

Done



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision
Order No. 301*

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

July 13, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 195

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SATURN MACHINE AND WELDING
COMPANY, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of April 6, 1976, is presently before this Commission for review. Specifically at issue is the Hearing Officer's vacation of the repeat violation alleged in Citation #2 and its proposed penalty of \$100.00 for failure of the Department of Labor "to prove consultation as provided under Section 4145 of the Employment Safety and Health Guide." If such consultation had been proven, the Hearing Officer would have been bound to sustain both the citation and its penalty.

As Compliance has alleged, Kentucky adopted its own occupational safety and health laws, pursuant to Sec. 18 of the Federal Williams-Steiger 1970 Occupational Safety and Health Act. The Kentucky plan, which is entirely separate in operation and administration from the Federal program, makes provision under KRS 338.991(1) for the imposition of a civil penalty of up to \$10,000 if an employer repeatedly violates the safety and health provisions of KRS 338. Pursuant to 338.991, certain guidelines are to be followed pending the issuance of a repeat citation, including a requirement that the Compliance Officer consult with his District Supervisor before determining a violation to be "repeated."

195 (301)

KOSHRC # 195
(Decision and Order of Review Commission)


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
Frankfort, Kentucky 40601
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

Mr. William R. Baird, President (Certified Mail #976107)
Saturn Machine & Welding Company, Inc.
Post Office Box 273
Sturgis, Kentucky 42459

This 13th day of July, 1976.



Iris R. Barrett
Executive Director

Deane



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 6, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision of
Order No. 260*

KOSHRC # 195

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SATURN MACHINE AND WELDING
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.

195 (260)

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.

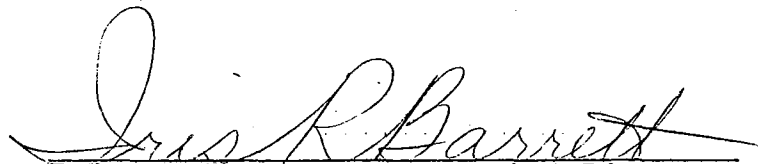
Copy of this Notice and Order has been served by mailing or personal delivery on the following:

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

Mr. William R. Baird, President (Certified Mail #467266)
Saturn Machine & Welding Company, Inc.
Post Office Box 273
Sturgis, Kentucky 42459

This 6th day of April, 1976.


Iris R. Barrett, Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 195

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

SATURN MACHINE AND WELDING COMPANY, INC.

RESPONDENT

* * * * *

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

Mr. Kenneth Sutton, Route 4, Morganfield, Kentucky 42437, for Respondent.

FOWLER - Hearing Officer.

* * * * *

As a result of an inspection by the Compliance Officers of the
Department of Labor, Commonwealth of Kentucky, on or about July 23, 1975,
it is alleged by the Department that the Respondent was in non serious violation
of one provision of the Act and Standards, and further, that they had repeated
an other than serious violation of a previous citation which became final without
contest.

Citation No. 1, listed twenty (20) separate items, only one of which,
namely item No. 20, is in contest, and citation No. 2, listed one (1) item for a
repeated non serious violation.

The contested items are as follows:

Citation 1, Item No. 20, an alleged violation of 29 CFR 1926.451(a)(2):

"A scaffold, approximately twenty-three (23) feet in length which was attached to the forks of an industrial truck; and which was raised to a height of about twenty (20) feet from the ground, did not have anchorage capable of carrying the maximum intended load without displacement. (The scaffold platform over-extended the forks of an industrial truck by approximately nine (9) feet on each side, thereby creating the likelihood of the truck and scaffold being overturned.)"

The abatement date for the alleged violation was August 23, 1975, and the proposed penalty was \$31.00.

Citation No. 2, an alleged violation of 29 CFR 1910.215(a)(2):

"A Worchester Drill Bit Grinder, located in the machine shop, was not provided with a guard that covered the spindle end, nut and flange projections. (Repeated safety standard violation previously cited on April 3, 1974, under 1910.215(a)(2) as adopted by OSH 11 and appearing on report #054 as citation #1, item #5.)"

This was an alleged repeated safety standard violation of a violation previously cited on April 3, 1974, under the same standard which became final without contest. The abatement date for this violation was set for September 9, 1975, and a proposed penalty of \$100.00 was assessed.

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 by the Department of Labor on July 23, 1975, at the Sturgis Airport in Sturgis, Kentucky, where employees of the Respondent company were engaged in work.
2. Citation was issued August 20, 1975, listing two citations, Item 20 of citation No. 1 being in contest and all of citation 2 being in contest.
3. The Notice of Contest was received August 27, 1975, contesting the above named items.
4. Notice of Contest with copy of Citations and proposed penalty transmitted to the Review Commission on September 2, 1975.
5. Notice of Receipt of Contest was mailed August 29, 1975, and Certification of Employer Form received September 8, 1975.
6. Complaint received September 15, 1975, and no formal Answer is found in the file.
7. The case was assigned to a Hearing Officer on October 14, 1975, and the hearing was scheduled and held October 30, 1975, at 11:00 A.M., at the Vocational Education Center in Henderson, Kentucky.
8. The transcript of the testimony of the hearing was received on January 21, 1976, and the parties were notified.

9. The parties were given 15 days by request to file Briefs but neither party has filed any Brief in connection with this matter.

DISCUSSION OF THE CASE

The first question addressing the Commission is the alleged violation of 29 CFR 1926.451(a)(2) as adopted by 803 KAR 2.030. The standard refers to footing or anchorage for scaffolds and the fact that they should be sound, rigid, and capable of carrying maximum intended load without settling or displacement. In connection with the alleged charge, pictures are shown as Plaintiff's exhibit 1, 2, and 3, and the exhibits together with the testimony, reveal that the Respondent company is not normally a construction company, but that they were constructing something for their own use, and that in doing so they were using a fork-lift truck with a scaffold resting on the forks of the truck and extended some 20 feet into the air where at least two men were working. Respondent admits that this was done, but states that they could not get anyone to do the work and, therefore, had to do it themselves and they saw nothing improper or unsafe about the operation of the fork-lift truck and the use of it as a scaffold in that fashion. The main contention of the Department was that the scaffold hoist in such a fashion was unstable and that it could tip the entire truck or the scaffold portion over and this certainly appears to be well within the range of probability from the testimony and from the exhibits as introduced.

The second citation is an alleged violation of 29 CFR 1910.215(a)(2). It concerns a failure to have a guard on abrasive wheel machinery and pictures of

the abrasive wheel are contained as Respondent's exhibits 1 and 2 in this record. There appears to be little question but that the grinder was not guarded and the Respondent's testimony was that to guard it would be in affect to destroy its usefulness, since it was used to sharpen bits and drills that were used in Respondent's normal work.

Testimony was introduced by the Department that the violation of citation 2 was a repeat violation in that the same company had been cited for the same standard violation at a previous time and in relation to a different machine. Respondent was under the impression at the time of the hearing that the machine in question was the one previously cited, but it was made clear to the Respondent that the repeat violation was of the standard and was not an alleged repeat of the same machine.

The Compliance Officer testified that he would not have proposed any penalty for the grinder violation except for the fact that it was a repeat violation and that accordingly, they had assessed a \$100.00 proposed penalty. As stated above, the normal type of work done by Saturn Machine and Welding Company, Inc., is not construction, but their normal work was that of designing working materials for use in various industries. The testimony of the Respondent was that they fabricated processes and specialized machinery and that they were a speciality company in the manufacturing of different types of machinery and not normally engaged in the construction business, although they were constructing the building in question for their own use (T.E. p.23). The fact that the Compliance Officer would not have recommended a penalty is contained in page 16

and the fact that it was a different piece of equipment from the first citation is contained at page 17, both Transcript of the Evidence.

Compliance Officer, Mr. Johnny Anderson, was questioned by the Hearing Officer concerning the requirement of the inspection regulation, #4145 which provides that no citation for repeated violation will be issued without consultation with the Assistant Regional Director (T.E. p. 30). The testimony of the Compliance Officer was not specific as to whether or not any consultation had been had with the Assistant Regional Director, or with anybody at the Kentucky level who would be comparable to that job.

There appeared no testimony except that there was a violation of failure to guard and the testimony was uncertain, at best, as to whether or not any consultation had been had in an attempt to comply with Section 4145 as above stated.

A reading of the Transcript of the Evidence and the testimony at the trial and the authorities considered by the Hearing Officer, it is concluded that the evidence as a whole supports the following Findings of Fact.

FINDINGS OF FACT

1. That jurisdiction of the subject matter and the person exists and is adequately proven.

2. That there was ample proof to sustain the violation of Item 20, citation 1, concerning the fork-lift truck and the scaffold attached thereto, and the Department has carried the burden of proof as to that citation and item.

3. That the Department carried the burden of proof insofar as Item 1, Citation 2, is concerned in relation to the failure to guard the Worchester Drill Bit Grinder and the Hearing Officer finds that the grinder was not guarded in accordance with the regulation.

4. That the Department of Labor complied with the inspection regulations and gave due and timely consideration to the fines proposed.

5. That the Department of Labor failed to prove that the citation concerning the failure to guard the grinder was a repeat violation because there was no showing that a consultation had been had with the Assistant Regional Director of the OSHA or any person under the Kentucky Law occupying a similar position.

6. That if consultation had been had in accordance with Section 4145, a repeat violation would have been proven, because it involved the same standard and it is not necessary to prove that the violation concerned the same grinder, but it was sufficient to show that the same violation had occurred by the same company in relation to two separate pieces of machinery.

7. That, having failed to prove a repeat violation, accompanied by the testimony of the Compliance Officer that no penalty would have been attached if it had not been a repeat violation, that there should be no penalty affixed for the failure to guard the grinder.

CONCLUSIONS OF LAW

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

1. That the use of a fork-lift truck, containing a scaffold at the top of the extended fork-lift, under the circumstances in this case, is an unstable object and a violation of 29 CFR 1926.451(a)(2) and did constitute a dangerous condition and a violation as aforesaid.
2. That the violation of 29 CFR 1910.215(a)(2) concerning the failure to guard the Worchester Drill Bit Grinder was proven, and the condition constituted a violation of said standard.
3. That the Respondent was not in repeat violation of 29 CFR 1910.215 (a)(2), concerning the grinder and the failure to guard it, because of the failure of the Department of Labor to prove consultation as provided under Section 4145 of the Employment Safety and Health Guide.
4. 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.
5. That under the regulations, except for the failure to provide consultation prior to the issuance of the citation, there was evidence of a repeat violation of the failure to guard the grinder, since all that is necessary to prove is that the company had been in previous violation of the same standard and it may refer to different machines or appliances within a single corporate entity (see CCH, OSHD Para, 19,508, World Wide Construction Service, Inc., April 7, 1975).

RECOMMENDED ORDER

That Citation 1, Item 20, as contained in Complainant's Complaint Para. 6(a) and 9(a) and the proposed penalty of \$31.00 may be and the same are hereby sustained.

IT IS FURTHER ORDERED AND ADJUDGED that Citation No. 2, as contained in Complainant's Complaint, Para. 6(b) and 9(b) is sustained, except that it is provided that said violation is not a repeat violation and no penalty is attached thereto.

IT IS FURTHER ORDERED AND ADJUDGED that the repeat violation as alleged in Citation No. 2, and the proposed penalty of \$100.00 therefore, may be and the same is hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that the abatement date for the Citations sustained herein shall be as soon as possible, not to exceed 30 days from the effective date of this Order.


JOHN T. FOWLER, SR.
Hearing Officer

Dated: April 6, 1976
Frankfort, Kentucky

DECISION NO. 260