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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

KOSHRC Decision + Order No. 559

April 17, 1978

KOSHRC #386

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

AMBROSIUS ERECTING CORP. — 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 January 30, 1978, is before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Respondent.

An arc welder on the construction site had unguarded terminals for the welding leads. This condition was cited as a nonserious violation of the standards. At the time of inspection the welder was not in operation and the Compliance Officer did not determine whether the machine was operable. The Hearing Officer has recommended that this citation be vacated. The Recommendation is based upon the finding that the Complainant has taken the position in other cases that machines which do not conform to the requirements of the Act, but are inoperable, do not violate the Act.

We disagree with and reverse the Hearing Officer's recommendation on this point. The welder was on the job site and not guarded in compliance with the standard. Employees had ready access to the machine and a violation has been established. If for some reason employees could not be exposed, i.e., the machine was inoperable, this point should be raised as a defense to the citation.

The second item involves an alleged nonserious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030). Employees were observed riding on a work platform and working on structural steel 14 feet above the ground without safety belts and lanyards to protect against a fall. The Hearing Officer has sustained this violation and his recommendation is clearly supported by the record. The introduction of a standards interpretation directive regarding this item created some confusion. The directive is not a standard but is issued to explain the Department of Labor's interpretation of a particular standard. We affirm the Hearing Officer's recommendation sustaining a violation as alleged.

The Hearing Officer has sustained a violation of 29 CFR 1926.152(e)(2) as alleged in Citation 1 of Item 3. The Compliance Officer did not observe any form of electrical interconnection or bonding as required by the standard. An employee of the Respondent told the Compliance Officer that the gasoline transfer system did not contain an internal bonding system. Employees had ready access to the system and if an interval bonding system did exist, as implied in the Respondent's brief, this should have been presented as a defense. We agree with the recommendation on this item.

The Hearing Officer has sustained a violation of 29 CFR 1926.152(g)(9) (as adopted by 803 KAR 2:030). He has correctly stated that the purpose of the standard is to restrict smoking in service and refueling areas at all times. The record indicates that the required signs were not posted at the time of inspection. We affirm this recommendation.

The major issue in this case involves an alleged repeat serious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030). Employees of the Respondent were observed working on structural steel approximately 28 feet in the air without any form of fall protection. The record indicates that the employees were performing connecting work. During this connecting process it is more hazardous to be tied off. The Hearing Officer has sustained a repeat serious violation as alleged. We disagree and reverse.

Mr. Shapiro reached his recommendation on this item by finding that the Respondent could have and should have protected the employees from the hazard of a fall with safety nets. The Respondent was not cited for a violation of the safety net standard, it was mentioned only within the description of the alleged personal protective equipment violation.

The employees were unfortunately exposed to a fall hazard but use of safety belts and lanyards is a greater hazard under the circumstances. We need not address the questions of whether the Respondent could have been found in violation of the safety net standard if properly cited or whether the previous settlement could be the basis for a designation of a repeat violation.

Accordingly it is ORDERED that the Recommendation vacating a nonserious violation of 29 CFR 1910.252(b)(2)(iv)(d) (as adopted by 803 KAR 2:020) is hereby REVERSED and the violation is SUSTAINED.

That the recommendation sustaining nonserious violations of 29 CFR 1926.28(a), 29 CFR 1926.152(e)(2), and 29 CFR 1926.152 (g)(9) (as adopted by 803 KAR 2:030) is AFFIRMED.

That the recommendation sustaining a repeat serious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) and a penalty of $1700 is hereby REVERSED. The citation and penalty are VACATED. All other findings of the Hearing Officer not inconsistent with this decision are AFFIRMED.

Merle H. Stanton, Chairman

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

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

Dated: April 17, 1978
Frankfort, Kentucky

DECISION NO. 559

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
U. S. 127 South
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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Frederick G. Huggins
Assistant Counsel

Honorable D. Patton Pelfrey (Certified Mail #783111)
BROWN, TODD & HEYBURN
Sixteenth Floor, Citizens Plaza
Louisville, Kentucky 40202

Mr. J. E. Redding, President (First Class Mail)
Ambrosius Erecting Corp.
2791 South Floyd Street
Louisville, Kentucky 40213

This 17th day of April, 1978.

Iris R. Barrett
Executive Director

Payne

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
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GOVERNOR

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MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC Decision & Order No 527

January 30, 1978

KOSHRC # 386

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

AMBROSIUS ERECTING CORP. — 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

Honorable D. Patton Pelfrey (Certified Mail #783010)
Brown, Todd & Heyburn
Sixteenth Floor, Citizens Plaza
Louisville, Kentucky 40202

Mr. J. E. Redding, President (First Class Mail)
Ambrosius Erecting Corp.
2791 South Floyd Street
Louisville, Kentucky 40213

This 30th day of January, 1978.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #386

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

V.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

AMBROSIUS ERECTING CORP. — RESPONDENT

STATEMENT OF THE CASE

This matter arises out of two citations issued against Ambrosius Erecting Corporation, hereinafter referred to as "Ambrosius" 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 14, and 15, 1977, a Compliance Officer for the Commissioner made an inspection of a construction site at the Jefferson Mall in Louisville. As a result of that inspection, the Commissioner issued two citations on June 17, 1977, charging Ambrosius with four nonserious violations of the Act and one repeated serious violation of the Act. The Commissioner proposed a penalty of $1700.00 for the serious violation.

On June 24, 1977, and within 15 working days from receipt of the citations, Ambrosius filed a notice with the Commissioner contesting the citations. Notice of the contest was transmitted to this Review Commission on June 29, 1977, and notice of receipt of the contest was sent by the Review Commission to Ambrosius on the same date. Thereafter, on July 13, 1977, the Commissioner filed its Complaint and on August 1, 1977, the matter was assigned to a Hearing Officer and scheduled for a hearing

on August 16, 1977. On the following day, August 2, 1977, the Respondent filed its Answer.

The Commissioner on August 4, 1977, filed a Motion to continue the hearing and by Order dated August 9, 1977, the hearing was rescheduled to September 8, 1977. Subsequently, on Motion of the Respondent filed September 6, 1977, the hearing was again continued to October 4, 1977.

The hearing was held in Louisville on October 4, 1977, pursuant to KRS 338.070(4). That section of the statute authorizes this Review Commission to rule on appeals from citations, notifications 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 to 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 its own motion.

The standards allegedly violated (as adopted by 803 KAR 2:020 and 2:030) the descriptions of the alleged violations, and the penalties proposed for same are as follows:

1910.252(d)(2)(iv)(d)	The terminals for welding leads on the "Lincoln" arc welder (A445375), at the southwest side of the building were not protected from accidental electrical contact by personnel or by metal objects.	$.00
1926.28(a)	Iron workers using the suspended work platform of the "Lorain" 550 Moto Crane for access to the structural steel at the northwest side of the building were not wearing safety belts and lanyards attached to a leg of the sling or to the master link of the work platform. AND; Iron workers on the structural steel at the northwest side of the building were not wearing safety belts, lifelines and lanyards to protect them from a fall of approximately 14 feet to the concrete floor below nor was any other protection provided.	$.00

1926.152(3)(2)	The transfer of gasoline, a flammable liquid, from the container on the equipment truck at the east side of the site to other containers was done without the containers electrically interconnected.	$.00
1926.152(g)(9)	Conspicuous and legible signs prohibiting smoking were not posted at the portable tank on the equipment truck on the east side of the site.	$.00
1926.28(a)	Iron workers on the structural steel at the northwest side of the building were not wearing safety belts, lifelines, and lanyards to protect them from a fall of approximately 28 feet to the concrete floor below, nor were safety nets as provided for in 1926.105(a) or any other type of protection used.	$1700.00

The last item was cited as a repeat violation for which Ambrosius was issued a citation on April 29, 1976.

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

Ambrosius is engaged in steel erection, rigging and millwright work which, although they are separate operations, are related to one another and generally performed by iron workers. Steel erection, as its name implies, is the erection of steel skeletal structures, such as the steel framework of a building. Rigging is the moving of heavy equipment into place in such structures, and millwright work refers to the leveling and alignment of such structures.

On June 14, and 15, 1977, the days the inspection was made, Ambrosius was erecting the steel structure for a building at the Jefferson Mall in Louisville. The crew performing the job was being supervised by a foreman and consisted of four iron workers and two operators. The structure under construction had two elevated levels, the first level being 14 feet above

ground, and the top level being approximately 28 feet above ground. Two of the iron workers were observed working as "steel connectors" on the top level. At the same time, the other two iron workers were working on the ground "hooking" steel beams to a crane. Of the two operators, one was operating the crane and the other was functioning as a handyman. The iron workers on the top level were not wearing any steel belts, lanyards or lifelines, nor were there any nets or other devices in use to protect them from falling to the ground.

During the course of his inspection, the Compliance Officer apparently observed one or more of Ambrosius' employees on the first level as well. They too were not wearing safety belts, lanyards or lifelines, nor were there any devices present to protect them from a fall. No testimony, however, was presented concerning what job they were performing.

Steel erection was described as consisting of three basic phases, namely: steel connecting, plumbing and aligning, and bolting. The three phases are performed in that order.

In steel connecting a steel beam is lifted by a crane to the area of the skeletal structure to which it is to be attached. When the steel beam is to be installed horizontally between two other beams, two steel connectors simultaneously guide each end of the beam into position and insert one or two bolts into the beam at the point of connection to hold it in place. The bolts, however, are not tightened at this time.

After all the beams are in place and the skeletal frame is complete, the second phase of the operation is performed. In this phase, the skeletal structure is plumbed and aligned.

The final phase, "bolting", is performed when the structure has been plumbed and aligned. In this phase, additional bolts are inserted through the steel beams at all points of connection and the bolts are then tightened to secure the connection.

During the connecting phase of the steel erection it is important that the mobility of the steel connectors not be restricted. Otherwise, they may be unable to avoid the irregular movement of the steel beams as they are lifted into position. Thus, it is generally recognized by steel erectors that the steel connectors should not be required to wear safety belts, lifelines or lanyards which would hamper their movements while connecting steel. This is because such equipment could create a greater hazard than they prevent.

The increased hazard presented by safety belts, lifelines and lanyards during connection is recognized by the Commissioner. In a directive to its Compliance Officers, relating to the interpretation and enforcement of 29 CFR 1926.28(a), the Commissioner states that such equipment shall not be required while connecting steel. However, the directive goes on to interpret the standard to require the use of other protective equipment, such as, for example, safety nets, during the connecting phase of steel erection.

Ambrosius, as a part of its safety program, provides its foremen with safety belts, lanyards and lifelines for each member of their crews who works above ground. In addition, Ambrosius provides its foremen with safety nets which the foremen are directed to use if they are feasible during connecting operations. It is apparently left to the discretion of the foremen, who are experienced iron workers, to determine whether safety nets are feasible for a particular job.

In this case, the foreman, although, he had been provided with safety nets, did not use them during the steel connecting operations on the top level. Instead, he had intended to use in their place metal flooring to be installed on the level immediately below. However, at the time of the inspection, the framework of the lower level had not been completed sufficiently to install the flooring so that, with the

exception of the existing steel framework on that level, there was nothing to prevent the employees working on the top level from falling to the ground 28 feet below.

Because a fall of 28 feet exposed the steel connectors to a threat of serious bodily injury or death, the failure to wear safety equipment, or use other protective devices, was cited as a serious violation of the Act. The Compliance Officer proposed a penalty of $1700.00 for the alleged violation. This penalty was proposed in accordance with guidelines established by the Commissioner in order to obtain uniformity in the proposal of such penalties. Under the Commissioner's guidelines, an unadjusted penalty of $1,000.00 is proposed for all serious violations. These same guidelines also permit an adjustment of up to 20% for the good faith shown by the employer in complying with the Act, of up to 20% for the history of the company in complying with the Act, and up to 10% for the size of the employer in terms of the number employed. Although, some judgment must be used in determining the proper amount to be allowed for good faith and history, the size adjustment is a purely mathematical computation. Employers with less than 20 employees are given the maximum adjustment or 10% for size, those with 20 to 99 employees are given a 5% adjustment for size, and those with 100 or more employees are given no adjustment for size.

In this case, Ambrosius was not allowed any adjustment for good faith because the violation was cited as a repeat violation. In addition it was allowed only 10% for history because the company had been inspected on previous occasions. Since Ambrosius had between 20 and 99 employees it was also allowed only a 5% adjustment for size. These adjustments reduced the unadjusted penalty to $850.00. Again, in accordance with the Commissioner's policies, because the violation was cited as repeated, the adjusted penalty was multiplied by two resulting in the proposed penalty of $1700.00.

The earlier violation, upon which the repeat allegation is based, was cited on April 29, 1976. It too alleged a serious violation of 29 CFR 1926.28(a) for failing to use safety belts, lifelines and lanyards or other protective equipment while working 30 feet above the ground and proposed a penalty of $650.00. The citation was contested in Comissioner of Labor v. Ambrosius Erecting Corp. KOSHRC #274 and then settled by written agreement of the parties. Under the terms of that agreement an Order was entered permitting Ambrosius to withdraw its notice of contest, sustaining the citation and reducing the penalty from $650.00 to $500.00. In the Order, it was noted that although Ambrosius agreed to withdraw its contest and pay the fine, it did not admit a violation of the Act.

Ambrosius had a Lincoln Arc Welder at the construction site to which electrical terminal welding leads were attached by wing nuts. These leads were not covered at the point of attachment so that during any operation of the welder they presented a hazard of electrical shock to employees coming in accidental contact with them. At the time of the inspection, however, the welder was not in operation and the Compliance Officer did not ascertain if it was in fact operable.

The arc welder was powered by a gasoline motor. Gasoline for the welder was stored in a 110 gallon portable tank. In transferring gasoline from the tank to the welder, the Compliance Officer was informed by the foreman that no method of bonding was used. Bonding is a process whereby a wire is attached to the tank in which a flammable liquid, such as gasoline, is stored and a tank in which the flammable liquid is being transferred. The purpose of the wire is to minimize the danger of static electricity creating a spark which could ignite the fuel during the transfer. The failure to connect or "bond" the two tanks with such a wire creates a hazard of explosion when the fuel is being transferred.

The 110 gallon portable tank was stored on the back of a utility truck at the construction site. No signs were installed in the vicinity of the truck prohibiting smoking in the area, or otherwise giving warning of the existence of the gasoline. Although, the Compliance Officer during his inspection ascertained the purpose of the tank and its usual contents, he did not inspect the tank. He, therefore, did not know if it contained gasoline at the time of his inspection.

To lift the iron workers onto the structure under construction, Ambrosius used a working platform attached to a Lorain crane. The platform was 48 inches long and 9 inches wide, and was equipped with guardrails. The Compliance Officer observed Ambrosius' employees being carried on the platform who were not tied off to the crane or to the master link of the platform. Therefore, except for the guardrails, there was nothing to prevent them from falling from the platform if it unexpectedly swung out of control or tipped over.

Although, the Compliance Officer cited the failure of the employees to tie off to the crane or master link as being in violation of 29 CFR 1926.28(a), he relied upon a directive from the Commissioner interpretating 29 CFR 1926.550(b)(2) and 29 CFR 1910.180(h)(3)(V). The purpose of that directive is to interpret the application of those standards to work platforms suspended from cranes. That directive interprets those standards to require employees using such platforms to wear safety belts or lanyards attached to "a leg of the sling or to the master link".

CONCLUSIONS OF LAW

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 of hazardous conditions or where this part indicates the need for using such equipment for reducing the hazards of the employees.

Three conditions were found by the Compliance Officer which he cited as being in violation of this standard. Two of the conditions were cited as nonserious violations and one was cited as a serious violation. The serious violation was also cited as a repeat of an earlier violation on the same standard and the parties have directed most of their attention to that citation.

The serious citation was based upon the observation by the Compliance Officer of two of Ambrosius' employees working on the top level of a building under construction. The men were working approximately 28 feet in the air with no protective devices to prevent them from falling. Ambrosius focuses a great deal of attention on the fact that these men were connecting steel where the use of safety belts, lifelines or lanyards are not only impracticable, they are also dangerous. Ambrosius cites, Brown and Root, Inc., CCH-OSHD ¶ 20,960 (1976), where the employer was cited for violation of the same standard because two of its steel connectors were working 55 feet in the air and were not protected by safety belts or by safety nets. The Administrative Law Judge in vacating the citation found that the use of safety belts during steel connection exposed the steel connectors to a greater hazard than they would have protected against. Therefore, the steel connectors could not be required to wear them and there was no violation of the standard.

The Commissioner does not seriously contend that the steel connectors should have worn safety belts or other such devices. Indeed, the Commissioner's own directive recognizes the increased hazard presented by such devices during steel connection. Instead, the Commissioner contends that even if it is assumed that the men were engaged in steel connection, (as in fact the evidence establishes), Ambrosius could have, and should have, protected them from the hazard of a fall with safety nets.

In response, Ambrosius again cites Brown and Root, Inc., supra, where it was found that it would have been impossible to install safety nets or other such means of protection because of the physical shape and composition of the particular structure under construction. As a result of this finding, the Administrative Law Judge vacated the citation. No such evidence has been presented here.

The evidence in this case is that safety nets were provided by Ambrosius, that they were available for use on the job, and that they were not used because the foreman decided they were not feasible. His decision appears to have been based more on convenience than on the fact that the safety nets were not capable of being used. As contended by the Commissioner, in order to avoid the requirement of the safety net, Ambrosius had the burden of affirmatively showing that safety nets were impracticable or impossible to install, or that once installed they presented a greater hazard to their employees than the hazard they protected against, United States Steel Corp. v. KOSHRC, 537 F2d 780 (3rd Cir. 1976), The proof presented by Ambrosius not only fails to do this, on the contrary, it establishes that safety nets could have been installed on the job. The failure to do so violates the standard.

Ambrosius contends that even if the failure to use safety nets was a violation of the standard, it does not necessarily follow that Ambrosius was in violation of the Act because they were not used. Ambrosius states that it satisfied the standard by providing the foreman with such nets and adopting a company policy that they be used in all situations where they are feasible. Ambrosius argues that a foreman is not a "per se supervisor" for establishing liability under the Act and his wrongful act should not be imputed to his employer.

The actions of supervisory personnel, such as a foreman can be imputed to the employer under the Act. Iowa Southern Utilities, Co., CCH-OSHD ¶ 21,612 (1977). However, where the actions of a foreman are

contrary to company policy, and are not foreseeable by the employer, they are not imputed to the employer on the grounds that to do so would impose a standard of absolute liability on the employer not intended by the Act. Therefore, in order to escape liability for acts of the foreman, or other supervisory personnel, the employer must show that the foreman's acts were directly contrary to the stated policy and instructions of the employer. Horne Plumbing and Heating Co., vs. OSHRC, 528 F2nd 564 (5th Cir.; 1976).

Although it is the policy of Ambrosius to require the use of safety nets where they are feasible, to a large extent the matter of feasibility seems to have been left to the foreman's discretion. Thus, the failure to use the nets was not directly contrary to a specific policy of the company and the knowledge of the foreman of the condition which existed at the time of the inspection is imputed to Ambrosius. Therefore, the citation charging a serious violation of 29 CFR 1926.28(a) should be sustained. Furthermore, the penalty proposed for the violation was appropriate under the circumstances.

Ambrosius contends that the Commissioner is in error in citing this as a repeat violation. Ambrosius argues that under the terms of the settlement agreement under which the Order was entered in Commissioner of Labor v. Ambrosius Erecting Corp., Docket No. 274, it specifically provided that Ambrosius did not admit any violation of this standard. Since Ambrosius did not admit a violation, it contends that a subsequent violation of the standard is not a repeat violation. This argument is without merit.

KRS 338.141 vests in the Commissioner the authority to issue a citation against an employer whom one of its representatives has found to be in violation of the Act. The employer has 15 working days to contest the citation, otherwise it becomes a final order of this Review

Commission. Therefore, in all cases where citations are issued and are not contested, the employers are automatically found to be in violation of the Act.

Although, Ambrosius did contest the earlier citation issued on April 29, 1976, it later agreed to withdraw its contest of that portion of the citation alleging a violation of 29 CFR 1926.28(a). This in effect nullified the contest. Therefore, even though Ambrosius did not admit a violation of the standard it put itself in the same position it would have been in if it had not filed any contest at all. This is reflected in the Order entered in that action on October 4, 1976, which sustained that portion of the citation relating to this standard.

This is not to say, as Ambrosius seems to imply, that Ambrosius came away empty handed from that settlement agreement. Quite the contrary is true. For one thing the penalty proposed for the violation was reduced from $650.00 to $500.00. Furthermore, a violation alleged in the same citation of 29 CFR 1926.700(b)(2) was vacated. Thus, the argument put forth by Ambrosius that no Respondent will ever settle disputed citations if the Commissioner is allowed to use them as the basis for alleging a repeat violation because a settlement will serve no purpose, is not supported either by the law, or by the facts of this case, or by the facts surrounding the settlement agreement entered into in the earlier case.

Ambrosius was also cited separately for a nonserious violation of 29 CFR 1926.28(a) in its use of a work platform attached to a crane used to carry its employees to and from the structure under construction. The basis of the citation was that employees riding the work platform were not wearing safety belts or lanyards attached to a leg of the sling or the master link of the work platform. The failure to wear such equipment exposed those employees to the hazard of falling from the platform if it suddenly swung out of control or tipped over.

In citing Ambrosius for this condition, the Compliance Officer relied upon a directive issued by the Commissioner interpreting 29 CFR 1926.550(b)(2) and 29 CFR 1910.180(h)(3)(V). The first standard, 29 CFR 1926.550(b)(2) relates to crawler, locomotive, and truck cranes used in construction, and specifically provides that they shall meet the ANSI requirements for such equipment. The second standard 29 CFR 1910.180(h)(3)(b) also relates to crawler, locomotive and truck cranes, and specifically provides that they shall not be used while anyone is on the "load or hook". In the Commissioner's directive, the term "load or hook" is interpreted not to apply to working platforms suspended from such cranes. The directive then goes on to set conditions where working platforms suspended from cranes can be used. One of those conditions is that employees working on such platforms be required to wear safety belts and lanyards attached to either a leg of the sling or to the master link of the work platform.

The standards referred to in the Commissioner's directive do not directly relate to the use of working platforms suspended from cranes. Therefore, the reference to the standards in the directive is confusing, to say the least. However, the directive is nothing more than a memorandum from the Commissioner to its Compliance Officers and others employed by the Commissioner to enforce the Act and, unlike a regulation, has little or no force at law. Thus, the question presented with regard to this citation, as in all citations, is whether the conditions observed by the Compliance Officer violated the standard referred to in the citation, and if it did, whether the violation was properly described in the citation.

That the use of the work platform in the manner observed by the Compliance Officer is a violation of 29 CFR 1926.28(a) is not seriously contested. The employees on the work platform were obviously exposed to hazardous conditio for which they should have been required to use appropriate personal protective

equipment. The question remains, however, whether the description of the violative condition contained in the citation properly charged a violation of the standard.

KRS 338.141(1) provides in part:

> That the "citation" shall describe the alleged violation, . . ."

The purpose of this requirement is to aid the employer in correcting a hazard by providing him with a clear description of what the hazard is and how it violates the Act. A citation which does not describe the violation with sufficient particularity is subject to dismissal.

In this case the citation would have been sufficient if it had simply described the violation as the failure to require the use of appropriate equipment to protect the employees using the work platform from the hazards of a fall. The fact that the Commissioner described the violation with greater particularity than is required does not invalidate the citation. Clearly the description used in the citation is sufficient to inform Ambrosius of the nature of the violation and, therefore, it satisfies the requirements of the statute. Thus, the citation should be sustained.

The third condition observed by the Compliance Officer which is cited as being in violation of 29 CFR 1926.28(a) involves employees working on the first elevated level of the structure 14 feet above the ground. There was no evidence presented as to what work they were performing, only that while doing their work they were not wearing any personal protective equipment to protect them from the hazard of a fall. Thus, they were exposed to a hazardous condition in violation of the standard and the citation should be sustained.

29 CFR 1910.252(b)(2)(iv)(d) provides:

> Welding, cutting, ambrazing . . . .
> Application, installation, and operation of arc welding and cutting equipment - Terminals for welding leads should be protected from accidental

> electrical contact by personnel or by metal objects . . . .

In this case, the terminals on the welding leads on the Lincoln Arc Welder were subject to accidental electrical contact by personnel or by metal objects. Furthermore, the location of the welder on the job site exposed the employees of Ambrosius to the hazard of accidental contact when or if the welder was in operation. However, the Commissioner did not establish whether or not the welder was operable at the time of the inspection and therefore, whether it presented a potential hazard to the employees. The Commissioner has taken the position in other cases brought before this Review Commission that machines which do not conform to the requirements of the Act, but which are inoperable, do not violate the Act. In Commissioner of Labor vs. Johnson Plumbing Co., KOSHRC #388, this interpretation of the Act was accepted by this Review Commission. Thus, the citation for violation of this standard should be vacated.

29 CFR 1926.152(e)(2) provides:

> Flammable and combustible liquids . . . .
> Dispensing liquids . . . . Transfer of flammable liquids from one container to another shall be done only when containers are electrically interconnected (bonded).

This citation involved the portable gasoline tank in which gasoline for the Lincoln Arc Welder was stored. Although, the Compliance Officer did not observe gasoline being transferred from the portable gas tank to the welder, he was informed by the foreman on the job that the containers were not electrically interconnected by means of a bonding wire when this was done. The Act does not require a Compliance Officer to witness all violations which he cites. Instead a citation is sufficient if it is made on facts discovered by the Compliance Officer during the course of his inspection. The facts here indicate the standard was violated and the citation was properly issued.

29 CFR 1926.152(g)(9) states:

> Flammable and combustible liquids . . . .
> Service and refueling areas . . . . Conspicious and legible signs prohibiting smoking shall be posted.

There is no dispute that there were no "no smoking" signs in the area of the tank where the gasoline for the arc welder was stored. Ambrosius states, however, that the Commissioner did not prove whether there was any gasoline in the storage tank at the time of the inspection and contends, therefore, that no hazard was shown to the employees.

The purpose of this standard is to restrict smoking in areas where flammable liquids are stored or dispensed. This restriction applies at all times, including those times when there may temporarily be no flammable liquids in the area. Therefore, it isn't material whether or not the portable tank contained any gasoline at the time of the inspection. The fact is that it was used to store gasoline and the absence of no smoking signs was a violation of the standard.

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 June 17, 1977, charging a nonserious violation of 29 CFR 1910.252(b)(2)(iv)(d)(as adopted by 803 KAR 2:020) be and is hereby vacated.

That the citation issued on June 17, 1977, charging a nonserious violation of 29 CFR 1926.28(a) and 29 CFR 1926.152(e)(2), and 29 CFR 1926.152(g)(9)(as adopted by 803 KAR 2:030) be and is hereby sustained.

That the citation issued June 17, 1977, charging a serious violation of 29 CFR 1926.28(a)(as adopted by 803 KAR 2:030) and proposing a penalty therefor of $1700.00 be and is hereby sustained.

IT IS FURTHER ORDERED that the citations sustained must be abated and the penalties paid without delay, but no later than 30 days from the date hereof.

PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: January 30, 1978
Frankfort, Kentucky

DECISION NO. 527