticle I-beams or poles are placed in the ground, at approximately five foot intervals, holes are cut in the I-beams at a height of about 39 feet and platform iron plates are bolted on the I-beams. Then a crane lifts two 30 inch wide platforms and they are bolted in place on the platform iron plates on both sides of the I-beams. Then, after additional angle iron plates are welded in place on the I-beams at about 5 foot intervals above the platform, 2 inch by 6 inch channel irons 20 to 30 feet in length are placed horizontally on both sides of the I-beams.

3. By placing the channel irons on both sides of the I-beams, a cage 16 inches in width is formed. The channel irons are put up and held in place by vice grips and then are welded in place. The employees working in the area are in

a cage formed between the two channel irons. From this cage, the employees take the angle iron plates and weld them in place on the I-beams for the additional channel irons. The employees are out of the cage only when they are being handed the additional channel irons but as soon as the channel irons are put in place, the employees on the sign are within the cage between the channel irons. The employees on the sign are momentarily unprotected by the cage on both sides or are protected by a channel iron on only one side only at the time channel irons are being handed to them to be put in place.

4. If the employees were using safety belts and lanyards, a somewhat analagous situation would occur during the period when the employee would have to reach a work surface in order to attach the safety belt. Until the employee actually reached his work surface and hooked the safety belt, he would be unprotected.

5. The respondent, who had constructed about 6,000 such signs during the past ten or fifteen years, and who has never had an employee fall from such signs, indicated that fastening the lanyards and safety belts to the channel irons below would require the employees to move across, bend over, with no protection at all, unhook himself, get to another position walking along in a stooped position, which he believed would be more likely to cause him to fall than if he just walked upright and walked along with the hand rail.

6. It is, upon the foregoing, found that respondent's employees are as free from peril as if the cited standard were strictly followed.

Upon the basis of the foregoing, the Hearing Officer makes the following:

CONCLUSIONS OF LAW

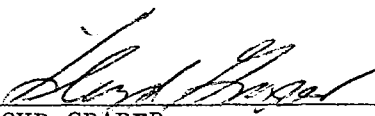
1. While the failure to comply exactly with the terms of a standard requires the Commissioner of Labor to issue a citation, it is not his function to

decide whether or not the employer's actions amount to substantial compliance with the requirements of the standard. Substantial compliance is all that the law requires if it results in the employees' being as free from peril as if the standard was strictly followed. It is the function of the Review Commission to decide whether the employer's compliance substantially meets the requirements of the standard. If, as here, the employer's failure to comply did not increase the peril to his employees, he should prevail in a contest of the citation on the basis of substantial compliance.

2. Since the respondent employer substantially complied with the standard charged to have been violated, the Citation, the proposed abatement date, and the proposed penalty should be dismissed.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the Citation charging a serious violation of Standard 29 CFR Part 1926.28(a); the proposed abatement date of one week; and the proposed penalty of \$500.00 shall be and they hereby are dismissed with prejudice.



LLOYD GRAPER
Hearing Officer, KOSHRC

Dated: December 11, 1975
Frankfort, Kentucky

Decision No. 204