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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

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

December 13, 1977

KOSHRC #364

KOSHRC Decision + Order No 501

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

GEOGHEGAN ROOFING & SUPPLY, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of September 20, 1977, is presently before this Commission for review, pursuant to an Order of Direction for Review.

The first item under review is an alleged violation of 29 CFR 1926.150(a)(4) (as adopted by 803 KAR 2:030). The Respondent had a fire extinguisher located near their tar kettles. The extinguisher was not fully charged and was missing the pin necessary to prevent accidental discharge. The cited standard states, "All fire fighting equipment shall be periodically inspected and maintained in operating condition. Defective equipment shall be immediately replaced" (emphasis added).

The Hearing Officer has found that the extinguisher observed by the Compliance Officer was certainly in violation of the standard. We agree with this finding. The Hearing Officer has vacated the citation, however, based on a finding that no hazard was presented to the employees because of the availability of "Dri Fog", a powdered substance used to extinguish flare ups in the kettles. We disagree with the vacating of this citation. An improperly maintained piece of firefighting equipment does present a hazard because an employee could possibly try to rely on this equipment and thus lose important time in fighting a fire. It is also questionable

whether "Dri Fog" alone would be sufficient firefighting equipment for this job.

The second issue considered by this Commission is an alleged repeat violation of 29 CFR 1926.500(d)(1) or 29 CFR 1926.28(a), (as adopted by 803 KAR 2:030), and the proposed penalty of $210.00. Employees of the Respondent were observed working on and sometimes near the edge of a flat roof approximately 18 feet high. There was no perimeter guard on the roof and personal protective equipment to guard against falls was not provided for the employees.

The Hearing Officer has found that safety lines are not feasible but under the conditions here a safety rail would provide protection in many instances. He has affirmed the citation and proposed penalty as a repeat violation. We must disagree with his findings on this matter.

In a recent decision the Franklin Circuit Court held that rail guarding cannot be required for flat roofs under 29 CFR 1926.500 (d)(1) (as adopted by 803 KAR 2:030). There are feasible personal protective devices and equipment to protect employees working under these conditions. Thus, the Respondent has violated 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030). The Respondent was previously found to be in violation of the railing standard and that violation was the basis for the repeat designation here. Although employees were exposed to a fall in both cases, the Respondent is now found in violation of a different standard. Therefore a repeat designation is inappropriate and the penalty is reduced to $100.00.

Accordingly it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has vacated the violation of 29 CFR 1926.105(a)(4) (as adopted by 803 KAR 2:030) is hereby REVERSED, the citation and no penalty provision is AFFIRMED. Abatement shall be accomplished in seven (7) days. The Commission further finds a violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) as alleged in Citation 3, Item 1, and imposes a penalty of $100.00. Abatement shall be made in seven (7) days. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

Merle H. Stanton, Chairman

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

DATED: December 13, 1977
Frankfort, Ky.

/s/ John C. Roberts
John C. Roberts, Commissioner

DECISION NO. 501

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: Frederick G. Huggins
Assistant Counsel

Ms. Robert C. Geoghegan, Sec., Treas. (Certified Mail #240801)
Geoghegan Roofing and Supply, Inc.
411 Dishman Lane
Bowling Green, Kentucky 42101

Honorable Philip I. Huddleston (Certified Mail #240802)
Attorney at Law
1032 College Street
Bowling Green, Kentucky 42101

This 13th day of December, 1977.

Iris R. Barrett
Executive Director

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
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JULIAN M. CARROLL
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EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

KOSHRC Decision + Order No. 472

September 20, 1977

KOSHRC #364

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

GEOGHEGAN ROOFING & SUPPLY, 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: Frederick G. Huggins
Assistant Counsel

Mrs. Robert C. Geoghegan, Sec./Treas. (Certified Mail #240712)
Geoghegan Roofing and Supply, Inc.
411 Dishman Lane
Bowling Green, Kentucky 42101

This 20th day of September, 1977.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #364

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

GEOGHEGAN ROOFING & SUPPLY — RESPONDENT

## STATEMENT OF THE CASE

This matter arises out of three citations issued against Geoghegan Roofing and Supply, Inc., hereinafter referred to as "Geoghegan", 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 March 16, 1977, a Compliance Officer for the Commissioner made an inspection of a jobsite in Bowling Green where Geoghegan was installing a new roof. As a result of that inspection, the Commissioner issued three citations against Geoghegan on March 30, 1977, charging Geoghegan with six nonserious and two repeated nonserious violations of the Act, and proposing a total penalty therefor of $386.00.

On April 11, 1977, and within 15 working days from receipt of the citations, Geoghegan filed a notice with the Commissioner contesting all the citations. Notice of the contest was transmitted to this Review Commission on April 14, 1977, and notice of receipt of the contest was mailed to Geoghegan on April 15, 1977. The Commissioner then filed its Complaint on April 27, 1977. By separate notices dated May 18, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Bowling Green on June 9, 1977, pursuant to KRS 338.070(4). 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 the Review Commission on appeal timely filed by either party, or upon its own motion.

The standards alleged to have been violated (as adopted by 803 KAR 2:030 pursuant to KRS 338.061), the description of the alleged violations, and the penalties proposed for same, are as follows:

| | | |
|---|---|---|
| 29 CFR 1926.51 (a)(4) | A common cup was used for drinking water (bottle used). | $ -0- |
| 29 CFR 1926.100 as amended by 803 KAR 2:030 Section 1(2)(a) | Hard hats were not worn by all employees at all times while engaged in construction work. | $ -0- |
| 29 CFR 1926.150 (a)(1) | A portable fire extinguisher was not maintained in a fully charged and operable condition. | $ -0- |
| 29 CFR 1926.152 (a)(1) | Approved metal safety cans were not used for the handling of gasoline (flame arrestor missing from larger safety can, smaller can for derrick not a safety can). | $ -0- |
| 29 CFR 1926.153 (g) | LP-Gas cylinders used with the tar kettle were not firmly secured. | $ -0- |
| 29 CFR 1926.550 (a)(b) | A record of the dates and results of thorough annual inspections of each hoisting machine was not maintained (derrick). | $ -0- |
| 29 CFR 1926.450 (a)(10) | A portable ladder was not tied, blocked, or otherwise secured to prevent its displacement. | |
| | and | $176.00 |

| | | |
|---|---|---|
| 29 CFR 1926.450 (a)(9) | The side rails of a portable ladder did not extend a least 36 inches above the landing. | |
| 29 CFR 1926.500 (d)(1) | An open-sided roof 6 feet or more above the ground was not guarded by a standard railing (or equivalent). | |
| or | | $210.00 |
| 29 CFR 1926.28 (c) | Nor was appropriate personal protective equipment (i.e. safety belts, lifelines, or equivalent) worn by employees exposed to falling from the roof. | |

The last four were cited as repeat violations of the same standards contained in a citation issued against Geoghegan on May 14, 1975.

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

Geoghegan is a roofing contractor who, on the day of the inspection was installing a new roof on a K-Mart store building in Bowling Green. The roof it was installing was an asphalt roof covered by gravel and consisted of three layers of felt and asphalt and one layer of gravel and asphalt.

To install the roof, the asphalt was first reduced to a molten state. This was done by melting the asphalt in kettles heated by LP-Gas. Geoghegan had two kettles at the site. These kettles were standing on a paved parking lot adjacent to the store. Two LP-Gas cylinders were connected to the kettles by a hose. The cylinders were also standing on the parking lot and, except for the hose connecting them to the kettle, they were unsecured and could be rocked back and forth about three to four inches.

After the asphalt was reduced to a molten state, it was pumped through a hose up to the roof to a point about five feet from the edge. There it was collected in pots in which it was carried to the area of the roof where it was to be applied.

The felt used to cover the roof was a black tar paper which came in rolls three feet wide. Part of the felt was lifted to the roof in a truck whose bed could be raised, and the rest was lifted by means of a mechanical monorail hoist attached to the edge of the building. The hoist was also used to lift all of the gravel to the roof.

The hoist operated by first lifting the materials from the ground in a bucket. When the bucket was able to clear the edge, the hoist carried it onto the roof to a point approximately four feet from the edge. When it was lifting gravel, the men would line up at this point with wheelbarrows. The gravel was then emptied into the wheelbarrows and the loaded wheelbarrows were moved to the area of the roof where the gravel was needed. Although the men pushing the wheelbarrows were not required to come close to the edge of the roof, occasionally they would lose control of a heavy load and veer towards the edge.

The hoist was operated by one employee who stood at the edge of the roof. A narrow vertical bar, which was a part of the hoist, stood between the employee and the edge of the roof. This bar was the only means of protection the employee had to protect him from falling.

The hoist was maintained by Geoghegan's employees at the company's shop. That is also where all records of such maintenance are kept. No maintenance records were kept at the jobsite where the hoist was being used.

Two men were needed to install a layer of asphalt and felt. The first, a "mopper" spread the asphalt on the deck of the roof, and the

second, a "felt layer" unrolled the felt over the asphalt. The felt was laid in parallel strips lengthwise along the roof beginning at one corner. To start a roll the mopper applied about 3 or 4 feet of asphalt from one edge of the roof. The felt layer then unrolled enough felt to cover that area. When that small area was covered the felt layer and the mopper reversed their direction and the mopper then applied asphalt to the roof deck in front of the roll while the felt layer unrolled the felt across the asphalt. This process was repeated until three layers of felt had been laid. Then a top layer of asphalt and gravel was laid to form the cover of the roof.

Both the mopper and the felt layer worked at the side of the strip being covered. Therefore, except when they were laying the last strip of each layer, they did not come closer than three feet to the edge of the roof during the process.

On the day of the inspection Geohegan had eight employees working at the site. None of the employees were wearing hard hats. Drinking water was furnished for the employees in a bottle out of which apparently all employees had to drink.

On the ground near the kettles, the Compliance Officer observed a fire extinguisher which was not fully charged, and which was missing a safety pin that is used to prevent accidental discharges. Although this fire extinguisher would have been of little use in the event of a fire, Geoghegan had another substance called "Dri Fog", available in a truck parked nearby. This substance is a powder which is thrown onto a fire to extinguish it.

There were also two cans containing gasoline on the roof. The larger can did not have a flame arrester in its spout. This is a

device used to prevent flammable liquids from exploding when ignited. The smaller gasoline can did not have a flame arrestor, a spring loaded lid, or a proper ventilation system to allow vapors accumulating in the can to escape.

To gain access to the roof, which was approximately 18 feet high, the employees used a portable ladder. The rails of this ladder extended approximately 18 inches above the roof. The ladder was not secured or tied to the wall in any way.

CONCLUSIONS OF LAW

29 CFR 1926.51(a)(4), provides in part:

> Sanitation . . . . Potable Water . . . . The common drinking cup is prohibited.

At the time of the inspection, Geoghegan had eight employees on the job, and provided a single bottle of water which all could drink from. It is apparent from the evidence that there were no means for the employees to obtain a drink other than directly from the bottle. This is in clear violation of the standard.

29 CFR 1926.100 as amended by 803 KAR 2:030(1)(ii)(a), provides:

> Hard hats conforming to the specifications of the American National Standards Institute safety requirements for industrial head protection, (Z) 89.1 (1971), shall be worn by all employees at all times, while engaged in a type of work covered by the scope of this Safety Standard.

This safety standard is intended to protect employees from head injuries when they are exposed to the hazard of falling or flying objects. Although, it was not established that the employees working on the roof were exposed to such a hazard, there were at least two or three working on the ground below who were. Since none of the employees at the site were wearing hard hats, Geoghegan was in violation of this standard as well.

29 CFR 1926.150(a)(4) provides:

> Fire protection . . . . General requirements . . . . All firefighting equipment shall be periodically inspected and maintained in operating condition. Defective equipment shall be immediately replaced.

The fire extinguisher observed by the Compliance Officer was certainly in violation of this standard. It was not fully charged and its safety pin was missing. The question remains, though, whether it presented a hazard to the employees under the circumstances. In our opinion it did not.

Geoghegan did not rely upon the fire extinguisher for protection. Instead, Geoghegan had a quantity of a substance known as "Dri Fog" which it relied upon to extinguish any fires that might erupt. Therefore, the failure to maintain the fire extinguisher in operating condition was not a violation of the Act in these circumstances.

29 CFR 1926.152(a)(1) provides:

> Flammable and combustible liquids . . . . General requirements. Only approved containers and portable tanks shall be used for the storage and handling of flammable and combustible liquids. Approved metal safety cans shall be used for the handling and use of flammable liquids in quantities greater than one gallon, except that this shall not apply to those flammable liquid materials which are highly viscid (extremely hard to pour), which may be used and handled in original shipping containers. For quantities of one gallon or less, only the original container or approved metal safety cans shall be used for storage, use and handling of flammable liquids.

The two cans containing gasoline observed by the Compliance Officer were in violation of the standard in that they did not meet the requirements of an approved container. They, therefore, presented a hazard of fire to the employees working at the site and violated the standard.

29 CFR 1926.153(g) provides:

> Liquified petroleum gas (LP-Gas) . . . . Containers and regulating equipment installed outside of buildings or structures. Containers shall be upright upon firm foundations or otherwise firmly secured. The possible effect on the outlet piping of settling shall be guarded against by a flexible connection or special fitting.

Although the cylinders were standing in a paved parking lot, the testimony established that they were in an unsteady position and there was a possibility that they might tip over. In that event, the only thing which would prevent them from striking the ground was a hose connecting the cylinders to the kettle. Because of the weight of the cylinders, the hose would not appear to be adequate to prevent the cylinders from falling completely to the ground and therefore, the failure to firmly secure them was a violation of the standard.

29 CFR 1926.550(a)(6) provides:

> Cranes and Derricks . . . . General requirements . . . . A thorough annual inspection of the hoisting machinery shall be made by a competent person, or by a government or private agency recognized by the U. S. Department of Labor. The employer shall maintain a record of the dates and results of inspections for each hoisting machine and piece of equipment.

The standard requires the employer to do two things, namely: to cause each hoisting machine to be inspected annually by a qualified person and to keep a record of each such inspection. In the instant case Geoghegan was cited for failing to maintain the proper record at the jobsite.

Geoghegan maintains that such a record, though not available at the jobsite, was kept at its shop where the inspection of the machine was conducted. Goeghegan contends that the language of the citation does not require the record to be kept at the jobsite, and therefore, so long as a record was kept at its place of business, the standard was not violated.

This precise question was raised in the case of Verne--Woodrow Company - OSHD - ¶ 15,562 (1973). In rejecting the argument that the standard does not require the records to be kept at the jobsite, the judge held that even though the standard is silent as to where the records must be kept, when read in conjunction with other sections of the Act, "it is clear that the record must be maintained at the workplace". The judge reasoned that if the records could be kept away from the job, enforcement of the standard would become extremely difficult.

For these reasons, even if Geoghegan did maintain a record of the inspection at its shop, the failure to maintain such a record with the hoist was a violation of the standard.

29 CFR 1926.450(a)(9) and (10) provides:

> Ladders . . . . General requirements . . . . The side rails shall extend not less than 36 inches above the landing. When this is not practical, grab rails, which provide a secure grip for an employee moving to or from the point of access, shall be installed . . . .
>
> Portable ladders in use shall be tied, blocked, or otherwise secured to prevent their being displaced.

Although cited as only one violation, in fact, there would appear to be two violations involving the same ladder. The obvious purpose of the first paragraph set out above is to provide employees using the ladder with something to hold onto when moving from the top of a ladder onto a landing. The second paragraph is intended to ensure that ladders being used to gain access to heights be firmly secured. Both are intended to provide protection from falls.

The ladder being used by Geoghegan's employees to gain access to the roof on which they were working was clearly in violation of these

standards. Further, in view of the repeat nature of the violation, the penalty proposed for the violation was appropriate under the circumstances.

29 CFR 1926.500(d)(1) provided in part as follows:

> Guardrails, handrails and covers . . . . Guarding of open-sided floors, platforms and runways . . . . Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent . . . . on all open-sides . . . .

29 CFR 1926.28(a) provides:

> Personal protective equipment . . . . The employer is responsible for requiring the 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 to the employees.

The roof upon which Geoghegan's employees were working at the time of the inspection was a flat roof 18 feet above the ground and had no railing or equivalent protection to prevent the employees from falling over the side. Nor were the employees wearing any protective equipment to prevent their falling. Geoghegan contends, however, that such protective devices were not necessary because their absence did not expose the employees to any hazard. Geoghegan also contends that the use of protective devices such as railings and safety lines, would not be feasible in roofing work and their use, rather than reducing the employees exposure to hazardous conditions, would in all likelihood increase the hazard.

For the most part we would agree that safety lines would not be feasible, and, because of the required diverse movements of the employees across the roof, might even create an additional hazard. An exception would be the operator of the hoist who stands in one position, and who could secure a line to the vertical bar upon which the controls are located.

We would also agree that a rail cannot be placed along the edge of the roof when a layer of tar paper and asphalt is being installed along that edge by a mopper and felt layer. But there are times when employees are required to work near the edge, or when they are inadvertently drawn near the edge when moving heavy loads of gravel in a wheelbarrow. On those occasions the presence of a safety rail would serve to protect the employees from falling and the failure to provide them constitutes a violation of the standard. Furthermore, in view of the repeat nature of the violation, the penalty proposed was appropriate under the circumstances.

RECOMMENDED DECISION

Upon the basis of the foregoing Findings of Fact, Conclusions of Law, and upon the entire record,

IT IS HEREBY ORDERED:

That the citation issued March 30, 1977, charging a nonserious violation 29 CFR 1926.51(a)(4) (as adopted by 803 KAR 2:030) is hereby affirmed.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.100 as amended by 803 KAR 2:030 Section 1 (2)(a) is hereby affirmed.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.150(a)(4) (as adopted by 803 KAR 2:030) is hereby vacated.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.152(a)(1) (as adopted by 803 KAR 2:030) is hereby affirmed.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.153(g) (as adopted by 803 KAR 2:030) is hereby affirmed.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.550(a)(6) (as adopted by 803 KAR 2:030) is hereby affirmed.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.450(a)(10) and 29 CFR 1926.450(a)(9) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of $176.00 is hereby affirmed.

That the citation issued March 30, 1977, charging a nonserious violation of 29 CFR 1926.500(d)(i) or 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of $210.00 is hereby affirmed.

Paul Shapiro

PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: September 20, 1977
Frankfort, Kentucky

DECISION NO. 472