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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 14, 1977

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC #321

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MYERS-THOMPSON DISPLAYS, INC.

RESPONDENT

* * * * *

D. J. MARLER, C. W. BOWLING,
JOHN SULLIVAN, and GARY PLATT,
EMPLOYEES OF MYERS-THOMPSON
DISPLACY, INC.

INTERVENORS

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and STOWERS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of March 15, 1977, is presently before this Commission for review, pursuant to an Order of Direction for Review by Chairman Merle H. Stanton.

At issue is the Hearing Officer's decision dismissing notice of failure to abate nonserious violation of 29 CFR 1910.23(c)(1)(i) (as adopted by 803 KAR 2:020) and vacating the proposed penalty of seven hundred (\$700) dollars.

The Respondent contends that he has not violated the cited standard and along with the Intervenor contends that the guarding required by the standard would create a greater hazard to the employees.

Hearing Officer Shapiro, after hearing and reviewing the facts and evidence introduced, has dismissed the notice of failure to abate and vacated the proposed penalty. His decision is based on a finding that compliance would increase hazards to

the employees and substantially interfere with their work, thus, failure to install guardrails on the storage platforms is not a violation.

After careful review of the record in this case it is the finding of this Commission that the Hearing Officer's decision is in error. The Complainant made a motion to brief this matter before the Commission. The motion was granted but the Commission did not receive the aid of briefs in reaching its decision.

The storage areas in question constitute platforms as the term is used within the cited standard. Under the facts and circumstances presented in this case these platforms must be guarded to comply with the requirements of 29 CFR 1910.23(c)(1)(i) (as adopted by 803 KAR 2:020).

Employees working on the platforms are exposed to a fall of six feet ten inches to ground level. The bed of a truck being loaded or unloaded would reduce the distance of a fall to approximately three feet provided one falls on to the truck bed. There is a distinct probability that someone working would not fall on to the truck bed since the overall length of the platform exceeds 100 feet, and workers could be on the platform and fall where no truck is in place for loading or unloading.

As pointed out by the Compliance Officer, removable guardrails or taut chains would probably satisfy the requirements of the standard. These measures, while protecting against falls of more than four feet, would not create increased hazard to employees loading or unloading trucks.

The Commission finds that the penalty to be assessed against respondent for violation of the cited standard shall be five hundred (\$500) dollars. The proposed penalty of seven hundred (\$700) dollars is reduced due to slight employee exposure to the hazard in terms of number of employees exposed and frequency of exposure. Further penalty reduction is inappropriate because a failure to abate is involved here.

For the above mentioned reasons, it is the unanimous ORDER of this Review Commission that the Hearing Officer's decision dismissing notification of failure to abate a violation of 29 CFR 1910.23(c)(1)(i) (as adopted by 803 KAR 2:020) and vacating the proposed penalty, is hereby REVERSED. A penalty of five hundred (\$500) dollars for the violation is hereby imposed. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED


Merle H. Stanton, Chairman

(Agreed, but unavailable for signature)
Charles B. Upton, Commissioner


H. L. Stowers, Commissioner

DATED: June 14, 1977
Frankfort, Kentucky

DECISION NO. 427

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
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: Peter J. Glauber
Assistant Counsel

Mr. Kurt Richter, President (Certified Mail #114268)
Myers-Thompson Displays, Inc.
134 East Woodlawn
Louisville, Kentucky 40214

Messrs. D. J. Marler, C. W. Bowling (Certified Mail #114269)
John G. Sullivan, and Gary Platt
c/o Myers-Thompson Displays, Inc.
134 East Woodlawn
Louisville, Kentucky 40214

This 14th day of June, 1977.


Iris R. Barrett, Executive Director



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 15, 1977

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 321

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MYERS-THOMPSON DISPLAYS, INC.

RESPONDENT

D. J. MARLER, C. W. BOWLING,
JOHN G. SULLIVAN & GARY PLATT

INTERVENORS

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:

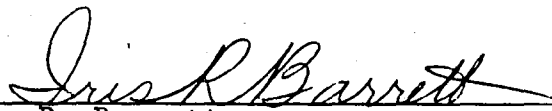
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. Kurt Richter, President (Certified Mail #456856)
Myers-Thompson Displays, Inc.
134 East Woodlawn
Louisville, Kentucky 40214

Messrs. D. J. Marler, C. W. Bowling, (Certified Mail #456857)
John G. Sullivan, and Gary Platt
% Myers-Thompson Displays, Inc.
134 East Woodlawn
Louisville, Kentucky 40214

This 15th day of March, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #321

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS. FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

MYERS-THOMPSON DISPLAYS, INC.

RESPONDENT

D. J. MARLER, C. W. BOWLING
JOHN G. SULLIVAN & GARY PLATT

INTRERVENORS

STATEMENT OF THE CASE

This matter arises from a citation issued against Myers-Thompson Displays, Inc., hereinafter referred to as "Displays Inc." by the Commissioner of Labor, hereinafter referred to as the "Commissioner", for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On June 15 and 16, 1976, a Compliance Officer for the Commission made an inspection of the business facilities of Displays Inc., in Louisville. As a result of that inspection, the Commissioner on July 9, 1976 issued one citation against Displays Inc., charging it with 16 nonserious violations of the Act, proposing a penalty therefor of \$68.00 and fixing abatement dates for each violation. The citation was not contested and by operation of law became a final order of this Review Commission.

Subsequently, on September 9, 1976, the Compliance Officer made a follow-up inspection of the business facilities to determine if the abatement dates for each violation had been complied with. In the

course of that inspection, he found that all of the violations had been abated except Item 14(a). Because of the failure to abate that violation, the Commissioner on September 14, 1976, notified Displays Inc., that it was proposing an additional penalty of \$700.00.

On September 17, 1976, and within 15 working days from the notification of the additional proposed penalty, Displays Inc. filed a notice with the Commissioner contesting the additional penalty. Notice of the contest was transmitted to this Review Commission on September 21, 1976, and notice of the receipt of contest was sent to Displays Inc. on September 22, 1976. Thereafter, on September 27, 1976, the Commissioner filed its Complaint. On the same date, September 27, 1976, an Order was entered allowing D. J. Marler, C. W. Bowling, John G. Sullivan and Gary Platt, employees of Displays, Inc. to intervene in this action.

By separate orders dated October 22, 1976, the matter was assigned to a Hearing Officer and scheduled for hearing. The hearing was held pursuant to KRS 338.070(4) on November 11, 1976 in Louisville. That section of the statute authorizes this Review Commission to rule on appeals from citations, notations and variances to the provisions of the Act, and to adopt and promulgate rules and regulations concerning the conduct of those hearings. KRS 338.081 further authorizes this Review Commission to appoint Hearing Officers to conduct its hearings and represent it in this manner. The decisions of Hearing Officers are subject to review by this 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 proposed for failing to abate same by August 11, 1976, are as follows:

1910.23(c)
(1)(1)

Open sided platform at [the]
location listed below, which
[was] four feet or more above
adjacent floor levels, were not
guarded by standard railings,
or the equivalent, on all open
sides, or provided with toeboards
to protect employees passing
beneath:

\$700.00

(a) The south platform in
Building "B"

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

FINDINGS OF FACT

Displays Inc. is in the business of assembling commercial displays for its customers. These displays are exhibited at shows such as the Kentucky State Fair, The Ice Show, the Recreational Vehicle Show and similar events. It also assembles seasonal displays such as at Christmas and other holidays. The materials which Displays Inc., uses in its displays are stored at it's business facilities.

The platform cited as being in violation of the standard was located in one of the storage buildings and was used solely for the storage of display materials. The platform was of wooden construction six feet ten inches above the ground and was approximately 100 to 125 feet long by 40 feet deep. There were no guardrails or toeboards along any open side of the platform.

When materials were needed from the platform, a truck was driven into the warehouse and backed up to the section of the platform where the materials were located. The materials were then loaded from the platform to the truck. The opposite procedure was used to unload materials and

store them on the platform. The bed of the truck was approximately 3 feet above the ground.

The evidence for Displays Inc. consisted of testimony by the owner of the company and by the intervenors who were all employees of Displays Inc. The employees stated that the installation of guardrails would require lifting the display materials over them while loading and unloading the materials to or from the truck. Since many of these materials were heavy, the employees were of the opinion that the installation of guardrails would not only make their work more difficult, it would also increase the danger of injury.

CONCLUSIONS OF LAW

CFR 1910.23(c)(i) provides in part as follows:

Guarding floor and wall openings and holes
Protection of open-sided floors, platforms and runways . . . Every open sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (3) of this section) on all open sides The railing shall be provided with a toeboard wherever, beneath the open sides. . . [p]ersons can pass.

Displays Inc. in contesting the penalty for failure to abate contends in effect that it did not violate the above standard. The question, therefore, arises whether such a defense is relevant at this time since Displays Inc. failed to contest the citation in which the violation was originally alleged.

This precise issue was raised in Savina Home Industries, Inc., CCH-OSHD-¶ 21.469 (1977). There the Federal Review Commission said:

Before examining the evidence in the case, it will be useful to review what complainant must prove to establish a failure to abate and what an employer may assert as a defense to such a charge. Where, as here,

the original citation is not timely contested and there is a reinspection subsequent to the expiration of the abatement date specified in that citation, the complainant's prima facie case of failure to abate is made upon showing that: (1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon reinspection is the identical one for which respondent was originally cited. An employer may rebut this prima facie case by showing that the condition has in fact been corrected, or, if not corrected, that the employer has prevented the exposure of his employees to the violative condition. . . [citing authority]. The prima facie case may also be rebutted by a showing that the condition for which the employer was cited was in fact not violative of the Act either at the time of the original inspection or at the time of reinspection . . . [citing authority]. (emphasis added)

Therefore, even though the original citation became a final order of this Review Commission on the failure to contest it, Displays Inc., is not precluded from contesting that citation now insofar as it pertains to the penalty proposed for failure to abate the violative conditions cited.

The standard requires the installation of both guardrails and toeboards on the open sides of all platforms. Although, originally cited for failing to have either, the Compliance Officer testified that the failure to install a toeboard on the platform did not constitute a hazard in this case. Therefore, the only question is whether the failure to install guardrails is a violation of the standard.

The question raises two issues: (1) Do the storage platforms constitute "platforms" as that term is used in the standard and (2) if they do, was the failure to install guardrails on these platforms a violation of the standard?

CFR 1910.21(a)(4) defines the term "platform" as used in 1910.23 (c)(i) as follows:

A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery or equipment.

In Ventre Packing Co., Inc., CCH-OSHD-¶ 16,475 (1973), the Commission stated that a storage platform which employees were required to go upon to store or retrieve materials or equipment is a working platform within the meaning of the standard. Therefore, the storage platforms of Displays Inc., are also working platforms within the meaning of the standard.

The issue remains, though, whether the failure to install guardrails on Displays Inc.'s platforms was a violation of the standard.

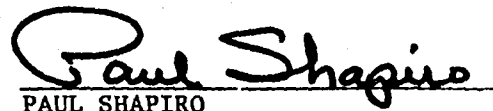
The testimony established that the installation of guardrails would not only make the employees work more difficult, it would in all likelihood also increase the danger of injury, since the employees would then be required to lift heavy objects over the rails. It was further shown that the installation of removable rails would make no sense, since the only time the employees worked on the platforms was when they were storing or removing materials. As one employee so clearly pointed out, the only time such rails would be in place would be when no one was working in the area. Therefore, the installation of removable rails would serve no purpose whatsoever.

It is recognized that an employer need not comply with a standard which increases the hazard of injury in a given situation rather than reduces it, Ray Johnson d/b/a Johnson Roofing Co., CCH-OSHD ¶19,092 (1974), or where compliance substantially interferes with work operations, Carr Erectors, Inc., CCH-OSHD ¶19,363 (1975). Here compliance would have

both increased the hazards to the employees and substantially interfered with their work. For these reasons, we conclude that the failure to install guardrails on the storage platforms was not a violation of the standard.

RECOMMENDED DECISION

NOW, THEREFORE, IT IS HEREBY ORDERED, that the Notification of an Additional Penalty For Failure to Abate Item 14(a) of the Citation issued on July 9, 1976 be, and the same is, hereby dismissed, and the proposed penalty therefor, vacated.


PAUL SHAPIRO
HEARING OFFICER
KOSHR

Dated: March 15, 1977
Frankfort, Kentucky

DECISION NO. 392