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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

104 BRIDGE ST.  
FRANKFORT, KENTUCKY 40601

HERBERT L. STOWERS  
MEMBER

*KOSHRC  
Decision +  
Order No 429*

PHONE (502) 564-6892

CHARLES B. UPTON  
MEMBER

June 14, 1977

KOSHRC #341

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

G & S COMPANY

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners.

PER CURIAM:

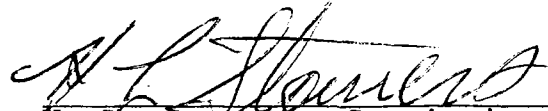
A Recommended Order of Hearing Officer Herbert B. Sparks, issued under date of 31 March 1977, is called before this Commission for purposes of reviewing the proposed penalty of \$200.00.

We find that the facts at hand do not warrant the recommended reduction in penalty, as the record indicates that the Respondent did not make reasonable efforts to enforce the use of appropriate personal protective equipment as required by 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030). The seriousness of the violation has been well established in the record, and it would circumvent the purposes of the Act to reduce the penalty in this instance, where a resultant injury would be gravely serious if not fatal to an employee.

Accordingly, it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has reduced the proposed penalty to \$200 is REVERSED, and the original proposed penalty of \$500 is hereby REINSTATED. All other findings of the Hearing Officer not inconsistent with this Decision are hereby AFFIRMED.

*Merle H. Stanton*  
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. 429


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  
Capital Plaza Tower - 1st Floor  
Frankfort, Kentucky 40601  
Attention: Timothy O'Mara  
Assistant Counsel

Mr. James L. Sawyer, Manager (Certified Mail #114271)  
G & S Company  
810 Old Clarksville Pike  
P. O. Box 442  
Hopkinsville, Kentucky 42240

This 14th day of June, 1977.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

*Hayne*



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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

104 BRIDGE ST.  
FRANKFORT, KENTUCKY 40601

HERBERT L. STOWERS  
MEMBER

*KOSHRC  
Decision #  
Order No. 397*

PHONE (502) 564-6892

CHARLES B. UPTON  
MEMBER

March 31, 1977

KOSHRC # 341

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

G & S COMPANY

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: Timothy O'Mara  
Assistant Counsel

Mr. James L. Sawyer, Manager (Certified Mail #456869)  
G & S Company  
810 Old Clarksville Pike  
P. O. Box 442  
Hopkinsville, Kentucky 42240

This 31st day of March, 1977.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC # 341

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

G & S COMPANY

RESPONDENT

\* \* \* \* \*

Hon. Timothy O'Mara, Assistant Counsel, Department of Labor,  
Frankfort, Kentucky, for Complainant

Mr. James L. Sawyer, Manager, G & S Company, 810 Old Clarksville  
Pike, P.O. Box 442, Hopkinsville, Kentucky 42240, for  
Respondent

\* \* \* \* \*

An inspection was made on November 15, 1976, by the  
Kentucky Department of Labor, Division of Occupational Safety  
and Health, at a place of employment located in Barren County,  
Kentucky, at or near Happy Valley Road, where the Respondent was  
engaged in the installation of siding.

The Respondent allegedly violated the provisions of KRS  
Chapter 338 (Kentucky Occupational Safety and Health Act of 1972)  
in the following respects, which was alleged to be a serious vio-  
lation. There was an alleged violation of 29 CFR 1926.28(a) (as  
adopted by 803 KAR 2:030) in that

"appropriate personal protective equipment (i.e. safety belts, life lines, or equivalent) was not worn by an employee subject to a fall of approximately 20 feet (employee walking steel beam east side of addition)."

The alleged violation was alleged to be a serious violation within the meaning of the Act.

The date by which the alleged violation was to be corrected was immediately and there was a proposed penalty of \$500.00.

The procedural pertinent information and dates are as follows:

- 1) Inspection of the premises mentioned above was November 15, 1976.
- 2) Citation issued December 6, 1976.
- 3) The proposed penalty for the contested standard herein in question was \$500.00, and the abatement date was immediately.
- 4) Notice of Contest was received from the employer on December 16, 1976, contesting the above named item.
- 5) Notice of Receipt of Contest was mailed on December 21, 1976.
- 6) Certification of Employer Form was received January 3, 1977.
- 7) Complaint was received January 5, 1977. No formal answer was filed herein, but no complaint of same was made by the Department, either prior to the proceedings or during the hearing.
- 8) Case was assigned to a Hearing Officer on January 26, 1977; the hearing was originally scheduled to be held on February 10, 1977 at 10:00 a.m. in Bowling Green; there was a postponement due to the motion of Complainant and the Amended Notice of Hearing was mailed out on February 9, 1977.
- 9) The hearing was scheduled for and held on February 25, 1977 at 10:00 a.m. (CST) at the Department of Labor, Kidds Building, Greenwood Way, Bowling Green, Kentucky.

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 authorized 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 hearing. Under the provisions of KRS 338.081, the hearing was authorized by the 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 the citation or penalty.

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

#### FINDINGS OF FACT

1) Jurisdiction of the parties in the subject matter and due and timely notice of the hearing is found by the Hearing Officer.

2) The Respondent was engaged in the activity as aforesaid alleged and there was one individual seen walking a beam approximately 20 feet in the air and holding on to another beam above his head. (T.R., page 10 and Complainant's Exhibit 1).

3) The Complainant thought that this was the most appropriate standard in that it was the Compliance Officer's testimony that he felt like this standard would fit the situation because the man was



twenty feet in the air and he was exposed to serious physical harm and he did not have any kind of personal protective equipment on. (T.R. Pg. 13).

4) The Respondent, at the hearing, represented that he felt like it was unrefuted that on the day in question the employer had furnished the safety belts and lanyards that were herein in question. The Respondent-Employer objected to the fact that the company was being responsible for the employees not wearing the equipment and he was concerned as to how far the Respondent's responsibility went.

5) The Respondent also pointed out that he, as boss, could not be on the job with them every minute, nor could a foreman watch them every minute to make sure that they tied off or had their gear on. (T.R. Pg. 29). The Respondent further represented that "normally when they had to use their tools they had their belt on because I rigged them up so that their belt is essentially their tool belt" (T.R. Pg. 29). Their safety belt is their tool belt. They have their lanyard with them. All they have to do is throw it over a beam and snap it and they have tied off. They cannot fall over five feet. (T.R. Pgs. 29 & 30).

6) In light of the testimony and in light of all the circumstances of this case, the following Conclusions of Law would seem to be appropriate.

#### CONCLUSIONS OF LAW

1) The Complainant has furnished the Hearing Officer with proof of the violation of the section reflecting the protested charge and the charge is found to be a serious violation.

2) See 1975-1976 OSHD (20,441) Oakland Construction Company where the judge properly found a violation of 1926.28(a) wherein an employee was killed in a 15 to 18 foot fall resulting from being permitted to work without a safety belt or other protection on a horizontal beam about eight feet above the scaffold platform.

3) Under the circumstances set out hereinabove, it does not appear that the purposes of the Act would be fulfilled nor that justice would be served by assessing the penalty in the proposed amount, thus the penalty for this violation should be reduced to \$200.00.

4) In considering the reduction of this penalty, the Hearing Officer has taken into consideration like cases decided by the Commission where there has been only one individual involved and where, in this instance, the safety belts and personal protective equipment were in fact available, but he was simply not using them.

5) See 1975-1976 OSHD (20,087) Jack Moreman Electrical Contractor, Inc., where a penalty of \$200.00 was assessed for violation of personal protective equipment by the provisions of the same standard through a failure to enforce the wearing of a safety belt by an employee working on a transformer tower of a utility power line. The lower penalty there was considered appropriate in view of this limited exposure, the employer's small size, its good faith, and the company's prior history.

6) Also a precedent for this would be the Federal case decided in 1974-1975 OSHD (19,027) Deere Construction Company where the same standard was in issue and the citation had been issued because the employees were seen on steel girders without

safety belts or tied off lanyards. The proposed penalty was reduced from \$550.00 to \$300.00 because the record did not show the degree of probability of an accident.

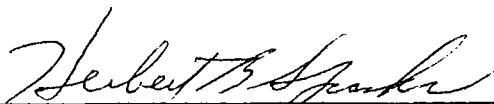
7) There are numerous other Federal cases and State cases where the reduction of penalty in like or similar circumstances of the facts of this case have been reduced.

8) In light of the foregoing the following Recommended Order would seem to be appropriate.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein in question charging a serious violation alleging a violation of 29 CFR 1926.28(a) shall be and the same is hereby sustained, and the penalty of \$500.00 shall be and the same is hereby reduced to \$200.00. This violation must be corrected without delay, but no later than 30 days from the date of this Recommended Order.

This 28th day of March, 1977.

  
HERBERT B. SPARKS  
HEARING OFFICER

Dated: March 31, 1977  
Frankfort, Kentucky

DECISION NO. 397