



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 6, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

VS.

IRVIN H. WHITEHOUSE & SONS COMPANY

KOSHRC #437

COMPLAINANT

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 July 6, 1978, 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 finding that the evidence herein adequately supports the findings and conclusions of the Hearing Officer, it is therefore the ORDER of this Commission that the Recommended Order in this case be and it is hereby AFFIRMED. The violations and proposed penalties are hereby SUSTAINED. Abatement shall be immediate.

Merle H. Stanton
Merle H. Stanton, Chairman

/s/ Charles B. Upton
Charles B. Upton, Commission

DATED: October 6, 1978
Frankfort, Ky.

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

DECISION NO: 616

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 Mail)
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health


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

Honorable Laurence J. Zielke (Certified Mail #458382)
Attorney for Respondent
Zielke, Davidson, Taft & Risch
2100 First National Tower
Louisville, Kentucky 40202

Irvin H. Whitehouse & Sons Co. (Certified Mail #358383)
4600 Jennings Lane
Louisville, Kentucky 40218

Irvin H. Whitehouse & Sons Co. (Certified Mail #458384)
Post Office Box 1033
Paducah, Kentucky 42001

This 6th day of October, 1978.


Iris R. Barrett
Executive Director

Agree



437

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

July 6, 1978

KOSHRC #437

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

IRVIN H. WHITEHOUSE & SONS

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

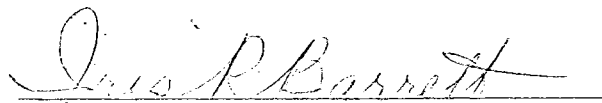
Honorable Kenneth E. Hollis. (Messenger Service)
General Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Timothy P. O'Mara
Assistant Counsel

Hon. Laurence J. Zielke (Certified Mail #457584)
Zielke, Davidson, Taft & Risch
2100 First National Tower
Louisville, Kentucky 40202

Irvin H. Whitehouse & Sons Co. (First Class Mail)
4600 Jennings Lane
Louisville, Kentucky 40218

Irvin H. Whitehouse & Sons Co. (First Class Mail)
P. O. Box 1033
Paducah, Kentucky 42001

This 6th day of July, 1978.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHR #437

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS. FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

IRVIN H. WHITEHOUSE & SONS

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of two citations issued November 1, 1977, against Irvin H. Whitehouse and Sons, hereinafter referred to as "Whitehouse", by the Commissioner of Labor, hereinafter referred to as the "Commissioner". for violation of the Kentucky Occupational Safety and Health Act, herein-after referred to as the "Act".

On October 18, 1977, a Compliance Officer for the Commissioner made an inspection of a construction site where Whitehouse was performing as a subcontractor. As a result of that inspection, the Commissioner issued two citations on November 1, 1977, charging Whitehouse with one serious violation of the Act, and one regulatory violation, and proposing a penalty therefor of \$600.00.

On November 14, 1977, and within 15 working days from receipt of the citation, Whitehouse filed a notice with the Commissioner contesting both citations. Notice of the contest was transmitted to this Review Commission on November 16, 1977, and notice of receipt of the contest was sent by this Review Commission to Whitehouse on the following day. Thereafter, on December 6, 1977, the Commissioner filed its Complaint, and on December 19, 1977, Whitehouse filed its Answer. On January 6, 1978, this matter was assigned to a Hearing Officer and scheduled for hearing on January 31, 1978.

On January 16, 1978, Whitehouse moved this Review Commission to continue the hearing to a later date and on the same date an Order was entered continuing the hearing to February 16, 1978. On February 13, 1978, Respondent again moved this Review Commission to continue the hearing citing illness on the part of its Vice President as the basis for the continuance. By Order of February 15, 1978, the hearing was continued until March 8, 1978.

The hearing was held in Paducah on March 8, 1978, pursuant to KRS 338.070(4). That section of the statutes authorizes the 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 represent it in this manner. The decisions of Hearing Officers are subject to discretionary review by this Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

The standard (as adopted by 803 KAR 2:030) and the regulation (as adopted by 803 KAR 2:180) allegedly violated, the descriptions of the alleged violations, and the penalty proposed for same, are as follows:

29 CFR 1926.451 (e)(7)(ii) (803 KAR 2:030)	Employees were allowed to ride on manually propelled mobile scaffolds whose minimum base dimensions were less than one-half the height of the scaffolds, thereby exposing employees to a potential fall of fifteen (15) feet.	\$600.00
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SECTION 3 (803 KAR 2:180)	The supplementary records of occupational injuries and illnesses (OSHA Form No. 101) or the Workmen's Compensation Form SF-1 was not available for inspection at this establishment within six (6) working days after knowledge that recordable cases had occurred.	-0-
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Prior to the presentation of proof, Whitehouse tendered a motion to amend its answer in conformity with an amended answer attached to the motion. The amendment raised no issues which were not implicit in the contest itself or the original answer. Therefore, since the amended answer in effect raised no new issues, the Commissioner was not prejudiced by its admissions, and the motion was sustained.

At the conclusion of the Commissioner's proof, Whitehouse moved to dismiss the citation on the grounds that the Complainant had not satisfied the burden of proof and established a prima facie case. Ruling on the motion was deferred until after the evidence had been reviewed. Now having reviewed the evidence the motion is overruled.

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

Whitehouse is a painting contractor with its main offices in Louisville. At the time of the inspection Whitehouse was engaged in painting the interior of a distilling plant under construction near Paducah for Heublien, Inc. Because of the interior height of the structure, much of the painting was being done on scaffolds.

On October 3, 1977, Whitehouse employed Robert E. Smith as a painter on the job. He was assigned to a crew of 4 men, two of whom were working on the ground, and two of whom were working on a set of double scaffolds which consisted of two scaffolds joined together by a pickboard or a platform. The scaffolds were each 52 inches wide by 72 inches long and 15 feet high. The pickboard or platform connecting them was 27 feet in length.

Robert Smith was one of the two men working on the scaffold. He was spray painting the interior girders with an airless paint gun. He and the other man working on the scaffold would start painting from the

middle of the pickboard between the two scaffolds and then work their way to opposite ends of the pickboard. When they finished spray painting an area, they would remain on the double scaffold while the two men on the ground moved it to another area. Neither of the men on the scaffold were wearing safety lines or lanyards and although they were available for their use, were not required.

During the course of the day while Robert Smith was standing in the middle of the pickboard, the men on the ground suddenly started to move the scaffold to another area. Mr. Smith lost his balance and fell to the ground sustaining serious injuries which required his hospitalization. These injuries included a broken hip, an injured knee which later required surgery, lacerations and two lost teeth.

On October 4, 1977, Lester Smith was employed by Whitehouse as a painter. He worked for Whitehouse until October 13, 1977, when a scaffold he was on, similar to the one Robert Smith had fallen from, toppled over while being moved. At the time of the accident, Lester Smith had been painting sprinkler pipes with a glove dipped in paint. Although he was wearing a life line at the time of the accident, the line was not secured or tied off. His failure to secure the life line was apparently consistent with practice of painters on the job. Because the lifelines or lanyards were only 7 feet long and the distance the scaffolds were moved was usually greater than that, the painters would not secure the life lines when being moved.

As a result of the accident, Lester Smith also suffered serious injuries, though not quite so severe as Robert Smith's. He sustained broken ribs and contusions of the lung and was hospitalized for 10 days.

Up until October 14, at least, the men working on the scaffolds were permitted to remain on them while they were being moved. The Commissioner determined that this was a serious violation of the cited standard and proposed a penalty of \$600.00.

In proposing penalties, the Commissioner uses guidelines contained in its Compliance Manual. Under these guidelines, an unadjusted penalty of \$1,000.00 is proposed for each serious violation. This unadjusted penalty may be reduced by up to 20% for "good faith" shown by the employer in complying with the Act, and up to 20% for the "history" of the employer in complying with the Act. Employers with less than 100 employees are also permitted a reduction for size.

Here, the Commissioner allowed the maximum credit of 40% for good faith and history, but since the company had more than 100 employees, no allowance was made for size. The allowed adjustments reduced the penalty to the \$600.00 proposed.

All of the company's accident reports and records are kept in Louisville at its main office. Because it maintained no accident records at the construction site in Paducah, the Commissioner also cited the company with a regulatory violation.

CONCLUSIONS OF LAW

29 CFR 1926.451(e)(7)(iii) states in part:

Scaffolding Manually propelled mobile scaffolds The employer shall not allow employees to ride on manually propelled scaffolds unless the minimum dimension of the scaffold base when ready for rolling is at least one-half of the height

The Commissioner contends that the "minimum dimension of the scaffold base" refers to the smallest side of the scaffold. In this case the smallest side was 52 inches or 4 feet 4 inches. Thus, under the Commissioner's interpretation of the standard, the maximum height allowed for employees to ride on a scaffold with this dimension is 8 feet 8 inches. Since the scaffold in question was 15 feet in height, the Commissioner maintains that allowing employees to ride this scaffold violated the standard.

Whitehouse contends first that the term "minimum dimension" is ambiguous and vague and, therefore, the standard is unenforceable. In the

alternative Whitehouse maintains that the term "minimum dimension" refers to the sum of one long and one short side. Thus, in this case, where one side is 72 inches or 6 feet, and the other is 4 feet 4 inches, for a total of 10 feet 4 inches, the allowable height is 20 feet 8 inches. Since the scaffold was 15 feet in height, Whitehouse maintains that no violation occurred when the employees were allowed to ride on it.

In order to be enforceable, a standard must reasonably notify an employer of its requirements, otherwise it violates the due process clause of the 14th Amendment. In Ryder Truck Lines, Inc. vs. Brennan 497 SW2d 230 (CA-5, 1974), the Court held that a standard must "afford a reasonable warning of the proscribed conduct in light of common understanding and practices". Here, the standard's reference to a "minimum dimension", thought somewhat vague, is not so vague as to fail to afford a reasonable warning to an employer of what constitutes a violation of the standard.

Webster's Third New International Dictionary defines the word "minimum" as the "least quantity assignable". The word is derived from the Latin word "minimus" which also means smallest or least. Thus, as used in the standard, the term "minimum dimension" means the smallest dimension, which in this case is 4 feet 4 inches. Since the height of the scaffold exceeded twice this size, the movement of men upon it was a violation of its provisions. Furthermore, in view of the hazard presented by the violation, the penalty proposed was reasonable.

803 KAR 2:180, Section 3 provides:

Supplementary record. In addition to the log of occupational injuries and illnesses provided for inspection at each establishment within six (6) working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Form OSHA No. 101. The Workman's Compensation SF-1 is an acceptable alternative record for those employers covered by Workmen's Compensation.

The purpose of this regulation is to require that current reports of accidents occurring at places of employment be maintained at that place of employment so that they are available for inspection during safety and health investigations. The term "establishment" in the regulation refers to any place where employers report to work each day. Where employees have more than one such place, the records pertaining to accidents must be kept at each establishment where an accident occurs.

Here, the construction site of the Heublien Plant was an "establishment" within the meaning of the regulation. Therefore, the failure to maintain at the construction site records of the accidents occurring there was a violation of the regulation.

RECOMMENDED DECISION


NOW, THEREFORE, upon the basis of the foregoing Findings of Fact, Conclusions of Law and upon the entire record.

IT IS HEREBY ORDERED

That the citation charging a violation of 29 CFR 1926.451(e)(7)(ii) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of \$600.00 is hereby affirmed and the penalty sustained.

That the citation charging a violation of 803 KAR 2:180, Section 3, is hereby affirmed.

That the violations affirmed and the penalty sustained paid, must be abated, without delay, but no later than 30 days from the date hereof.


PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: July 6, 1978
Frankfort, Kentucky

DECISION NO.587