KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

April 11, 1977

KOSHRC #314

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

HUGHES MASONRY COMPANY, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and STOWERS, Commissioners.

PER CURIAM:

A Recommended Order in this case of Hearing Officer Paul Shapiro, issued under date of February 7, 1977, is now before this Commission. This review was ordered pursuant to a call for review by Merle H. Stanton, Chairman, to further consider a repeat, nonserious violation, Citation 2, of 29 CFR 1926.451(1)(10) (as adopted by 803 KAR 2:030). Pursuant to the Notice for Direction for Review by KOSH Review Commission, dated March 14, 1977, parties desiring to file briefs were to respond within ten (10) days. Because Complainant's Motion to file a brief was not timely received, the motion is denied. It is noted for the record that briefs were filed by both parties before the Hearing Officer.

At the hearing in the above-styled action, the Commissioner of Labor, hereinafter called the "Commissioner", through counsel, moved to amend the citation and complaint by deleting the allegation that the violation at issue was a repeat violation and by deleting the proposed penalty. This deletion of the repeated aspect of the violation was the result of a policy decision by the Commissioner not to treat violations as repeated where the inspection upon which the earlier violation was cited took place more than twenty-four (24) months prior to the second inspection. The

Hearing Officer sustained the motion and the hearing continued. However, in his Recommended Order, the Hearing Officer vacated his earlier ruling and overruled the Commissioner's motion stating:

> "The Commission by adopting this policy has in effect enacted a definition of a repeat violation, and we can find no authority in the Act permitting him to do so."

While the Commission accepts the Hearing Officer's ruling that Respondent was in violation of 29 CFR 1926.451(1)(10) (as adopted by 803 KAR 2:030), we take issue with the above ruling.

The Commissioner of Labor has ample and broad powers to adopt relevant and necessary regulations to implement the statutory duties imposed on him by KRS Chapter 338. KRS 13.082 states that the power vested in every administrative agency to adopt regulations shall be uniform and shall be confined to the direct implementation of the duties of that administrative body as assigned by the general assembly. Further, KRS 12.080 gives the head of each department the power to prescribe such rules and regulations as he deems expedient for the proper conduct of the work of that department. It is the opinion of this Commission that the policy decision in question is an administrative determination within the meaning of KRS 13.080. It is further held that the decision concerning the twenty-four (24) month limitation on repeat violations by the Commissioner is well within his prerogative and does not constitute an overstepping of his authority. The Commissioner of Labor has within his province a determination of charges of violations to be made against employers under this Act. If, in the fair administration of the Act and its implementing rules and regulations, a charge is reduced from repeat to nonserious, this Commission is of the opinion this should be allowed, since the parties proceeded under this assumption of reduction of charge of violation made. The respondent should not be found guilty of a greater offense than proof was offered on or defended against, and we do not think it necessary, expedient or just to remand this case for further proof, since this employer then would not receive fair treatment with other employers who have been given the benefit of the two-year limitation as to repeat violations. It, therefore, is the decision of this Commission that the Commissioner's motion to delete the repeated aspect of the violation and the proposed penalty should be sustained and that the Respondent found to be in violation of 29 CFR 1926.457(1)(10).

Concerning the imposition by the Commissioner of a policy whereby a penalty should not be imposed where the citation contains no more than ten (10) nonserious violations of the Act, the Hearing Officer stated:

> "Although the Congressional Act did not become effective until October, 1976, the Commissioner, as a matter of policy, was of the opinion that its provisions applied to the matters in dispute here.
>
> "Regarding the proposed penalty, we also question the Commissioners interpretation of the Congressional Act upon which the motion to delete the penalty is based in so far as the interpretation affects penalties proposed prior to the effective date of the Congressional Act. However, since no proof was offered concerning the appropriateness of the proposed penalty, that issue need not be considered further."

Reading this, an assumption may be made incorrectly that the Kentucky Occupational Safety and Health Program must precisely follow the lead of, and be identical with, its federal counterpart. However, such is not the case because the Kentucky program must only be "as effective as" the federal program. There is no prohibition against state programs being "more effective than" their federal counterpart or that the states cannot adopt changes in policies and procedures more quickly than it is done on the federal level. It is, therefore, the opinion of this Commission that the above stated language is misleading and incorrect and is overruled.

Accordingly, it is ORDERED that the decision of the Hearing Officer that sustained a violation of 29 CFR 1926.451(1)(10) (as adopted by 803 KAR 2:030) as a "repeated" violation is hereby VACATED. It is the holding of this Commission that the Commissioner's motion made at the hearing to delete the "repeated" aspect of the citation and complaint and to delete the proposed penalty is hereby SUSTAINED. It, therefore, is ORDERED that the citation and complaint as amended alleging a nonserious violation of 29 CFR 1925. 451(1)(10) with no proposed penalty should be and hereby is SUSTAINED. All conclusions and findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

Merle H. Stanton, Chairman

Charles B. Upton

Charles B. Upton, Commissioner

/s/ H. L. Stowers

Herbert L. Stowers, Commissioner

Dated: April 11, 1977
Frankfort, Kentucky
DECISION NO. 403

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 &Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

The Honorable Bissell Roberts (Certified Mail #456872)
Attorney at Law
3400 First National Tower
Louisville, Kentucky 40202

Mr. Walter U. Jennings, Coordinator (First Class Mail)
Hughes Masonry Co., Inc.
Post Office Box 333
Crestwood, Kentucky 40014

This 11th day of April, 1977.

Iris R. Barrett

Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
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FRANKFORT, KENTUCKY 40601
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MEMBER

KOSHRC
Decision +
Order No 386

February 7, 1977

KOSHRC # 314

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

HUGHES MASONRY 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.

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: Peter J. Glauber
Assistant Counsel

The Honorable Bissell Roberts (Certified Mail # 976250)
Attorney at Law
3400 First National Tower
Louisville, Kentucky 40202

Mr. Walter U. Jennings, Coordinator (First Class Mail)
Hughes Masonry Co., Inc.
Post Office Box 333
Crestwood, Kentucky 40014

This 7th day of February, 1977.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #314

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

HUGHES MASONRY COMPANY, INC. — RESPONDENT

STATEMENT OF THE CASE

This matter arises from the contest of a citation issued August 20, 1976, against Hughes Masonry Company, Inc., hereinafter called "Hughes Masonry", by the Commissioner of Labor, hereinafter called the "Commissioner".

On August 11 and 12, 1976 a Compliance Officer for the Commissioner inspected the construction site of the Jefferson State Vocational Technical School and Manpower Skill Center in Louisville, where Hughes Masonry was performing a contstruction contract. As a result of that inspection the Commissioner issued two citations against Hughes Masonry on August 20, 1976, the first citation charging it with two nonserious violations of the Kentucky Occupational Safety and Health Act, hereinafter called the "Act", and the second citation charging it with one nonserious repeat violation of the Act. The second citation also proposed a penalty of $188.00 for the alleged violation.

Hughes Masonry, on August 27, 1976, and within 15 working days from the issuance of the citation, filed a notice with the Commissioner contesting the second citation. Notice of the contest was duly transmitted to this Review Commission on August 30, 1976, and thereafter on September

7, 1976, the Commissioner filed its Complaint. Hughes Masonry then filed its Answer on September 21, 1976. By separate notices dated September 23, 1976, the matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Louisville on October 20, 1976, pursuant to KRS 338.070(4). That section of the statutes authorizes the Review Commission to hear and rule on appeals from citations, notations and variances to the provisions of the Act, and to adopt and promulgate rules and regulations concerning the procedural aspects of its hearings. KRS 338.081 further authorizes such hearings to be conducted by Hearing Officers appointed by the Review Commission to represent it in this manner. Decisions of Hearing Officers are subject to review by the Review Commission on appeal timely filed by either party, or upon its own motion.

The standard, regulation or section of KRS Chapter 338 allegedly violated, the description of the alleged violation and the penalty originally proposed for same are as follows:

1926.451(1)(10)	Platforms on the tubular welded frame scaffold at the locations listed below more than ten (10) feet above the ground did not have guardrails made of lumber, not less than two (2) by four (4) inches (or other material providing equivalent protection) or toeboards installed on all open sides and ends. (a) Southeast corner of the building of the elevator shaft. (b) The south scaffold at the south wall of the building. (c) The west wall between columns "M" and "N" on Number Two (2) line. (d) The north scaffold at the southwest corner of the building (e) The north scaffold at the south wall at the southwest corner of the building. (f) The west end of the south wall.	$188.00

The violation was cited as a repeat of an earlier violation contained in a citation issued on July 22, 1974.

At the hearing the Commissioner moved to amend the citation and its complaint by deleting the allegation that the violation was a repeat violation and also by deleting the proposed penalty. The motion to delete the allegation that it was a repeat violation was based on a policy decision by the Commissioner not to treat violations as repeated where the inspection upon which the earlier violation was cited took place more than 24 months prior to the second inspection. Since the inspections involved here were conducted more than 24 months apart the Commissioner elected pursuant to its new policy, not to treat the second violation as being repeated.

The Commissioner's motion to delete the penalty was based on an Act of Congress which in effect prohibits the imposition of a penalty where the citation contains no more than 10 nonserious violations of the Act. Although the Congressional Act did not become effective until October, 1976, the Commissioner, as a matter of policy, was of the opinion that its provisions applied to the matters in dispute here.

There being no objection to the motion, it was sustained at the hearing. Upon reconsideration, however, that ruling appears to be incorrect at least insofar as the allegation of a repeat violation is concerned.

The Commissioner as one of the agents charged with the administration and enforcement of the Act has the duty and authority to interpret those provisions which may be subject to different constructions. Furthermore, because of the Commissioners duties with respect to the Act, his interpretations are entitled to be given weight, particularly where they are of long standing. But the policy adopted by the Commissioner not to treat as repeat violations, violations of the same standard

occuring more than 24 months apart is more than an interpretation of the Act. The Commissioner by adopting this policy has in effect enacted a definition of a repeat violation, and we can find no authority in the Act permitting him to do so. For this reason, the policy has no validity.

In this connection, it should also be pointed out that although the Commissioner has the widest jurisdiction of any agency in the enforcement of the Act, there are other agencies which are also charged with its enforcement. If each such agency had the right to unilaterally define various terms used in the Act, which by themselves are not subject to any ambiguity in their meaning, there would be no uniformity in the Act's application.

For these reasons we hereby vacate our earlier ruling and overrule that portion of the Commissioner's motion to delete the allegations that the violation is a repeat of an earlier violation. Further, since the Answer did not deny the allegation that Hughes Masonry had on a previous occasion violated the standard in issue here, that allegation must be taken as admitted for the purpose of this proceeding.

Regarding the proposed penalty, we also question the Commissioners interpretation of the Congressional Act upon which the motion to delete the penalty is based in so far as the interpretation affects penalties proposed prior to the effective date of the Congressional Act. However, since no proof was offered concerning the appropriateness of the proposed penalty, that issue need not be considered further.

Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law and Recommended Decision is hereby made.

FINDINGS OF FACT

Hughes Masonry is a masonry contractor who on the date of inspection was engaged in the construction of the brick walls at the Jefferson State Vocational and Technical School. As a part of the construction,

in order to enable its employees to work on the upper reaches of the walls, Hughes Masonry was using multi-level tubular frame scaffolding which ran the entire length of each wall under construction. Each level was approximately 6-1/2 feet above the other and was encompassed within a skeletal frame of tubular braces, most of which were seven feet apart dividing the scaffold into sections. Most of the braces were joined by cross braces on the side away from the wall except at the top level. On the top level the braces were joined on that side by two chains, one at the top of the brace, and one midway between the top chain and the floor of the top level.

Not all sections below the top level contained a cross brace. Those sections where materials used in the construction were loaded and unloaded contained no such brace. Also, those sections which were less than seven feet wide, contained no cross braces. Toeboards were also missing from each level.

Most of the employees of Hughes Masonry worked on the scaffolds during the construction, but there were also some who worked on the ground delivering materials to the scaffold. All employees were hired through the union and had received safety training in schools sponsored jointly by contractors organizations and the union. Employees were aware of the risks involved in working or going below a scaffold, but they were not specifically prohibited from doing so.

CONCLUSIONS OF LAW

CFR 1926.451(d)(10) provides as follows:

> Tubular welded frame scaffolds . . . . Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection) and approximately 42 inches high, with a midrail of 1 x 6 inch lumber (or other materials providing equivalent protection) and toeboards shall be installed on all open sides and ends and all scaffolds more than 10 feet above the ground or floor. Toeboards shall be minimum of 4 inches in height.

There is no question that guardrails as described in the standard were not provided, nor were toeboards installed as required. Hughes Masonry contends though that the cross bracing on each section provided equivalent protection to those working on the scaffold and the absence of toeboards created no hazard because employees did not work in the ground below and, when below the scaffold, they were aware of the danger of falling objects.

This particular standard has been amended on several occasions. Prior to the current amendment cross braces erected continuously were considered sufficient protection and the standard so provided. This provision was deleted from the standard when it was last amended and it can be assumed from that that they were no longer considered sufficient protection.

But even if the cross braces were considered sufficient protection, Hughes Masonry would still be in violation of the standard since the cross braces were not continuous along the entire length of the scaffold. On some sections they were missing because the sections were used to load and unload materials, and on others they were missing because they simply did not fit. Finally, they were also missing from the ends of the scaffold.

Hughes Masonry also violated the standard by failing to install toeboards along the scaffolds. This provision is intended to reduce the hazard of objects falling from the scaffold and striking persons below. Although there were no work stations below the scaffold, employees had access to the area and were thereby exposed to the hazard.

RECOMMENDED DECISION

NOW, THEREFORE, IT IS HEREBY ORDERED, that the citation issued on August 20, 1976, charging Hughes Masonry Company, Inc. with a nonserious repeat violation of CFR 1926.451(d)(10), be and the same hereby is, sustained.

It is further ordered, that the penalty fixed for said violation be, and the same hereby is, vacated.

It is further ordered, that the violation shall be corrected without delay, but no later than 30 days from the date hereof.

Paul Shapiro

PAUL SHAPIRO
HEARING OFFICER
KOSHRC

Dated: February 7, 1977
Frankfort, Kentucky

DECISION NO. 386