



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 14, 1978

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #400

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

EMANUEL F. ESTEP MASONRY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

STANTON, Chairman, FOR THE MAJORITY:

A Recommended Order of Hearing Officer Charles A. Goodman III, issued under date of January 23, 1978, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

A hearing was held on the Respondent's contest of a citation alleging a repeat nonserious violation of 29 CFR 1926.451(d)(3) (as adopted by 803 KAR 2:030) and proposing a penalty of \$70.00.

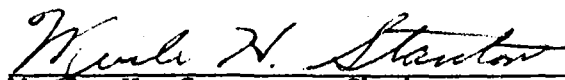
The Respondent company, on the date of inspection, was using a scaffold while erecting a concrete block wall. The scaffold sections were cross braced on either the front or back. Every section had cross bracing on one side and no two adjacent sections were cross braced on the same side.

The standard requires, (in part), "Scaffolds shall be properly braced by cross-bracing or diagonal braces, or both, for securing vertical members together laterally,...." The Complainant interprets this standard to require bracing on both the front and back of all scaffolding sections. The Respondent states that the standard does not specifically require this "double" bracing and the bracing employed was necessitated by the construction process on this particular location.

The case basically involves an interpretation of the cited standard. The Hearing Officer has concluded that the standard is complied with when each section is cross braced or diagonally braced, or both, and, the scaffolding is secure. He has found that these conditions were met therefore the citation and penalty should be dismissed. We disagree with this interpretation and reverse the Hearing Officer's Recommended Order.

To comply with the standard the scaffold involved must be cross braced, or diagonally braced, or both, on both sides. The standard was violated as indicated by the photographs and testimony in this case.

Accordingly IT IS ORDERED by a majority of this Commission that the Hearing Officer's recommendation dismissing the citation and proposed penalty is REVERSED. A violation of 29 CFR 1926.451(d)(3) (as adopted by 803 KAR 2:030) is AFFIRMED and a penalty of \$70.00 is hereby imposed.



Merle H. Stanton, Chairman

/s/ Charles B. Upton

Charles B. Upton, Commissioner

ROBERTS, Commissioner, DISSENTING:

I believe that the Hearing Officer's interpretation of the standard is correct and the dismissal of the citation and penalty should be sustained.

/s/ John C. Roberts

John C. Roberts, Commissioner

Dated: April 14, 1978
Frankfort, Kentucky

DECISION NO. 558


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
Frankfort, Kentucky 40601
Attention: Honorable Timothy O'Mara
Assistant Counsel

Mr. Emanuel F. Estep, President (Certified Mail #783109)
Emanuel F. Estep Masonry Contractor
1515 39th Street
Ashland, Kentucky 41101

This 14th day of April, 1978.



Iris R. Barrett
Executive Director

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400 (524)



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

CHARLES B. UPTON
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

January 23, 1978

KOSHRC # 400

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

EMANUEL F. ESTEP MASONRY

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.


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

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

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

Mr. Emanuel F. Estep, President (Certified Mail #240797)
Emanuel F. Estep Masonry Contractor
1515 39th Street
Ashland, Kentucky 41101

This 23rd day of January, 1978.



Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

KOSHRC DOCKET
NUMBER 400

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

EMANUEL F. ESTEP MASONRY

RESPONDENT

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FOR COMPLAINANT: Hon. Tomothy P. O'Mara
Assistant Counsel
Department of Labor
301 West Jefferson Street
Louisville, KY 40202

FOR RESPONDENT: Mr. Emanuel F. Estep
Mr. Lowell Griffith
Emanuel F. Estep Masonry
1515 39th Street
Ashland, KY 41101

GOODMAN, HEARING OFFICER

On August 1, 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 a construction site at 3300 Winchester Avenue, Ashland, Kentucky. At that time and place employees of

Emanuel F. Estep Masonry (hereinafter referred to as "Estep"), were engaged in the erection of concrete block walls in the construction of an addition to Betsy Ross Bakery. Estep was functioning in a sub-contractor capacity.

As a result of that inspection, the Commissioner issued three (3) citations on August 3, 1977, charging Estep with one (1) non-serious violation, one (1) repeat non-serious violation, and one (1) regulatory violation of the Kentucky Occupational Safety and Health Act (hereinafter referred to as "Act"). Citation No. 2, containing the repeat non-serious violation, carried with it the only proposed penalty, that being in the amount of \$70.00. Estep is only contesting Citation No. 2 for the alleged repeat non-serious violation which has an abatement date of August 12, 1977.

The pertinent procedural information is as follows:

- 1) Inspection was conducted on August 1, 1977, by the Commissioner at the above-mentioned address.
- 2) Three (3) citations were issued on August 3, 1977, listing one (1) non-serious violation, one (1) repeat non-serious violation, and one (1) regulatory violation, the repeat non-serious violation carrying with it the only proposed penalty, that being in the amount of Seventy Dollars (\$70.00).
- 3) Notice of Contest received August 12, 1977, contesting only the citation for the alleged repeat non-serious violation. Notice of Contest with copy of citation received by the Review Commission on August 16, 1977.
- 4) Notice of Receipt of Contest mailed August 17, 1977, and Certification of Employer Form received August 23, 1977.
- 5) Complaint received September 6, 1977, and no formal answer was filed by Estep.
- 6) Notice of Assignment to Hearing Officer and Notice of Hearing were mailed on September 28, 1977.
- 7) Hearing was conducted on October 17, 1977, at the Ashland State Vocational-Technical School, Route 4, Winslow Road, Ashland, Kentucky.

- 8) Transcript of testimony at hearing was received by Hearing Officer on November 10, 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 by Citation No. 2, 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(d)(3) (as adopted by 803 KAR 2:030)	Ten (10) sections of tubular welded scaffolds, one (1) section high, were not properly braced by cross-bracing for securing vertical members together laterally.	\$70.00
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29 CFR 1926.451(d)(3), as adopted by 803 KAR 2:030, reads as follows:

Scaffolds shall be properly braced by cross-bracing or diagonal braces, or both, for securing vertical members together laterally, and the cross braces shall be of such length as will automatically square and align vertical members so that the erect scaffold is always plumb, square, and rigid. All brace connections shall be made secure.

This violation was cited as a repeat of an earlier violation of the same standard cited on May 3, 1977.

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

Upon 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, Estep had employees engaged in the construction of an addition to Betsy Ross Bakery at 3300 Winchester Avenue, the specific type of construction being masonry work--erecting concrete block walls.

The Compliance Officer cited Estep for an apparent violation of the above-specified standard because each and every section of the scaffolding in question was not cross-braced on both sides. The sections of the scaffolding were alternately cross-braced on either the "back" (the side facing away from the wall) or the "front" (the side facing the wall). Each section of the scaffolding had cross-bracing on either its front or back, and no two adjacent sections were cross-braced on the same side.

The Compliance Officer in proposing the penalty for the apparent violation used an OSHA 10 and 12 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 by use of the OSHA 12 Form shall be \$100.00. Therefore, the unadjusted penalty, or base penalty, was \$100.00. Adjustments were made by the use of the OSHA 10 Form, taking into account

the good faith, size and history of Estep. This resulted in an adjusted proposed penalty of \$70.00.

At the hearing, the Compliance Officer stated that it was a policy and procedure of the Kentucky Department of Labor, Occupational Safety and Health Division of Compliance, that all scaffolding sections be cross-braced on both front and back. Estep countered with the contention that, not only was it impracticable in the particular situation for each section of the scaffolding to be cross-braced front and back, but also that the particular standard in question did not specifically require by its wording this type of double bracing. Indeed, the only requirement of 29 CFR 1926.451(d)(3) is that scaffolding be "properly" braced by cross-bracing or diagonal braces or both, so that the erect scaffold is always plumb, square, and rigid. Employees of Estep were observed upon the scaffolding by the Compliance Officer, and it was not contended by Estep that its employees were not utilizing the scaffolding.

CONCLUSIONS OF LAW

After researching the within question of whether each section of scaffolding need be double braced in order to comply with the standard in question, this Hearing Officer has come to the conclusion that compliance with the standard may be had if two conditions are met: (1) Each section of scaffolding is cross-braced or diagonally braced or both, and, (2) The scaffolding is secure.

Even though the scaffolding in question was not double braced, each section was cross-braced on one side or the other, and it is the opinion of this Hearing Officer from the testimony presented at the hearing that the scaffolding as it was braced was no less secure than it would have been if

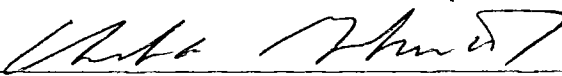
double braced. The Commissioner offered no proof that the method of bracing employed by Estep was in any way inferior to double bracing, and, further offered no showing either by testimony or citation to authority that double bracing was necessary in order to effect compliance with the standard.

Therefore, it is the finding of this Hearing Officer that Estep was not in violation of 29 CFR 1926.451(d)(3).

RECOMMENDED ORDER

NOW THEREFORE, IT IS HEREBY ORDERED:

That the citation charging a repeat non-serious violation of 29 CFR 1926.451(d)(3) is hereby dismissed.



CHARLES A. GOODMAN III
HEARING OFFICER

CAG:nt

DATED: January 23, 1978
Frankfort, Kentucky

Decision No. 524