

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2219-92

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

THACKER CONSTRUCTION, INC

RESPONDENT

* * * * *

DECISION AND ORDER
OF THE REVIEW COMMISSION

We called this case on our own motion under our rules of procedure 47 (3) to consider our hearing officer's decision to dismiss citation 1, items 2, 3 and 4. Upon consideration of the recommended order, and without benefit of briefs from either party, we reverse the decision of our hearing officer and by this decision and order sustain citation 1, items 2, 3 and 4 along with the penalties of \$450, \$600 and \$600 respectively.

We **affirm** our hearing officer's decision to sustain citation 1, items 1a, 1b and 1c and the penalty of \$600 for those items. We adopt our hearing officer's findings of fact and conclusions of law as to citation 1, items 1a, 1b and 1c as if set out fully in this decision.

We reach a decision in this case after consideration of the evidence adduced at the hearing. Our hearing officer dismissed citations 2, 3 and 4 because as he said in his recommended order:

Respondent was hired to do an exterior job and would therefore have no reason for its employees to be on the second floor of the David School... Respondent should not be held responsible for violation of 29 CFR 1926.

500 (b) (1) and 29 CFR 1926.500 (d) (1).

The rationale advanced by our hearing officer for his decision to dismiss the three citations is that of employee misconduct. To prevail on the theory of employee misconduct, the employer must prove he had a rule against (in this case) employees roaming around a construction site where they did not belong, that he communicated the rule to his employees and that he enforced the rule through employee discipline. Since there was no proof introduced to support an employee misconduct defense, the defense will fail and we so find.

When the labor cabinet's compliance officer interviewed Thacker's employees, he was told the employees had been inside the building under construction and were thus exposed to open sided holes in the second floor and the stairway with pan treads not filled in. Transcript of the Evidence (TE) 20. Paul Thacker, the employer, even admitted his men had been exposed to the hazards on the second floor. TE 43.

Photographs taken by the compliance officer of the interior of the building under construction reveal the unguarded holes in the floor and the uncovered pan treads. We find the holes in the second floor were unguarded, the pan treads were not filled in and the Thacker employees were exposed to the tripping and falling hazards. Since the employees were exposed to the falling and tripping hazards, citations 2, 3 and 4 are proven.

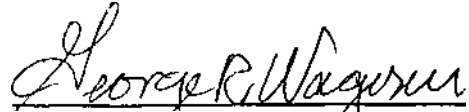
We find the penalties to be correctly computed and determined by the labor cabinet. Thus the fine for citation 2 is \$450 while

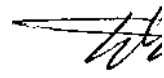
the fines for citations 3 and 4 is \$600 each.

We affirm our hearing officer's recommended order to the extent it is not inconsistent with this decision.

Thacker Construction shall immediately abate all violations. The total penalty in this case is \$2,250.

It is so ordered.


George Wagener
Chairman

 1:744?
Donald A. Butler
Member

Copy of this Order has been served upon the following parties in the manner indicated:

HON TERRY R ANDERSON
COUNSEL
LABOR CABINET
OFFICE OF GENERAL COUNSEL
1047 U S 127 S - STE #4
FRANKFORT KY 40601

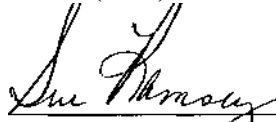
(MESSENGER MAIL)

MR PAUL THACKER
THACKER CONSTRUCTION
P O BOX 1441
PIKEVILLE KY 41501

(FIRST CLASS MAIL)

This 24th day of March, 1995.

Debbie Linnig Michals
Executive Director
KOSH REVIEW COMMISSION
#4 Millcreek Park
Rt. #3, Millville Road
Frankfort, KY 40601
PH: (502) 573-6892
FAX (502) 73-4619



Sue Ramsey
Executive Assistant