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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

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

June 20, 1978

KOSHRC #410

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROBERT LEAR & SON

RESPONDENT


DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Charles A. Goodman III, issued under date of April 25, 1978, is presently before this Commission for review, pursuant to a Petition for Discretionary Review.

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 unanimous ORDER of the Review Commission that the Recommended Order of the Hearing Officer be and it hereby is affirmed, the citation and proposed penalty of five hundred dollars (\$500.00) are SUSTAINED.


Merle H. Stanton, Chairman

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Dated: July 20, 1978
Frankfort, Ky.

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

DECISION NO. 580

1s1 John C. Roberts
John C. Roberts, Commissioner

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

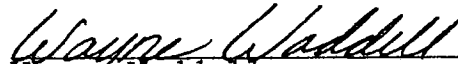
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Timothy P. O'Mara
Assistant Counsel

Hon. Stewart E. Conner (Certified Mail #457571)
WYATT, GRAFTON & SLOSS
28th Floor, Citizens Plaza
Louisville, Kentucky 40202

Mr. J. William Conner, Gen'l. Mgr. (Certified Mail #457572)
Robert Lear & Son
800-804 East Main Street
Louisville, Kentucky 40206

This 20th day of June, 1978.


Wayne Waddell
Counsel
KOSH REVIEW COMMISSION

Wayne



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014

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

IRIS R. BARRETT
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 21, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #410

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROBERT LEAR & SON

RESPONDENT

ORDER

The Review Commission, on June 20, 1978, issued a Decision and Order determinative of the issues in the above-styled case. A copy of the Decision and Order was served on the parties by mailing or personal delivery on the 20th day of June, 1978.

The Order contains a clerical error on the lower left side of page 1. The Order is hereby corrected and amended to read:

Dated: June 20, 1978
Frankfort, Ky.

DECISION NO. 580.

Wayne Waddell
Wayne Waddell
Counsel
KOSH REVIEW COMMISSION

This is to certify that a copy of this 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: Hon. Timothy P. O'Mara
Assistant Counsel

Hon. Stewart E. Conner (Certified Mail #457577)
WYATT, GRAFTON & SLOSS
28th Floor, Citizens Plaza
Louisville, Kentucky 40202

Mr. J. William Conner, Gen'l. Mgr. (Certified Mail #457578)
Robert Lear & Son
800-804 East Main Street
Louisville, Kentucky 40206

This 21st day of June, 1978.


Wayne Waddell
Counsel
KOSH REVIEW COMMISSION

Staple



014

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

IRIS R. BARRETT
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

April 25, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

*KOSHRC
Decision
Order No. 565*

KOSHRC #410

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROBERT LEAR & SON

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:

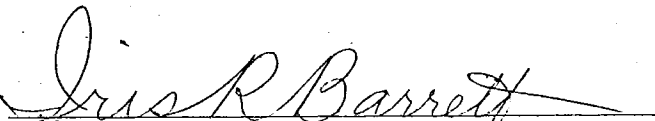
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Timothy P. O'Mara
Assistant Counsel

Hon. Stewart E. Conner (Certified Mail #783127)
WYATT, GRAFTON & SLOSS
28th Floor, Citizens Plaza
Louisville, Kentucky 40202

Mr. J. William Conner, Gen'l. Mgr. (Certified Mail #783128)
Robert Lear & Son
800-804 East Main Street
Louisville, Kentucky 40206

This 25th day of April, 1978.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

KOSHRC DOCKET
NO. 410

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

ROBERT LEAR & SON

RESPONDENT

*

*

*

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

FOR RESPONDENT: Hon. Stewart E. Conner
Wyatt, Grafton & Sloss
2800 Citizens Plaza
Louisville, Kentucky 40202

GOODMAN, HEARING OFFICER

On or about August 9 and 11, 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 Building "H" of the P. Lorillard Tobacco Company facilities located at or near 3029 Michigan Drive, Louisville, Jefferson County, Kentucky. At that time and place employees of Robert Lear & Son (hereinafter referred to as "Lear"), were engaged in "tuckpointing", or reconditioning the brick facing of the building.

As a result of that inspection, the Commissioner issued two (2) citations on August 16, 1977, Citation No. 1 charging Lear with one (1) non-serious

violation of the Kentucky Occupational Safety & Health Act (hereinafter referred to as "Act"), with no proposed penalty therefor, and Citation No. 2 charging Lear with one (1) serious violation of the Act, and proposing a penalty therefor of Five Hundred Dollars (\$500.00). The date set for abatement for both violations was August 22, 1977.

The pertinent procedural information is as follows:

- 1) Inspection was conducted on August 9 and 11, 1977, by the Commissioner at the above-mentioned address.
- 2) Two (2) citations were issued on August 16, 1977, Citation No. 1 containing one (1) non-serious violation with no proposed penalty therefor, and Citation No. 2 containing one (1) serious violation with a proposed penalty hereinabove mentioned.
- 3) Notice of Contest received August 29, 1977.
- 4) Notice of receipt of Contest mailed August 31, 1977, and Certification of Employer Form received September 12, 1977.
- 5) Complaint received September 19, 1977.
- 6) Notice of assignment to Hearing Officer and Notice of Hearing were mailed on October 10, 1977.
- 7) Order of Postponement and Amended Notice of Hearing mailed November 4, 1977.
- 8) Motion by Respondent to File Answer to Complaint and Answer of Respondent to Complaint was received November 24, 1977, and Order permitting filing of Answer mailed November 25, 1977.
- 9) Hearing was conducted on November 29, 1977, at the Department of Labor, 801 West Jefferson Street, Louisville, Kentucky.
- 10) Transcript of testimony at hearing was received by Hearing Officer on December 29, 1977, and Notice of same was mailed on that date.
- 11) Motion by Complainant for Extension of Time to File Brief received January 16, 1978, and Order Granting Extension of Time to File Brief mailed on that date.

- 12) Motion by Complainant for Extension of Time to File Brief received January 25, 1978, and Order Granting Extension of Time to File Brief mailed on that date.
- 13) Memorandum Brief for Complainant received February 6, 1978.
- 14) Motion by Respondent for Extension of Time to File Brief received February 15, 1978, and Order Granting Extension of Time to File Brief mailed on that date.
- 15) Memorandum Brief for Respondent received March 13, 1978.

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.

At the hearing, counsel for Lear moved to withdraw its Contest of the alleged non-serious violation of 29 CFR 1926.451(i)(11) contained in Citation No. 1, which motion was granted. Therefore, the sole Standard remaining in controversy which is 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(i)(4) A pole used as a roof iron was not \$500.00
(as adopted by securely anchored and secured on the
803 KAR 2:030) middle swinging two-point suspension
scaffold used at the west wall of
Building "H", and there was no secondary
means of anchorage on any of the swing-
ing two-point suspension scaffolds used
on the west wall of Building "H." The
swinging two-point suspension scaffolds
were used at heights up to approximately
twenty-two (22) feet above the adjacent
ground level.

29 CFR 1826.451(i)(4), as adopted by 803 KAR 2:030, reads as follows:

The roof irons or hooks shall be of mild steel, or other equivalent material, of proper size and design, securely installed and anchored. Tiebacks of 3/4-inch manila rope, or the equivalent, shall serve as a secondary means of anchorage, installed at right angles to the face of the building, whenever possible, and secured to a structurally sound portion of the building.

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, evidence and briefs herein, the following Findings of Fact, Conclusions of Law, and Recommended Order are hereby made.

FINDINGS OF FACT

On the day of the inspection, there were approximately six (6) employees of Lear on the job site who were engaged in the operation of "tuckpointing," or masonry restoration work. The reason for this particular inspection was an accident which occurred at Building "H", and the Compliance Officer was called there to investigate. The accident involved an employee of Lear who had fallen from a two-point suspension scaffold to the roof of a lower building some twenty (20) feet below. This employee, a Mr. Basham, died three (3)

days later from injuries sustained as a result of that fall.

The particular scaffold in question was hanging on the west wall of Building "H" near the northwest corner of the building. The lines from which the scaffold was suspended were attached at the top of the building to two (2) 4 inch x 4 inch x 18 foot "outrigger" wooden poles which were being utilized as roof irons. The ends of the poles to which the lines were attached extended slightly beyond the roof parapet, with the remainder of the pole length, some sixteen (16) feet, extending back down to the roof's surface. The exact positioning of the poles are demonstrated by Complainant's Exhibit No. 2. Placed upon the end of each pole resting upon the roof's surface was a single polyethylene, or plastic, bag filled with sand, weighing between 75 and 100 pounds, and which was utilized to secure the poles in place.

The accident in question occurred when one (1) of the two (2) outrigger poles to the scaffold flipped over the parapet, thus causing Mr. Basham's side of the scaffold to give way, resulting in his fatal fall.

The Compliance Officer cited Lear for an apparent violation of the above-mentioned Standard for two (2) reasons. Firstly, it was his determination that the outrigger poles being used in lieu of the roof irons or hooks required by the Standard were not securely anchored by the weight of the sandbags atop them. Secondly, none of the outrigger poles were provided with a secondary means of anchorage, such as tiebacks, or their equivalent. In light of the fatality involved, it should be inarguable that, if there were a violation, it is serious.

Under the policy guidelines promulgated by the Commissioner, if a violation is found to be a serious violation, the unadjusted penalty shall be One

Thousand Dollars (\$1,000.00). Adjustments were made by use of the OSHA 10 Form, taking into account the good faith, size and history of Lear. This resulted in an adjusted penalty of Five Hundred Dollars (\$500.00), which is a result of a fifty percent (50%) reduction by the Compliance Officer, or the maximum that he is allowed to subtract from the unadjusted penalty pursuant to policy guidelines imposed upon him.

It was the testimony of the Compliance Officer that the pole which flipped over the parapet did not break while on the roof, and therefore pole breakage was not the cause of the accident (Transcript of Hearing [hereinafter TR], p.18). The Compliance Officer testified that the pole had flipped over the parapet because it "evidently" had worked its way loose from under its securing sandbag (TR, p.19 and 26). The Compliance Officer cited Lear for an apparent violation of the first part of the above-mentioned Standard, failure to securely anchor roof irons, solely because of this supposition on his part. The Compliance Officer cited Lear for an apparent violation of the second part of the above-mentioned Standard, failure to use secondary anchorage, in that none of the several outrigger poles still on the roof were provided with any means of secondary anchorage, either by tiebacks, or an equivalent (TR, p.20).

Upon cross examination, the Compliance Officer admitted that he uncovered no evidence as to how the outrigger pole in question got from under its securing sandbag, which sandbag still remained on the roof (TR, p.28). All other outrigger poles still had securing sandbags sitting atop them. As to the secondary anchorage, the Compliance Officer stated upon cross examination that it would have been "hard, if not impossible" to use a 3/4-inch manila rope or its equivalent as a tieback (TR, p.37).

Upon cross examination, the Compliance Officer also again admitted that the citation for apparent violation of the first part of the above-mentioned Standard, failure of primary anchorage, was due solely to the assumption that the flipped pole worked its way loose from under the sandbag, an assumption which the Compliance Officer also admitted was not substantiated by any physical evidence (TR, p.44, 45).

Another witness for the Commissioner, a Mr. Wayne Keith, who was on the scaffold with Mr. Basham, stated that he had never heard of a pole working itself out from under a sandbag (TR, p.57).

Mr. J. William Conner, General Manager, testifying on behalf of Lear, stated that the nearest structurally sound portion of the building to which secondary anchorage could be tied was the east wall of Building "H", some 268 feet away from the west wall (TR, p.65). Mr. Conner stated that, even if tiebacks could be extended that distance to the other wall, it would not be an effective means of secondary anchorage in that there would be too much "flex in the rope" (TR, p.66). As to U-Bolts for securing a tieback, Mr. Conner stated that the owner of the building would not have allowed holes punched in the roof. Mr. Conner stated that, in his 27 years experience in the construction industry, he had never heard of an outrigger pole working its way out from under a sandbag (TR, p.68). Mr. Conner stated that the use of sandbags as primary anchorage was standard practice in the industry (TR, p.73).

CONCLUSIONS OF LAW

It is reiterated that Lear has been cited for an apparent violation of 29 CFR 1926.451(i)(4) both for failure to provide satisfactory primary

anchorage, and for failure to provide any secondary anchorage.

As to failure of satisfactory primary anchorage, the uncontradicted evidence is that Lear was cited for an apparent violation of this first part of the above-mentioned Standard solely because of the outrigger pole which flipped and occasioned the fall and death of Mr. Basham. Since the pole did become disengaged from its securing sandbag, the Compliance Officer "assumed" that this was due to a failure on the part of the sandbag to adequately provide primary anchorage for the pole. However, this assumption by the Compliance Officer is not supported by any testimony or physical evidence. No one knows how the pole got out from under the sandbag - it may even have been purposefully moved by a party or parties unknown. Both Mr. Keith and Mr. Conner, in their combined experience of over 50 years in the industry, had never heard of an outrigger pole working its way loose from under a sandbag. The use of sandbags to provide primary anchorage for outrigger poles is standard industry practice.

Counsel, in his Brief on behalf of Lear, cites the case of Western Waterproofing Co., CCH 18,012 (June, 1974) as authority for the position that the use of sandbags is an accepted means of primary anchorage for the securing of outrigger poles on two-point suspension scaffolds. Even without the weight of this decision, this Hearing Officer would still be of the opinion that the use by Lear of 75 to 100 pound sandbags as primary anchorage for outrigger poles satisfies the requirement imposed by the first portion of 29 CFR 1926.451(i)(4).

This brings us to a consideration of the failure by Lear to utilize any means of secondary anchorage as required by the second portion of 29 CFR 1926.451(i)(4). Counsel for Lear in his brief has argued the Affirmative Defense of Impossibility of Compliance. Notwithstanding the fact that Lear failed to meet the procedural

requirement of pleading this Affirmative Defense in its Answer, this Hearing Officer is of the opinion that it was possible for Lear to provide satisfactory secondary anchorage for the poles.

This Hearing Officer finds that the evidence proves use by Lear of tiebacks to be an impossibility in the within case. However, there are equivalent means of secondary anchorage which Lear neither utilized nor considered utilizing. The Compliance Officer stated that an acceptable equivalent would have been metal weighted containers which straddled the poles and which would have guarded against movement in the eventuality of failure of the primary anchorage (TR, p.20). The Compliance Officer further stated that he had actually seen these containers in use (TR, p.20). These devices generally are hollow and are weighted by rocks, sandbags, or some other heavy material. Although Mr. Conner stated that such devices would be impractical (TR, p.72), it is the opinion of this Hearing Officer that practicality is not a valid consideration when the lives and safety of employees are at stake. Although Mr. Conner protested that it would be "impossible" to lift such devices to the roof, it seems that if 100 pound sandbags can be lifted to a roof, it would require no greater effort to lift a hollow metal container to that roof into which sandbags could be placed upon positioning the container on top of the outrigger poles.

There was no testimony on behalf of Lear to the effect that secondary anchorage is not industry practice, and, further, Mr. Keith testified that "we always tie back, if we got something to tie to" (TR, p.55).

Counsel in his brief cites the case of Stone Flex, Inc., CCH 22,193 (Aug., 1977), as authority to the effect that a secondary means of anchorage need only be used if it is available. This Hearing Officer agrees, but, as

above stated, is of the opinion that a secondary means of anchorage was available. Counsel also cites R & J Tuckpointing Co., Inc., CCH 22,184 (Aug., 1977), as another authority for the above position. In response, this Hearing Officer reiterates his previous statement that a secondary means of anchorage was available to Lear, and also states that it appears that R & J Tuckpointing was a primary anchorage case rather than a secondary anchorage case.

This Hearing Officer acknowledges the testimony of both Mr. Conner and Mr. Keith that they had never heard of an outrigger pole becoming unsecured from under a sandbag. However, this does not negative the need for secondary anchorage. In the case of Western Waterproofing Co., Inc., CCH 21,022 (July, 1976), cited by counsel for Commissioner in his Brief, it was held that secondary anchorage was necessary because it was possible, even if unlikely, that the scaffold could be pulled off the building. Even though there may be an extreme mathematical probability against an outrigger pole becoming unsecured from a 100 pound sandbag, an employer still has the duty to take whatever steps available to guard against that eventuality, however slight it may be. See also, Harry L. Melton, d/b/a Sta-Dri Roofing Co., CCH 18,866 (Oct., 1974); Constructora Maza, Inc., CCH 18,000 (June, 1974).

The requirement contained in the second part of 29 CFR 1926.451(i)(4) that a secondary means of anchorage shall be used in the case of two-point suspension scaffolds, in the opinion of this Hearing Officer, was violated by Lear, and the proposed penalty for said violation in the amount of Five Hundred Dollars (\$500.00), being the maximum adjustment allowable by the Commissioner in the case of a serious violation, is a just and equitable penalty.

RECOMMENDED ORDER


NOW THEREFORE, IT IS HEREBY ORDERED:

Motion by Lear for withdrawal of contest of 29 CFR 1926(i)(11) having been heretofore granted, the citation charging a non-serious violation thereof is a Final Order of the Review Commission.

That the citation charging a serious violation of 29 CFR 1926.451(i)(4), and the proposed penalty therefor of Five Hundred Dollars (\$500.00) is hereby affirmed.

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

That the penalty for said serious violation be paid without delay, but in no event later than thirty (30) days from the date of this Recommended Order.



CHARLES A. GOODMAN III
HEARING OFFICER

CAG:dc

DATED: April 25, 1978
Frankfort, Kentucky

DECISION NO. 565