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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601

CHARLES B. UPTON
MEMBER

*KOSHRC
Decision +
Order No. 557*

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

April 14, 1978

KOSHRC #419

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROARK 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 John T. Fowler, Sr., issued under date of February 10, 1978, is presently before this Commission for review, pursuant to an Order of Direction for Review by Chairman Merle H. Stanton.

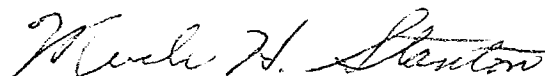
The Respondent was cited for an alleged serious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) with a proposed penalty of \$750.00. It was stipulated at the hearing that an employee of the Respondent company fell 16 feet from a pipe rack to the ground. It was further stipulated that the employee was not wearing a safety belt or lanyard and there was no safety net, platform or guardrail to prevent a fall.

The Complainant contends that the Respondent could have protected against the fall and avoided the citation by insuring that the employees used safety belts and lifelines or by constructing a scaffold. A scaffold could perhaps reduce or eliminate the fall hazard but erection of a scaffold would probably be impossible under the conditions at the worksite. The Respondent was not cited for a scaffolding violation, thus the reference is somewhat irrelevant.

The Respondent established that the Haveg pipes at the accident site carried acid and were brittle. A lifeline could not safely be attached to or stretched across these pipes. The Hearing Officer has concluded that the Department of Labor failed to carry its burden of proof by failing to show a specific measure that could have been taken to avoid the citation and failing to prove the feasibility and utility of such a measure.

We find no error in the application of the law to the facts herein, and the evidence adequately supports the findings and conclusions of the Hearing Officer.

Accordingly it is the unanimous ORDER of this Review Commission that the Recommended Order of the Hearing Officer, dismissing the citation and vacating the proposed penalty is hereby AFFIRMED.



Merle H. Stanton, Chairman

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

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

DATED: April 14, 1978
Frankfort, Kentucky

DECISION NO. 557

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: Larry D. Hamfeldt
Assistant Counsel

Honorable Carl Arthur Henlein (Certified Mail #783110)
MIDDLETON, REUTLINGER & BAIRD
501 South 2nd Street
Louisville, Kentucky 40202

Mr. Scott Roark, Jr., Vice President (First Class Mail)
Roark Mechanical Contractors, Inc.
4508 Illinois Avenue
Louisville, Kentucky 40213

This 14th day of April, 1978.



Iris R. Barrett
Executive Director

Stanton

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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

February 10, 1978

*To S. HRC
Decision &
Order No. 530*

KOSHRC # 419

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROARK 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: Larry D. Hamfeldt
Assistant Counsel

Hon. Carl Arthur Henlein (Certified Mail #783021)*
Middleton, Reutlinger & Baird
501 South 2nd Street
Louisville, Kentucky 40202

Mr. Scott Roark, Jr., Vice President (First Class Mail)
Roark Mechanical Contractors, Inc.
4508 Illinois Avenue
Louisville, Kentucky 40213

This 10th day of February, 1978.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 419

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

DECISION, FINDINGS OF FACT
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

ROARK MECHANICAL CONTRACTORS, INC.

RESPONDENT

* * * *

Hon. Larry D. Hamfeldt, Assistant General Counsel, Department of Labor, 801 West Jefferson Street, Louisville, Kentucky 40202, Counsel for the Complainant.

Hon. Charles Lawrence Woods, Attorney at Law, Middleton, Reutlinger and Baird, 501 South Second Street, Louisville, Kentucky 40202, Counsel for the Respondent.

FOWLER, Hearing Officer.

* * * *

As a result of a reported fatality accident, an inspection was made on August 31, 1977 and September 1 and 2, 1977 by Compliance Officers of the Department of Labor of premises at Stauffer Chemical Company, 6100 Camp Ground Road, Louisville, Kentucky, a place at which employees of the Respondent Company were working.

As a result of that inspection on or about September 12, 1977, the Respondent was issued one citation alleging one serious violation of the act and standard as follows:

An alleged violation of 29 CFR 1926.28(a) in that:

Two employees replacing steel I-beams of the pipe support rack, located at the south end of the TA-12B tank in the Phase II acid area, were not wearing safety belts

and life lines where they were exposed to the hazard of falling approximately 16 feet to the ground and striking stationary metal objects while falling, nor was any other type of protection provided.

The violation is alleged to be a serious violation within the meaning of the act and the abatement date was set for September 16, 1977 and a proposed penalty of \$750.00 was made.

The aforesaid Hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the Hearings. Under the provisions of KRS 338.081, Hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After Hearing and appeal, the Review Commission may sustain, modify or dismiss a citation or penalty.

The pertinent procedural information is as follows:

1. An inspection, August 1, 1977 and September 1 and 2, 1977 at Stauffer Chemical Company, 6100 Camp Ground Road, Louisville, Kentucky, a place at which employees of the Respondent Company were working.
2. Citation issued, September 12, 1977, listing one alleged serious violation.
3. Notice of Contest received September 16, 1977 contesting the single item.

4. Notice of Contest with copy of citation and proposed penalty transmitted to the Review Commission on September 20, 1977.

5. Notice of Receipt of Contest mailed September 21, 1977 and Certification of Employer Form received September 28, 1977.

6. Complaint received October 7, 1977, and Answer filed October 21, 1977.

7. The case was assigned to a Hearing Officer on October 25, 1977.

8. The Hearing was scheduled and held on November 29, 1977 at the Department of Labor, 801 West Jefferson Street, Louisville Kentucky 40202.

9. Notice of Receipt of the Transcript of the Evidence was sent to the parties on December 20, 1977 and briefing schedules set.

10. Brief for the Complainant was received January 11, 1978, and Brief for the Respondent was received January 23, 1978.

At the outset of the Hearing there was a stipulation entered into by the parties which stipulated jurisdiction of the parties and subject matter and also the parties stipulated that there was a fall at the Stauffer Chemical Company, and it was agreed that Ed Trevarthan, who is the deceased, did, at least, fall from the pipe rack approximately 16 feet above the ground to the floor. The exact cause of his death is not stipulation nor is it stipulated that any unsafe conditions in which he was working was a contributing factor to his death. The Respondent states that they feel that the

fall was a result of a stroke or heart attack or some other factor, but it is stipulated that his body fell from the third level to the ground, approximately 16 feet, and that he died as a result of a brain stem contusion some 11 days after the fall.

It is further stipulated that the employee and deceased, Mr. Trevarthan was not wearing any safety belt or lanyard nor was there any net, platform or guardrails existing at the place and time of his fall. This is contained on pages 1-5 of the Transcript of the Evidence.

It is further stipulated that the witness, John Arnold, is a Compliance Officer of the Department of Labor, and his qualifications are admitted and that he was qualified to act and was acting in his capacity at the time of his investigation (TE 6). Later, it is further agreed that the penalty was arrived at in accordance with proper procedures of the Department of Labor and the method nor the amount of the proposed penalty is in question (TE 24).

DISCUSSION OF THE CASE

The evidence in this case reveals that the inspection was a fatality report inspection (TE 7); that conferences were held both opening and closing and that walk-around inspection was also held with employee representation (TE 8). Mr. Ed Trevarthan and Mr. Ray Yoder were employees of the Respondent Company and were working on top of a pipe support rack at Stauffer Chemical Company some 16 feet above the concrete level of the ground. They were working without safety belts, and that Yoder and Trevarthan

had been talking when Mr. Yoder turned his head and shortly thereafter heard a noise, looked back and saw Mr. Trevarthan falling. (TE 10).

A diagram of the area is introduced showing the position from which it is felt that Mr. Trevarthan fell together with some photographs showing the condition which existed at the time and also indicating the position which the Compliance Officer feels that Mr. Trevarthan fell from (TE 11 - 20).

The Stauffer Chemical Company apparently is in the process of the manufacture of chemicals including acids which pass through some of the lines which are shown in the photographs and the employees were working on pipes which are the conduit for some of the chemicals and the acids which is manufactured by the Stauffer Chemical Company. The Roark employees were, according to the testimony, in the constant process of replacing steel beams which are eroded and eaten away because of the chemicals which are conducted through the lines near the steel beams. This is a similar operation as one would have with a ship at sea where a group of painters are continually touching up spots of the ship which are eroded by reason of the salt water content of the sea and the spray which hits various portions of the ship in route.

The testimony of the Compliance Officer is that it was possible to abate the condition which he says was violated with safety belts and lifelines and also that scaffolding could have been erected (TE 20).

On cross-examination the Compliance Officer states that he did not see the employee fall (TE 25); and that there was no place which existed overhead to which a life line might be attached (TE 26).

In response to a hypothetical question the Compliance Officer stated that he would not recommend attaching a life line across a Haveg pipe, given the assumed qualities of the pipe (TE 29).

The Compliance Officer also states that he would not recommend tying to a support beam underneath the beam also because of the existence of the Haveg pipe, which is brittle and which agitation or weight could cause a break or a separation at the connection, thus causing hot acid to be sprayed into the area (TE 31). The Compliance Officer admits that while he testified concerning scaffolding that there was no mention in the citation of scaffolding as being a means to abate the condition which existed.

Mr. Ray Yoder testified for the Respondent, and is the employee who was working with the deceased, Mr. Trevarthan at the time of his fall. Mr. Yoder is a pipe fitter and also a union steward with Local 522 of the Union (TE 33). The facts again show that Mr. Yoder and the deceased were placing rotted and eaten up steel beams which existed at three levels and that they were working on the top level; that the deceased was kneeling on one of the beams and that Mr. Yoder was approximately four (4) feet from him (TE 35). The

witness Yoder says that it would have been easy to keep oneself from falling through the opening which the Compliance Officer states he believes Mr. Trevarthan fell through (TE 36).

There is a description of a Haveg pipe and the witness testifies that the Haveg pipe is one used for the conduit of hot acids, that it is brittle, that it cannot be stepped on or dropped and that it carries the most powerful hot acid (TE 37). Mr. Yoder describes the possibility of fracturing a Haveg pipe by attaching a lifeline where it might cross the Haveg pipe thereby rupturing the brittle Haveg pipe which is the conduit for the hot acid described.

Consuming some of the testimony was the hypothesis of questions of the employee falling and how he might have fallen and so forth (TE 38).

Mr. Scott Roark, of the respondent company, says that the corrosion process of beams is constantly taking place and that his company, Roark Mechanical Contractors, are constantly in the process of renewing steel as it corrodes as a result of the leakage of acid from the pipe conduits which carry the acids in their manufacture and storage (TE 59).

In this case, we have the unfortunate situation of a man falling to his death, unseen by any witness. In order to establish a violation of the Standard in this or any other case, the Department must both allege the specific measures which are alleged to be violated and also must show what specific measures the employer should have taken to avoid the citation and prove the feasibility

and utility of these measures (See M. K. Binkley Company, OSHD 21,823). The complainant must show whatever device is appropriate to use to abate the condition in an appropriate or necessary method of protection accepted in the industry. (See J. P. Petty Company, Inc. OSHD 21,650.)

While the Compliance Officer did testify on direct examination that he felt that a proper method to abate the hazard would have been to supply the employees working in the area with safety belts and life lines and to tie off the employees in some fashion by scaffolding below the pipe rack (TE 20). The Compliance Officer, under cross-examination admits that if the Haveg pipe, which is a fiber pipe and very brittle, existed, as the proof shows that it did, that he would not recommend that a life line be either tied to that pipe or draped across the pipe which would bear the weight of a man who could have fallen. The Compliance Officer further states that he would not recommend a tie off from the support beam beneath the area which might disturb the Haveg pipe or Haveg fitting enough to cause it to spring a leak and that under those circumstances he would not recommend a life line to be tied off at that particular place.

It appears that the Compliance Officer was not aware of the type of pipes that existed and therefore did not know of their brittle and fragile nature and could not have foreseen that the tying of a life line which would cross those pipes would be any hazard in his initial citation.

However, assuming the pipes to be there and their nature, the Compliance Officer then states that he would not recommend a life line be tied as he has described in his citation. The Compliance Officer further stated that it would be very difficult and almost impossible to have erected scaffolding to protect any employees in the area in which they were working and I feel that an examination of the pictures reveals the impossibility of erecting scaffolding under such conditions.

The Respondent also raises the question that the job being performed by the Respondent Company is covered by section 29 CFR 1926.750 which regulates steel erection, and quotes authority to the proposition that a specific standard should be set forth which would supercede the general standard of which the Respondent is charged.

Respondent also raises the question that section 29 CFR 1926.28(a) is unenforceably vague and quotes the Ninth Circuit Court of Appeals case of Hoffman Construction vs. OSHRC and Dunlop, which is reported at 21,260 and adopted in Diamond Roofing Company at 21,906 on the premise that the general provisions section 29 CFR 1926.28(a) is unenforceably vague.

It is my opinion that the Compliance Officer, by his own testimony, assuming the hypothetical question to be true and based also on the proof which showed that the hypothetical question was true in its aspects, has shown that no violation of the cited standard existed in that the Department has failed to show that there was a feasible method available to abate the condition which was cited.

The Compliance Officer issued the citation, without knowing all the facts that existed at the time and place of the fall, and has, by his testimony, given the conditions that did exist, failed to show that life lines could be utilized under the conditions which existed and thus has failed to prove the violation as cited.

In view of the fact that your Hearing Officer feels that there has been no violation of 29 CFR 1926.28(a), I do not feel that it is necessary to reach the question of whether or not the steel erection standards should apply and whether the Respondent should have been charged with the violation of 29 CFR 1926.750; neither do I feel it appropriate to decide whether or not 29 CFR 1926.28(a) is unenforceably vague in its application to this case.

The Respondent was charged with a violation and the alleged reason for the violation was that the employees were not wearing safety belts and life lines and by the Compliance Officer's own testimony such life lines would not have been feasible or practicable or even advisable under the facts as afterwards developed and revealed to the Compliance Officer.

FINDINGS OF FACT

1. The employee, Edward Trevarthan, fell to his death some 16 feet and at the time was not wearing a safety belt or lanyard for his protection.

2. There is no proof that a method was available to the Respondent to have abated the condition which is alleged to have existed.

3. The Compliance Officer issued the citation without full knowledge of the conditions which existed, and in all fairness to him, conditions which he probably could not have discovered in the exercise of ordinary diligence.

It is concluded as a matter of law as follows:

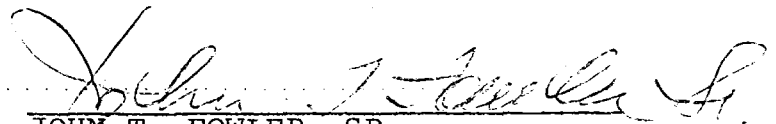
CONCLUSIONS OF LAW

1. The Department of Labor has failed to carry the Burden of Proof of a violation of the alleged standard in that it has failed to show that there was a specific measure that the employer should have taken to have avoided the citation and has failed to prove the feasibility and utility of using life lines as stated in the citation.

2. It is incumbent upon the Complainant not only to allege and prove a violation of the act, but also it must show specific measures the employer should have taken to have avoided the citation and the feasibility and utility of those measures.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation against the Respondent herein may be and is hereby dismissed and the proposed penalty therefore may be and is hereby vacated.


JOHN T. FOWLER, SR.
Hearing Officer

Dated: February 10, 1978
Frankfort, Kentucky

DECISION NO. 530