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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
PHONE (502) 564-6892

CHARLES B. UPTON
MEMBER

*KOSHRC
Decision +
Order No. 463*

September 13, 1977

HERBERT L. STOWERS
MEMBER

KOSHRC #346

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WAKY SIGN CO.

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 June 14, 1977, is called before this Commission for purposes of reviewing the proposed penalty of \$300.00.

The seriousness of the violation in this case has been well established in the record. We find that, under the facts and circumstances at hand, some reduction in the penalty proposed by the Department of Labor is warranted, but the Hearing Officer's recommended penalty is inappropriate and contrary to the purposes of the Act.

Therefore, it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has reduced the proposed penalty to \$300.00 is REVERSED, and the penalty of \$500.00 is hereby imposed. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

Merle H. Stanton

Merle H. Stanton, Chairman


H. L. Stowers, Commissioner

/s/ Charles B. Upton
Charles B. Upton, Commissioner

DATED: September 13, 1977
Frankfort, Kentucky

DECISION NO. 463

KOSHRC #346
(Decision and Order of Review Commission)

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

Hon. Kenneth E. Hollis, General Counsel (Messenger Service)
Department of Labor
Frankfort, Kentucky 40601
Attention: Hon. Timothy O'Mara
Assistant Counsel

Hon. Ray B. White (Certified Mail #456853)
White and Hughes, Attorneys
Park Row Executive Building
Bowling Green, Kentucky 42101

Mr. Leo Pitt, President (First Class Mail)
Waky Sign Company, Inc.
113 Old Louisville Road
Bowling Green, Kentucky 42101

This 13th day of September, 1977.


Iris R. Barrett
Executive Director

Keene



346 (330)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

HERBERT L. STOWERS
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

CHARLES B. UPTON
MEMBER

June 14, 1977

*KOSHRC
Decision of
Order No. 430*

KOSHRC # 346

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WAKY SIGN 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:

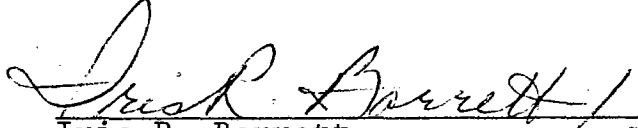
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Kenneth E. Hollis, General Counsel (Messenger Service)
Department of Labor
Frankfort, Kentucky 40601
Attention: Hon. Timothy O'Mara
Assistant Counsel

Hon. Ray B. White (Certified Mail #114278)
White and Hughes, Attorneys
Park Row Executive Building
Bowling Green, Kentucky 42101

Mr. Leo Pitt, President (Certified Mail #114279)
Waky Sign Company, Inc.
113 Old Louisville Road
Bowling Green, Kentucky 42101

This 14th day of June, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

KOSHRC # 346

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

WAKY SIGN COMPANY

RESPONDENT

* * * * *

Hon. Timothy P. O'Mara, Deputy General Counsel, Department of Labor, 801 West Jefferson, Louisville, Kentucky, attorney for Complainant

Hon. Ray White, Park Row Executive Building, Bowling Green, Kentucky, attorney for Respondent

* * * * *

An inspection was made on December 3, 1976, at a place of employment located in Warren County, Kentucky, at the Ramada Inn, Greenwood Interchange, Bowling Green, Kentucky, where the Respondent was engaged in the changing of fluorescent light bulbs in a sign, and the work being conducted was under the direction and control of the Respondent. On the basis of that inspection, on December 8, 1976, the Respondent was issued two (2) citations alleging four (4) nonserious and one (1) serious violation of the Act and Standards. One of the nonserious violations was subsequently deleted. The serious violation is the one that is herein in question.

The citations herein in question issued against Respondent were plead in the alternative in that there was an alleged violation of 29 CFR 1926.556(b)(2)(iv) (as adopted by 803 KAR 2:030) in that:

"Employees did not always stand firmly on the floor of the basket, and they climbed on the edge of the basket while in an elevated position (employees climbing in and out of basket while approximately eighty-five (85) feet high on aerial lift truck, worksite);

Or, 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, lifelines, or equivalent protection) was not worn by employees while exposed to falling approximately eighty-five (85) feet (employees were working on top of the sign and on top of the aerial ladder, worksite);

Or, an alleged violation of 29 CFR 1926.105(a) (as adopted by 803 KAR 2:030) in that:

"Safety nets were not provided to protect employees exposed to falling approximately eighty-five (85) feet (top of sign, worksite).

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above was December 3, 1976.
2. Citation was issued December 8, 1976.
3. The proposed penalty was \$700.00 and the abatement date was to be immediately upon receipt of the citation.
4. Notice of Receipt of Contest was mailed on January 12, 1977.
5. Notice of Contest was received on January 6, 1977.
6. Certification of Employer Form was received January 20, 1977.

7. Complaint was received on January 20, 1977.
8. A Motion and Dismiss and Answer was received on January 21, 1977.
9. Case was assigned to a Hearing Officer on January 25, 1977, and the case was to be originally heard on February 8, 1977 at 10:00 a.m. in Bowling Green, Kentucky. There was an Amended Notice of Hearing sent and the hearing was held on February 24, 1977 at 10:15 a.m. in the offices of 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 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

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

The testimony disclosed that this alleged violation took place very near the Department of Labor's office building in Bowling Green,

Kentucky. The Compliance Officer testified that as he arrived at the jobsite he noticed that there were two men on an aerial "lift" working, one on the ladder and one off the ladder, without any type of personal protective equipment. He also noted that he made a complete walk-around of the area and inspected the truck and all of the equipment involved. There were several photographs made and the three citations that were complained of were adequately documented by the exhibits that were introduced by the Complainant.

The Complainant saw fit to plead in the alternative and the standards herein in question read as follows:

29 CFR 1926.556(b)(2)(iv) (as adopted by 803 KAR 2:030)

under Aerial Lifts reads as follows:

"Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position."

29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) reads as follows:

"The employer is responsible for requiring of wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards of the employees."

29 CFR 1926.105(a) (as adopted by 803 KAR 2:030) reads as follows:

"Safety nets shall be provided when work places are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical."

The Compliance Officer specifically referred to photographs C-2, C-3 and C-5 which indicated that there was one man dressed in

a red coat and one man in an overall jumpsuit. The Compliance Officer testified that "at the time of the inspection the man in the jumpsuit ascended to the height of the sign in the basket." He further testified that "he watched this and the man in the red shirt climb the ladder to the same position. Once the man in the basket got to the sign he stepped out of the basket and proceeded to work on the sign. He believed they were changing light bulbs outside of the basket. He had climbed over the edge of the basket."

It was further the testimony of the Compliance Officer that neither safety belts nor lifelines were present. (TR. 12). It was further his testimony that they were in the basket part of the time, on top of the sign and in the sign, and there was no personal protective equipment evident. When this was called to the worker's attention, they continued to work after the necessity for safety lines or nets was referred to by the Compliance Officer.

The proposed penalty in this case was \$700.00 and the penalty adjustment factors has adjusted this penalty down from \$1,000.00. As to good faith, 10% out of a possible 20% was given. As to the history, 10% out of a possible 20% was given, and as to the adjustment factor due to size of the employer, 10% was given, attributing to a 30% decrease of the \$1,000.00 proposed penalty, leaving an adjusted penalty proposed of \$700.00.

The Respondent sought to make an issue out of the denial of equal protection to this Respondent in that the testimony disclosed that other sign companies were not inspected, and that Waky had been inspected, thus there had been a denial of equal protection

and a denial of the constitutional rights of the Respondent.

The Compliance Officer in question stated that he did not believe that he had ever made an inspection, much less issue a citation, to any other sign company in over two years in Warren County. The acting supervisor in the office testified that he believed that one name of a great number of names that Respondent's counsel called to his attention was familiar and that he had inspected the sign company in Jefferson County. He did, on re-direct examination, establish that it is very difficult to notice or observe companies engaged in the sign business in that they are on given premises for a very short period of time. They are very mobile and tend to be moving generally throughout the area, and this contributed to the fact that there are a limited number of sign companies that are being inspected by members of the Department of Labor.

The work engaged in by the Respondent's employees here was, basically, the change of fluorescent tubes and repairing of shorts. (TR. 52). The Respondent's president and sole stockholder also testified that they now have lanyards and safety belts and they are urged to be used at all times. (TR. 53).

There was a great deal of emphasis placed on the small size of the Respondent, and the fact that it was a small business with a limited number of employees, and what would appear to be a disproportionate penalty was sought to be imposed upon the Respondent.

In light of the foregoing the following Conclusions of Law would seem appropriate.

CONCLUSIONS OF LAW

Complainant has furnished the Review Commission with proof and has sustained its burden of proof as to the alleged violations of 29 CFR 1926.556(b)(2)(iv) and 29 CFR 1926.28(a) and 29 CFR 1926.105(a) (all as adopted by 803 KAR 2:030), and the charge is found to be a serious violation. The definition of a "serious violation" under the Act is "where there is a substantial probability that death or serious physical harm could result from the conditions which exist from one or more practices, means, methods, operations, or processes in a place of employment (unless the employer could not with the exercise of reasonable diligence know the violation). It would seem that the proposed penalty of \$700.00 would be large and the purposes of the Act would not be fulfilled by sustaining same, nor would justice be served by assessing the penalty in the proposed amount. It is recommended that the proposed penalty of \$700.00 should be reduced to \$300.00. This would seem to be equitable in light of the Respondent's evident desire to comply with the purposes of the Act, his statement as to the acquisition of various protective equipment since the citing herein in question, and in light of the size of the business run by Respondent in this instance.

It is also further held that as to the Motion to Dismiss made by the Respondent, the Respondent has failed to prove that there has been denial of equal protection. Conceding the fact that there have been a limited number of inspections of sign companies, it is felt that the uniqueness of their business and the nature of their

activities being at jobsites for a limited period of time probably account for the small number of inspections of their businesses.


In light of the foregoing Conclusions of Law, the following Recommended Order would seem appropriate.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein in question charging a serious violation of 29 CFR 1926.556(b)(2)(iv) or 29 CFR 1926.28(a), or 29 CFR 1926.105(a) (all as adopted by 803 KAR 2:030) shall be and the same is hereby sustained as a serious violation, and the proposed penalty of \$700.00 shall be and the same is hereby reduced to \$300.00.

This violation must be corrected without delay, but no later than fifteen (15) days from the date of this Recommended Order.

This 13th day of June, 1977.



HERBERT B. SPARKS
HEARING OFFICER

Dated: June 14, 1977
Frankfort, Kentucky

DECISION NO. 430