

Haynes



Fv

390(514)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

CHARLES B. UPTON
MEMBER

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

January 4, 1978

KOSHRC #390

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CLARK MECHANICAL CONTRACTORS, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Charles Goodman, issued under date of November 14, 1977, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Respondent.

Finding no error in the application of the law to the facts herein, and the evidence appearing to adequately support the findings and conclusions of the Hearing Officer, it is the ORDER of the Review Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED, and the citation and penalty involved are SUSTAINED.

Merle H. Stanton
Merle H. Stanton, Chairman

Dated: January 4, 1978
Frankfort, Kentucky

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

DECISION NO. 514

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

KOSHRC #390

(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

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

Mr. Emil C. Durbin, Vice Pres. (Certified Mail #240822)
Clark Mechanical Contractors, Inc.
4517 Poplar Level Road - Box 32304
Louisville, Kentucky 40232

This 4th day of January, 1978.



Iris R. Barfett
Executive Director

390(488)



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

November 14, 1977

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

John C. Roberts
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision 4
Order No. 488*

KOSHRC # 390

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CLARK MECHANICAL CONTRACTORS, 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.

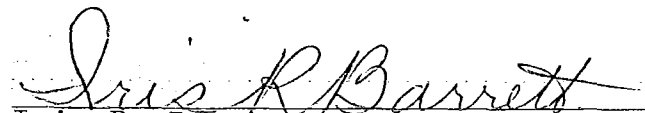
Copy of this Notice and Order has been served by mailing or personal delivery on the following:

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: Timothy P. O'Mara
Assistant Counsel

Mr. Emil C. Durbin, Vice Pres. (Certified Mail #240843)
Clark Mechanical Contractors, Inc.
4517 Poplar Level Road - Box 32304
Louisville, Kentucky 40232

This 14th day of November, 1977.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 390

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

V. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

CLARK MECHANICAL CONTRACTORS, INC.

RESPONDENT

* * * * *

FOR COMPLAINANT: Hon. Timothy O'Mara
Assistant Counsel
Department of Labor
801 West Jefferson Street
Louisville, Kentucky 40202

FOR RESPONDENT: Mr. R. F. Clark
4517 Poplar Level Road, Box 32304
Louisville, Kentucky 40232

GOODMAN, Hearing Officer

On June 14th and 15th, 1977, an inspection was conducted by a compliance officer on behalf of the Commissioner of Labor (hereinafter referred to as "Commissioner"), said inspection being upon the construction site of the Jefferson Mall on the "Outer Loop" in Louisville, Kentucky. At that time and place employees of Clark Mechanical Contractors, Inc. (hereinafter referred to as "Clark"), were working in a sub-contractor capacity, and were engaged in the installation of duct work.

As a result of that inspection, the Commissioner issued a citation on June 22, 1977, against Clark charging it with a non-serious repeat violation of the Kentucky Occupational Safety and Health Act (hereinafter referred to

as "Act"), and proposing a penalty therefor of Seventy Five Dollars (\$75.00).

The date set for abatement of same was June 27, 1977.

The pertinent procedural information is as follows:

- 1) Inspection was conducted on June 14 and 15, 1977, by the Commissioner at the above-mentioned address.
- 2) Citation was issued June 22, 1977, listing one (1) repeat non-serious violation and a proposed penalty hereinabove mentioned.
- 3) Notice of Contest received July 5, 1977, contesting the single item cited.
- 4) Notice of Contest with copy of citation and proposed penalty received by the Review Commission on July 6, 1977.
- 5) Notice of Receipt of Contest mailed July 6, 1977, and certification of employer form received July 11, 1977.
- 6) Complaint received July 13, 1977, with no formal answer being filed by Clark.
- 7) Notice of Assignment to Hearing Officer and Notice of Hearing were mailed on August 10, 1977.
- 8) Hearing was conducted on Tuesday, August 23, 1977, at the Department of Labor, 801 West Jefferson Street, Louisville, Kentucky.
- 9) Transcript of testimony of hearing was received September 22, 1977. No briefs were requested by either party, and none were filed.

The above-mentioned hearing was held pursuant to KRS 388.071(4), which authorizes the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of the Act, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 388.081, the within hearing was authorized by the provisions of said chapter and same may be conducted by a Hearing Officer appointed by the Review Commission to serve in its stead. The decisions of said Hearing Officer are subject to review by the Review Commission upon appeal timely filed by either party, or upon its own motion, subsequent to which the Review

Commission may sustain, modify or dismiss a citation or penalty.

The Standard alleged to have been violated, as adopted by KRS Chapter 338, the description of the alleged violation, and the penalty proposed for same are as follows:

29 CFR 1926.451(e)(4) (as adopted by 803 KAR 2:030)	The scaffold platform of the manually propelled mobile scaffold, at the center of the north side of the second floor, was not tightly planked for the full width of the scaffold.	\$75.00
--	---	---------

29 CFR 1926.451(e)(4), as adopted by 803 KAR 2:030, reads as follows:

Platforms shall be tightly planked for the full width of the scaffold except for necessary entrance openings. Platforms shall be secured in place.

This violation was cited as a repeat of an earlier violation of the same standard cited on April 9, 1976.

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

Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law and Recommended Order are hereby made.

FINDINGS OF FACT

On the day of the inspection, Clark had employees working at the construction site of the Jefferson Mall in Louisville, Kentucky, said employees being engaged in the function of installing duct work along the walls of the structure. In order to perform this function, Clark was using a manually propelled mobile scaffold, upon which its employees would stand.

The Compliance Officer cited Clark for an apparent violation of the

above-specified Standard because the particular scaffold in use was planked at two levels. One level of planking on the scaffold was at an approximate height of nine feet and ran for about half the width of the scaffold, and the other level of planking was at the approximate level of 7 to 7-1/2 feet, and ran for the remainder of the width of the scaffold. This was an apparent violation to the Compliance Officer in that, to comply with the subject Standard, each level of planking should have run the entire width of the scaffold.

The Compliance Officer in proposing the penalty for the apparent violation used an OSHA 10 Form. These forms are used by the Compliance Officers employed by the Commissioner in order to provide uniformity in the assessment of penalties. Under the policy guidelines promulgated by the Commissioner, if a violation is found to be a repeat non-serious violation where no former penalty was assessed, as is the within case, the unadjusted penalty shall be \$100.00. Therefore the unadjusted penalty was \$100.00. Adjustments were made by use of the OSHA 10 Form, taking into account the good faith, size and history of Clark. This resulted in an adjusted proposed penalty of \$75.00.

It should be noted here that the reason for the two level set up of the planking on the scaffold was that the particular operation in which the employees of Clark were engaged required the installation of the duct work to be begun at the 9 foot level and finished on the lower level on a repeated basis. Stated another way, the employee engaged in the installation was required to continually step up and step down in order to perform his function.

CONCLUSIONS OF LAW

By a strict interpretation of the particular Standard alleged to have been violated, 29 CFR 1926.451(e)(4), Clark was undeniably in violation. The

particular mobile scaffold in use by Clark was not tightly planked for its full width. It presented a clear potential hazard to all employees using it. The fact that the planking on the scaffold was so situated in order to accommodate a special operation of Clark does not justify the violation of the Standard. This Hearing Officer is aware that compliance with the Standard would impose an inconvenience upon the employees of Clark in their performance of the ducting installation. However, a gain in convenience cannot be at the loss of any degree of safety. The Standard as adopted by 803 KAR 2:030 must be adhered to, if at all possible, and that was not done by Clark in the within case.

In view of the fact that this was a repeat violation, the penalty proposed by the Compliance Officer was appropriate under the circumstances.

RECOMMENDED ORDER

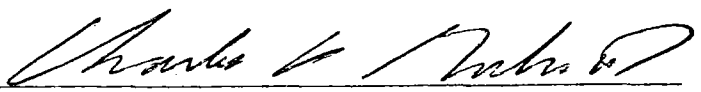
NOW THEREFORE, IT IS HEREBY ORDERED:

That the citation charging a non-serious repeat violation of 29 CFR 1926.451(e)(4) and proposing a penalty therefor of \$75.00 is hereby affirmed.

That, if not already abated, said violation must be abated immediately upon receipt of this Recommended Order.

That the penalty therefor be paid without delay, but in no event later than thirty (30) days from receipt of this Recommended Order.

DATED: November 14, 1977
Frankfort, Kentucky


CHARLES A. GOODMAN III
HEARING OFFICER
KOSHR

DECISION NO. 488