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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 13, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #378

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Reynolds &
Order No 539*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

STEEL BUILDERS OF KENTUCKY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman, UPTON and ROBERTS, Commissioners.

ROBERTS, Commissioner, FOR THE MAJORITY:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of December 27, 1977, is presently before this Commission for review pursuant to an Order of Direction for Review.

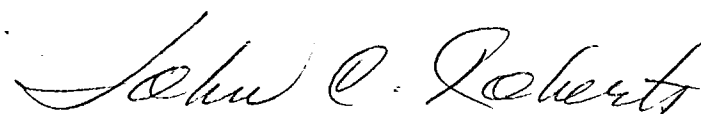
The Hearing Officer has affirmed the citation charging a serious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) with a penalty of \$500.00.

The personal protective equipment standard cited in this case is very broad in scope. The Federal Review Commission has held that specific measures of compliance as well as the feasibility and utility of these measures must be shown to support a violation under 1926.28(a). We feel that it is incumbent upon the Department of Labor to show some means of compliance in order to sustain a violation under this standard. It then becomes the responsibility of the Respondent to raise defenses of infeasibility or impossibility of compliance.

The Complainant has not met its burden of proof in this case. Only vague reference is made to safety belts and lifelines with no proof as to how those devices may be employed under the

circumstances at hand to prevent employee exposure to the hazard of a fall. Perimeter guarding and safety nets are mentioned by the Compliance Officer as equivalent means of protection. These are methods of eliminating the fall hazard but these standards have not been cited and are inapplicable to the situation at the time of inspection.

IT IS ORDERED by a majority of this Commission that the decision of the Hearing Officer affirming a serious violation of 29 CFR 1926.28(c) (as adopted by 803 KAR 2:030) and a penalty of \$500.00 is hereby REVERSED. The citation and proposed penalty are VACATED.


John C. Roberts, Commissioner

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

STANTON, Chairman, DISSENTING:

I dissent from the opinion of the majority in this case. The Hearing Officer's decision should be sustained. The Complainant has established a serious violation of the Standards and the proposed penalty is appropriate.

/s/ Merle H. Stanton
Merle H. Stanton, Chairman

DATED: March 13, 1978
Frankfort, Kentucky

DECISION NO. 539

This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

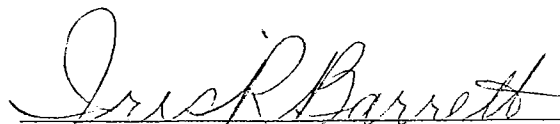
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. Joseph R. Lyvers (Certified Mail #783037)
Steel Builders of Kentucky
Route 4, Box 250E
Bardstown, Kentucky 40004

Mr. Doug Lyvers (First Class Mail)
Route #1
Bardstown, Kentucky 40004

This 13th day of March, 1978.



Iris R. Barrett
Executive Director



378(505)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

REVIEW COMMISSION

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

December 27, 1977

*KOSHRC
Decision +
Order No 505*

KOSHRC # 378

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

STEEL BUILDERS OF KENTUCKY

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 P. O'Mara
Assistant Counsel

Mr. Joseph R. Lyvers (Certified Mail #240814)
Steel Builders of Kentucky
Route 4, Box 250E
Bardstown, Kentucky 40004

Mr. Doug Lyvers (First Class Mail)
Route #1
Bardstown, Kentucky 40004

This 27th day of December, 1977.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHR #378

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

STEEL BUILDERS OF KENTUCKY

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of two citations issued against Steel Builders of Kentucky, hereinafter referred to as "Steel Builders", 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 May 18 and 19, 1977, a Compliance Officer for the Commissioner made an inspection of a construction site on Gardiner Lane in Louisville. As a result of that inspection, the Commissioner issued two citations on May 27, 1977, charging Steel Builders with two nonserious violations of the Act and one serious violation of the Act, and proposing a penalty therefor of \$500.00.

Steel Builders on June 6, 1977, and within 15 working days from receipt of the citation, filed a notice with the Commissioner contesting the second citation. Notice of the contest was transmitted to this Review Commission on June 7, 1977, and notice of receipt of the contest was sent to Steel Builders on June 8, 1977. Thereafter, the Commissioner on June 21, 1977, filed its Complaint and on August 2, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Louisville on August 17, 1977, pursuant to KRS 338.070(4). That section of the statutes authorizes this Review Commission to rule on appeals from citations, notations and variances to 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 discretionary review by the Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

The standard (as adopted by 803 KAR 2:030) allegedly violated, the description of the alleged violation and the penalty proposed for same, are as follows:

29 CFR 1926.28(a)	Safety belts and life lines were not being worn at all times by employees who were exposed to the hazards of a fall of fifteen (15) to eighteen (18) feet to the ground while installing insulation and roof decking on the Service Area, nor was equivalent protection such as prescribed in 1926.105(a) and 1926.500(d)(1) provided.	\$500.00
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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

Steel Builders is a structural steel contractor who, on the day of the inspection, was engaged in installing a roof and roof insulation on a building being constructed for an automobile dealership. The roof being constructed was approximately 15 to 18 feet above the ground and consisted of panels approximately 20 feet long and 3-1/2 feet wide. In installing the roof, Steel Builders' employees would lay the panels down in front of them, gradually covering the roof from one end to the other. This exposed them to the hazard of a fall through the open area in front of them.

While installing the insulation, one or two of the employees were required to come to the edge of the building. This also exposed them to the hazard of a fall.

None of the employees were secured by a lifeline or safety belt to prevent them from falling. Nor was there any perimeter guarding, safety net, catch platforms or other safety devices present to provide protection from a fall.

Because of the height at which the employees were working, a fall from the roof could result in death or serious bodily injury. For this reason the failure to provide protection against such a fall was cited as a serious violation.

The Commissioner proposed a \$500.00 penalty for the alleged violation. The penalty was proposed in accordance with guidelines established by the Commissioner in order to obtain uniformity in the application of penalties throughout the state. Under these guidelines, all serious violations carry a proposed unadjusted penalty of \$1,000.00. The guidelines also permit a reduction of the unadjusted penalty of up to 20% for the employer's good faith in complying with the Act, up to 20% for the history of the employer in complying with the Act, and up to 10% for the size of the employer in terms of the number employed. In this case, Steel Builders received the maximum adjustment of 50%, reducing the proposed penalty to \$500.00.

Before making his inspection, the Compliance Officer presented his credentials to the superintendent for the general contractor, a Mr. Dan Payne. The Compliance Officer and Mr. Payne then contacted all of the foreman for the subcontractors on the site. Steel Builders, as one of the subcontractors, did not have a foreman or other supervisor at the site and the brother of the company's owner, who is employed by the company as a laborer, represented Steel Builders at the opening conference.

CONCLUSIONS OF LAW

29 CFR 1926.28(a) provides as follows:

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 employees.

The Commissioner has interpreted this standard to require the use of lanyards, safety belts or lifelines, when employees working in steel erection are exposed to a possible fall of 10 feet or more. That interpretation would not be applicable here, though, since Steel Builders was not engaged in steel erection at the time of the inspection.

The citation, however, did not limit the application of the standard to safety belts, and lifelines, but found a violation because neither these nor other protective devices were used by Steel Builders even though there was a risk of a fall and the possibility of serious injury. Like the citation, the standard requires "appropriate personal protective equipment . . . where there is exposure to hazardous conditions", and the failure of Steel Builders to require the use of such equipment was a violation of the standard.

KRS 338.111 provides that a representative of the employer shall be given an opportunity to accompany the Compliance Officer when he makes his inspection. This section of the statute is identical to Section 8(e) of the Federal Act which has been construed to require the Compliance Officer to afford employers the opportunity to accompany him. However, even though the section is mandatory, the failure to formally extend an offer to the employer will not void the inspection where there has been substantial compliance with the Act and the employer is unable to demonstrate that prejudice resulted from his nonparticipation. Chicago Bridge and Iron Company v. Occupational Safety and Health Review Commission, 535 F 2nd 371 (7th Cir.; 1976).

Here, Steel Builders has not demonstrated that it was prejudiced by the absence of a management representative from the inspection. Furthermore, the compliance officer sought to find a representative of the company before making his inspection, and apparently thought one was present. All in all, the Act was substantially complied with and the inspection and citation were proper.

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 May 27, 1977, charging a serious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030), and proposing a penalty therefor of \$500.00, be and is hereby affirmed.

IT IS FURTHER ORDERED that the violation must be abated immediately upon receipt of this Decision, and the penalty must be paid without delay but no later than 30 days from the date hereof.



PAUL SHAPIRO
HEARING OFFICER
KOSHRRC

DATED: December 27, 1977
Frankfort, Kentucky

DECISION NO. 505