

Dione



JULIAN M. CARROLL



GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 234*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

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

February 24, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 192

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

TODDS MASONRY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; STANTON and UPTON, Commissioners.

PER CURIAM:

The Recommended Order of Hearing Officer Lloyd Graper, dated December 3, 1975, is presently before this Commission for review.

The record herein reveals that employees of Respondent were working on an unguarded scaffold 10 feet tall on the roof of a building 17 feet tall, exposing them to a potential fall of 27 feet.

Upon thorough review of the entire record in this case, it is the unanimous order of the Review Commission that that part of the Recommended Order amending Citation #1 from a "serious" to a "nonserious" violation and adjusting the proposed \$500 penalty to \$68 be and it hereby is REVERSED. It is the further order of this Commission that Citation #1 be REINSTATED as a serious violation and its original \$500 penalty stand assessed as proposed by the Department of Labor. The Hearing Officer's decision is AFFIRMED in all other respects not inconsistent with this opinion.

H. L. Stowers

H. L. Stowers, Chairman

*192 (204)
(KOS)*

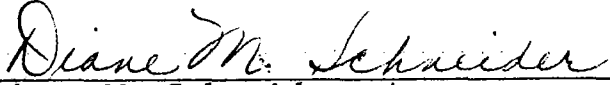
This is to certify that copy of this Decision has been served by mailing or personal delivery on the following:

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

Mr. Thomas Todd (Certified Mail # 456106)
Todds Masonry
Route #1 (Highway 80)
Nancy, Kentucky 42544

This 24th day of February, 1976.


Diane M. Schneider
Diane M. Schneider, Attorney
KOSH REVIEW COMMISSION

Dione



192(199)

JULIAN M. CARROLL



GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision
Order No. 199*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

December 3, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 192

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

TODDS MASONRY

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:

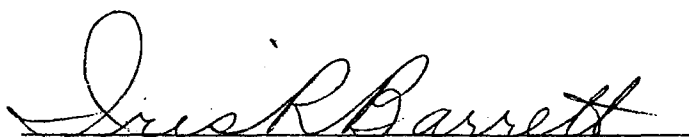
Commissioner of Labor
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. Thomas Todd
Todds Masonry
Route #1 (Highway 80)
Nancy, Kentucky 42544

(Certified Mail #456026)

This 3rd day of December, 1975.


Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 192

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

TODDS MASONRY

RESPONDENT

* * * * *

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

Mr. Thomas Todd, Nancy, Kentucky, for Respondent.

GRAPER, Hearing Officer.

An inspection was made on July 16, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health, of a place of employment located at Langdon Street, Somerset, Kentucky, whereat respondent was described as a masonry contractor. On the basis of such inspection, it was alleged in a Citation dated July 25, 1975, that respondent violated the provisions of KRS Chapter 338 (Relating to Kentucky Occupational Safety and Health) in the following respects:

Respondent is alleged to have committed a serious violation. The standard, regulation or section of KRS Chapter 338 allegedly violated was 29 CFR Part 1926.451(d)(10) as adopted by reference with certain modifications by 803 KAR 2:030. A description of the alleged violation is: "An employee was exposed to a fall of approximately twenty-five (25) feet while working on a scaffold ten (10) feet high which was setting adjacent to the edge of the first floor roof which is approximately seventeen (17) feet high." The date by which the alleged violation must be corrected was immediately upon receipt of the citation. By Notification of Proposed Penalty dated July 25, 1975, a penalty of \$500.00 was proposed.

A Notice of Contest, contesting both the alleged violation and the proposed penalty was received from the respondent employer on August 13, 1975. It, together with a copy of the Citation and the Notification of the Proposed Penalty, was transmitted to the Kentucky Occupational Safety and Health Review Commission on August 26, 1975, and received by it on August 28, 1975. On the same date, a Notice of Receipt of Contest was mailed and a Certification of Employer form indicating that no affected employee is represented by an authorized employee representative was received on September 3, 1975. A Complaint was received on September 2, 1975. On October 13, 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 Tuesday, October 28, 1975, at 11:00 a.m. (EST), at the District 8, Bureau of Highways Office, U. S. 27 South, Somerset, 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. At the hearing, the parties stipulated that the only factual issue was whether an employee working on a scaffold, not guarded by guardrails or equivalent protection, was exposed to the hazard of a fall of either ten feet or twenty-five feet. The scaffold was located on a roof. If it was probable that the employee could fall only ten feet to the roof, the violation would be other than serious. If there was substantial probability that the employee could fall twenty-five feet to the ground rather than ten feet to the roof, the violation would be serious.

2. KRS 338.991(12) provides, in part, "...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment...." It is, therefore, essential for complainant to prove that it is more likely than not that death or serious physical harm could result from the condition charged to be in violation. In this connection, the Compliance Officer indicated that he was approximately twenty to twenty-five feet from the edge of the building when he took pictures and observed the situation. He did not physically measure how many feet it was from the scaffold to the edge of the roof. He judged the scaffold to be approximately three to five feet from the edge of the roof. The employer indicated, first that the scaffold was at least ten feet onto the roof. From the pictures taken by the Compliance Officer, he then indicated that it was not more than seven feet from the edge of the roof. The employee actually on the scaffold testified that there was quite a bit of room between the scaffold and the edge of the building, that it was more likely that he would fall from the side of the scaffold away from the

edge, and that, if he fell on the side near the roof edge, that he would not have fallen off the edge unless he jumped. He went on to say that the scaffold was about seven or eight feet from the edge of the roof. The employee felt that it was pretty unlikely that he would fall off the edge if he fell off on the side near the edge. From the foregoing, it is found that complainant has failed to prove that it was more likely than not that death or serious physical harm could result from the condition charged to be in violation.

3. At the request of the Hearing Officer, the Compliance Officer testified as to the penalty that would have been proposed had the employee in question been exposed to a fall of but ten feet. In this connection, the Compliance Officer testified that the violation would have been other than serious and that the penalty proposed, giving consideration to the statutory criteria of gravity, history, size and good faith, would have been \$68.00.

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

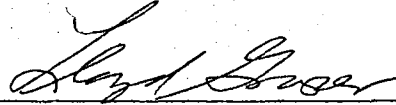
CONCLUSIONS OF LAW

1. As to the violation charged, the Commissioner of Labor has failed to meet the burden of proof necessary to establish a serious violation. He has, however, met the burden of proof as to an other than serious violation. The Citation, therefore, should be amended to other than serious and, as so amended, should be allowed to stand. The immediate abatement date should be allowed to stand. The Proposed Penalty should be amended to \$68.00 and, as so amended, should be allowed to stand.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the Citation shall be amended from serious to other than serious and, as so amended, shall be and it hereby is sustained. It is further ORDERED AND ADJUDGED that the immediate abatement date shall be and

it hereby is sustained. And, it is further ORDERED AND ADJUDGED that the Proposed Penalty shall be amended from \$500.00 to \$68.00 and, as so amended, shall be and it hereby is sustained.



LLOYD GRAPER
Hearing Officer, KOSHRC

Dated: December 3, 1975
Frankfort, Kentucky

Decision No. 199