Done

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KOSHRC Decision + Order No. 244

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

March 5, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 199

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

CALDWELL TANKS, 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 John T. Fowler, Sr., dated Dec. 10, 1975, is before the Commission for review. Upon review of the record in this matter, it is found that the Hearing Officer made proper application of the law to the facts herein, and that his conclusions are well-supported by the evidence. It is therefore the majority order of this Commission that the Recommended Order of the Hearing Officer be and it hereby is AFFIRMED; and it is further ordered that Item #6 charging a violation of 29 CFR 1910.132(a) and Item #8 charging a violation of 29 CFR 1910.95(a), and their proposed penalties of $37.00 each, be VACATED. All other findings of the Hearing Officer not inconsistent with this decision are hereby affirmed.

H. L. Stowers

H. L. Stowers, Chairman

/s/ Charles B. Upton

Charles B. Upton, Commissioner

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STANTON, Commissioner, CONCURRING in part and DISSENTING in part:

I must respectfully DISSENT from the conclusions of Commissioners Stowers and Upton regarding both contested items. It is my belief that the cited standards not only require the employer to furnish personal protective equipment, but further require his constant monitoring of the workplace to insure its use by employees. Mere provision of a safety device without more is insufficient to deter citation.

However, I do CONCUR in the majority decision to vacate the proposed penalties for reasons of good faith and the maintenance of a strong, continuing workplace safety program by the employer.

Merle H. Stanton, Commissioner

Dated: March 5, 1976
Frankfort, Kentucky

DECISION NO. 244

This is to certify that 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 & Health

Honorable Earl M. Cornett (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

Mr. G. H. Duncan, Jr., Exec. Vice Pres. (Certified Mail #456137)
Caldwell Tanks, Inc.
4000 Tower Road
Louisville, Kentucky 40219

This 5th day of March, 1976.

Iris R. Barrett

Iris R. Barrett, Executive Director

Issue Dec. 263

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JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
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H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 199

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

CALDWELL TANKS, 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: Peter J. Glauber
Assistant Counsel

Mr. G. H. Duncan, Jr. Exec. Vice-Pres. (Certified Mail #456380)
Caldwell Tanks, Inc.
4000 Tower Road
Louisville, Kentucky 40219

This 10th day of December, 1975.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

KOSHRC NO. 199

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

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

CALDWELL TANKS, INC. — RESPONDENT

* * * * * * * * * * *

Hon. Peter J. Glauber, Assistant Counsel, Department of Labor, Frankfort, Kentucky.

Hon. Kenneth E. Hollis, Assistant Counsel, Department of Labor, Frankfort, Kentucky.

G. H. Duncan, Jr. and B. M. Washburn, pro se, Personal Representatives for the Respondent, 4000 Tower Road, Louisville, Kentucky 40219.

Hon. Robert White, Personal Representative, Shopmen's Local #682, c/o of Caldwell Tanks, Inc., 4000 Tower Road, Louisville, Kentucky 40219

FOWLER - Hearing Officer

* * * * * * * * * * *

As a result of inspections on May 6, June 3, June 6, and August 5, all of 1975, by the Department of Labor, at a place of employment operated by the Respondent, Caldwell Tanks, Inc., located at 4000 Tower Road, Louisville, Kentucky, it was alleged in the Citation issued August 7, 1975, that the Respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972). As a result of such inspections, there was one Citation issued against the Respondent containing nine (9) items which were alleged

violations, all of a non-serious nature.

Only two (2) of the items in the Citation were contested and are of concern in this Decision and Recommendation. The contested items are Item number 6, which alleged a violation of 29 CFR 1910.132(a), the description of which was, " safety-toe footwear as provided for in 1910.136 is not worn in fabrication to protect employees from foot injury." The recommended penalty for the alleged violation was $37.00 and the abatement date was set at October 7, 1975. The other item in contest was Item number 8 in the Citation, which was an alleged violation of 29 CFR 1910.95(b)(1) said Citation having been permitted to be amended to an alleged violation of 29 CFR 1910.95 (a). A description of the alleged offense, as amended being as follows: "protection against the affects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16, when measured on the A Scale of a standard sound level meter at slow response. When noise levels are determined by octave and band analysis, the equivalent a-weighted sound level may be determined as follows: (giving graph for sound pressure level)." The recommended fine for the alleged violation was $37.00 and the proposed abatement date was September 8, 1975. A hearing was held on the contested items on November 7, 1975, at the Legal Arts Building in Louisville, Kentucky.

The pertinent procedural information and dates are as follows:

1. Inspection of the aforesaid premises was May 6, June 3, June 6, and August 5, 1975.

2. One Citation was issued alleging nine (9) separate item violations of which Number 6 and Number 8 are being contested and the Citation was issued on August 7, 1975.

3. Notice of Contest was received on August 21, 1975, and on September 2, 1975.

4. Notice of Contest with copy of Citation and proposed penalty was transmitted to the KOSH Review Commission on September 11, 1975.

5. Notice of Receipt of Contest was mailed on September 11, 1975, and Certification of Employer Form received on September 17, 1975.

6. Complaint was received on September 18, 1975. No formal Answer was filed, but the previous contest was considered as a formal Answer.

7. The case was assigned to a Hearing Officer on October 14, 1975.

8. Hearing was scheduled and held on November 7, 1975 at 10:00 A.M. in the Legal Arts Building, Louisville, Kentucky.

9. The Receipt of the Transcript of the Evidence of the Hearing was received on December 3, 1975, and no Briefs or Memorandum was requested by either party.

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 testimony of the witnesses revealed that there was no controversy concerning the sound levels as set forth in 29 CFR 1910.95(a) and that the sound levels that existed at the time of the inspections at certain portions of the place of employment by the Respondent Company, exceeded the sound levels tolerated by the regulation. It was further evident from the testimony that the employees who were engaged in the occupations, which caused excessive noise in violation of the sound levels tolerated by the Statute, had been supplied with, and did have, on their person earplugs and that they had been requested to use the earplugs by the Respondent Company.

There was testimony that at least two of the employees of the Respondent Company had used equipment causing excessive sound level tolerances without the use of the earplugs for several hours.

The testimony concerning the alleged violation of 29 CFR 1910.132(a), regarding the use of safety shoes, centered around the interpretation by the Department and by the Respondent Company, and whether or not each of them considered the use of such safety shoes necessary in the environment in which the

Respondent Company used its employees. The Department of Labor, by its witnesses stating that, in their opinion, the use of safety shoes was warranted and necessary, especially in the paint department since large portions of steel, which were used to make large tanks were operated by crane and that they could easily cause a foot injury to the person painting or working around them. On the other hand, the Respondent Company maintained that no such dangerous conditions existed as to warrant the use of safety shoes, and that they had a good safety program and that they had not experienced any significant number of injuries to the feet of employees as a result of not using safety shoes, and actually showed statistics of only four days lost time as a result of foot injuries which occurred in 1971 and no lost time as a result of any foot injury occurring after that time.

The Respondent Company had requested and had received a consultation with the Department of Labor in regard to the operation, and while this was not made clear to the Hearing Officer, it was apparent that the Respondent Company had asked for information and advise concerning the use of various types of safety equipment.

The evidence further indicated that the painters did not wear safety shoes but that the welders did wear safety shoes, and the Company did provide a method by which the employees could buy safety shoes and have same deducted from their payroll. The representative of the Union involved indicated resistance

toward the use of safety shoes by the employees because they did not feel it was justified and because of the cost and the discomfort in their use. Further, the testimony indicated that some of the employees were in areas that would not require the use of safety shoes while it was maintained that others were in such an area.

After hearing the testimony of the witnesses and after having read and examined the evidence and considered same, together with the exhibits filed and the arguments of the parties, it is concluded that substantial evidence on the record considered as a whole supports the following Findings of Fact.

FINDINGS OF FACT

1. Feasible engineering cannot correct the noise levels at the plant operated by Respondent Company, and that it was necessary to furnish and wear protective equipment against the excessive noise levels.

2. There was a meeting between the Respondent Company and the compliance division of the Department of Labor in Frankfort, prior to this hearing.

3. That the noise levels exceeded those tolerable in the regulations.

4. That the procedural requirements of inspection on the regulations were complied with.

5. That the employees were furnished earplugs to be used in areas where excessive noise indicated.

6. That the Respondent Company had a well organized and comprehensive safety program, including disciplinary action for violation.

7. The history of the Company shows only one foot injury since 1971 requiring more than first aid treatment.

8. The Respondent Company has now purchased ear muffs, instead of earplugs for use by employees who are engaged in activities which cause excessive noise in violation of the levels established.

9. That the Respondent Company used care and diligence in providing earplugs and attempted to enforce the regulation that they be used.

10. That the Respondent Company, in good faith, provided ear equipment with the full intention that it be used and did use reasonable care to see that it was used, and further that the Respondent Company acted in good faith in interpreting the regulation concerning safety shoes to the effect that they were not required in Respondent's operation.

CONCLUSIONS OF LAW

It is concluded by the Hearing Officer, as a matter of law: (1) that insofar as the noise exposure requirements of 29 CFR 1910.95(a), the case of Southern Indiana Gas & Electric, (CCH) Employment Safety & Health Guide, paragraph 17,374, dated March 5, 1974, OSHRC Docket number 456, applies, in that the Respondent Company had acted in good faith. The Respondent had purchased the earplugs and had given orders instructing the employees to use the personal protective equipment, and in view of the fact that the long hair currently being worn by many persons in today's society, accompanied by a shield which was used during the time the machine creating the noise was used, that it was next to impossible for Respondent to have complied further in the use

of earplugs without personally checking each employee for such use. The Hearing Officer recognizes the case of Trans Con Lines, Inc., CCH-ESHG, paragraph 15,279, which is urged as authority by the Department, but feels that the later decision of Southern Indiana as aforesaid is controlling and that the Respondent Company did all that could reasonably have been expected to have been done to enforce the use of earplugs. In view of the above, it is the Hearing Officer's conclusion that the Citation aforesaid should be vacated together with the penalty attached to it; (2) the Citation alleging violation of 29 CFR 1910.132(a) is very troublesome. The regulation is very vague and leaves a great deal to the interpretation of the party applying the standard. The regulation provides that such protective equipment shall be used and maintained wherever it is necessary by reason of hazards of processes or environment, etc. The regulation does not state with any specificity what constitutes such a hazard. Realizing that the decisions have generally held that the regulation is not too vague to be enforceable, (see Chief Freight Lines, Inc., CCH-ESHG paragraph 18,681, OSHRC Docket number 6483), it is, nevertheless, interesting to note that the decisions generally which have upheld alleged violations of the failure to use safety shoes have generally done so with the comment that the Respondent Company had a history of foot injuries (see Modern Automotive, 17,369 OSHD). In view of the fact that the Respondent Company shows no serious foot injuries over the last five years resulting in anything but first aid treatment, it is the conclusion of the Hearing Officer that factually, a sufficient danger and hazard does not exist requiring the use of the protective equipment set forth in the

But history reduces penalty only NOT vacate C. Item

regulation, and that the Citation and the accompanying penalty should be vacated.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the Citation issued against the Respondent alleging violations as contained in Items 6 (29 CFR 1910.132(a), and the penalty of $37.00 is hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that the Citation issued against the Respondent alleging violation as contained in Item number 8 (29 CFR 1910.95(a), and the proposed penalty of $37.00 is also hereby vacated.

JOHN T. FOWLER, SR.
Hearing Officer - KOSHRC

Decision No. 203

DATED: December 10, 1975