

*Maque*



*PV*

*461*

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

August 15, 1978

*KOSHRC  
Decision &  
Order No. 597*

KOSHRC #461

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JAY-GEE, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

ROBERTS, Commissioner, for the Majority:

A Recommended Order of Hearing Officer J. D. Atkinson, Jr., issued under date of May 24, 1978, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

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 a majority of this Review Commission that the Recommended Order of the Hearing Officer be and it hereby is AFFIRMED.

*John C. Roberts*

John C. Roberts, Commissioner

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

STANTON, Chairman, DISSENTING:

I disagree with the Recommended Order of the Hearing Officer and the majority decision to affirm.

The Hearing Officer's dismissal of the serious citation and proposed penalty is based on his finding that an isolated occurrence of employee misconduct was involved.

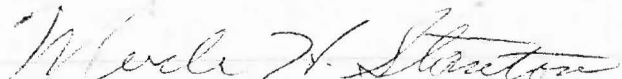
An employee was definitely exposed for a brief period of time to the hazard of a fall and serious injury. The evidence produced at the hearing did not establish a defense of isolated occurrence. To establish the defense there must be evidence of (1) a deviation (2) from a company work rule or instruction (3) which is enforced, and (4) the deviation must be unknown to the employer.

The Respondent gave general testimony regarding their safety program and record. A guarded platform or "cage" was available for use and the employees are apparently aware of this fact. A letter of reprimand was directed to the employee involved.

The Company did not establish that the employee's action was a deviation from an "enforced" company work rule or instruction regarding use of this particular device.

Another factor to be considered in cases involving a defense of isolated occurrence is the degree of supervision exercised by the employer. It is evident in this case that company supervision or instruction to the particular employee involved was minimal. The degree of supervision exercised directly effects the employer knowledge element of the defense.

I believe that the serious violation of 1910.23(c)(1) (as adopted by 803 KAR 2:020) and KRS 338.031(1)(a) should be sustained. Due to various mitigating factors in the case, I would vacate the proposed penalty.

  
Merle H. Stanton, Chairman

Dated: August 15, 1978  
Frankfort, Kentucky

DECISION NO. 597

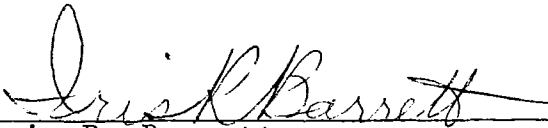
This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

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: Hon. Larry D. Hamfeldt  
Assistant Counsel

Mr. R. D. Tidball, Regional Mgr. (Certified Mail #457638)  
Jay-Gee, Inc.  
R. R. #2, Box 117-A  
Butler, Kentucky 41006

This 15th day of August, 1978.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

*Haynes*



461

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

May 24, 1978

*KOSHRC  
Decision  
Order No 574*

KOSHRC # 461

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JAY-GEE, 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  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Hon. Larry D. Hamfeldt  
Assistant Counsel

Mr. R. D. Tidball, Regional Mgr. (Certified Mail #783147)  
Jay-Gee, Inc.  
R. R. #2, Box 117-A  
Butler, Kentucky 41006

This 24th day of May, 1978.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION.

KOSHRC DOCKET

NO. 461

COMMISSIONER OF LABOR,  
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,

VS: : : :

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

JAY-GEE, INC.,

RESPONDENT.

FOR COMPLAINANT: Hon. Larry D. Hamfeldt,  
Attorney-at-Law,  
Department of Labor,  
Frankfort, Kentucky 40601.

FOR RESPONDENT: Mr. R. D. Tidball,  
Regional Manager,  
and  
Mr. Randall Brownfield,  
Plant Manager,  
Jay-Gee, Inc.,  
RR #2, Box 117-A  
Butler, Kentucky 41006

An inspection was made on January 24, 1978 at the Respondent's fabrication plant and premises at Butler, Kentucky, by a Compliance Officer for the Department of Labor. As a result of that inspection, Respondent was issued citations (as well as other citations not in contest) alleging violations of the Safety and Health Regulations pursuant to KRS Chapter 338 of Kentucky Revised Statutes as follows:

(a) Violation of 1910.178(g)(1) in that:

A battery charging installation in the tool room was not located in an area designated for that purpose.



(b) Violation of 1910.107(c)(5) in that:

An electric motor driving an exhaust fan for ventilation in the spraying room of the storage room, was not the type specifically approved for locations containing both deposits of readily ignitable residue and explosive vapors.

(c) Violation of 1910.23(c)(1) in that:

An employee was observed working from a plywood platform on the forks of a powered industrial truck approximately twelve (12) feet above the concrete floor in the storage building and the platform was not provided with a standard guardrail nor was personal protection such as safety belts and life lines being used as provided by 29 CFR Part 1910.132(a): and,

Violation of KRS 338.031 (1)(a) in that:

The employer failed to furnish to his employee working from a platform mounted on the forks of a Clark forklift truck at a height of approximately twelve (12) feet or more, a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm to his employees in that the work platform was not secured to the forks or lifting carriage of the forklift truck.

The violation alleged in paragraph (a) and (b) is a non-serious violation and paragraph (c) is a serious violation within the meaning of the Act.

At the Hearing, the parties agreed that Respondent was withdrawing his notice of contest of items (a) and (b) and that the Department of Labor is deleting the penalties assessed for those two items. It was agreed that these two items had already been abated on the hearing date.

This leaves the only matter in contest the alleged serious violation set out in Paragraph (c) for which a penalty of \$700.00 is proposed.

The pertinent procedural information is as follows:

(1) Inspection was conducted on or about January 24, 1978, by the Commissioner at the above-mentioned address.

(2) Two (2) citations were issued on February 10, 1978, the first containing a total of twenty-nine (29) non-serious violations and the second containing one

serious violation with the only penalties proposed those set out hereinabove.

(3) Notice of contest was received on February 27, 1978, contesting only the items set forth in (a), (b) and (c) hereinabove.

(4) Notice of receipt of contest was mailed March 2, 1978, and Certification of employer form was dated March 7, 1978.

(5) Complaint was filed March 13, 1978, and no formal answer is in the record.

(6) The case was assigned to a Hearing Officer on April 14, 1978.

(7) The hearing was scheduled and held on Tuesday, May 2, 1978, at District #6 Office of Bureau of Highways, Buttermilk Pike and I-75, Covington, Kentucky.

(8) Transcript was received on May 10, 1978, and Order approving same entered on said date.

(9) Neither of the parties requested the opportunity to file Briefs, and the matter stood submitted upon the receipt of the testimony.

#### DISCUSSION OF THE CASE.

The proof indicates that an opening conference, a walk-around inspection and a closing conference were properly held by the Department of Labor. The Compliance Officer was accompanied on the inspection by a Federal Monitor, Mr. Larry Calhoun of the Louisville Office and by Mr. Randall Brownfield, Respondent's plant manager. In the course of the inspection these three men passed through a 60' X 20' storage room on their way to inspect a paint room. They were in the paint room approximately five minutes. (TR. p.44). On their return back through the paint room, the Compliance Officer observed an employee seated on a plywood board placed on the uplifted forks of a forklift truck. There was no guard rail around this platform nor was the employee using any type of safety belt. Since the man had



not been working there when the inspection party first passed through the storage room, it appears that he could not have been working on this platform more than five minutes. The evidence showed that the Respondent Company had provided a cage for attachment to the forklift truck with appropriate safety features, for the use of employees in similar situations and had instructed employees in its use. Although the platform was described in the citation as being 12 feet high, the proof showed that the ceiling in this room was 12 feet high and that the platform was approximately ten feet above the floor. It also was shown by the proof that the platform was clamped to the forklift by "C" clamps and not "not secured" as set forth in the complaint.

#### CONCLUSION OF LAW.

The Hearing Officer is of the opinion that this incident was an "isolated occurrence of employee misconduct" sufficient to constitute a defense. There was evidence that the company had provided a safety cage for use on the forklift, that the employees had been instructed in its use, and that it was available for use on the day in question. There was further evidence that the Respondent had a good safety program, that work rules were enforced, and that safety infractions were written up against employees, and that after three safety infractions an employee was subject to remedial action. (TR. p. 38). In this case the employee was reprimanded in writing after the event. It is further clear that the violation was not foreseeable by the employer and lasted only a brief few minutes and involved only one employee.

No evidence having been introduced to refute these elements of the affirmative defense set out above, it is concluded as a matter of law that the

defense of isolated occurrence of employee misconduct requires that the citation be vacated.

RECOMMENDED ORDER.

(1) IT IS ORDERED AND ADJUDGED that the motion to withdraw contest and the motion to delete proposed penalties for (a) violation of 1910.178(g)(1) and (b) Violation of 1910.107(c)(5) are hereby sustained and the no penalty provision sustained. The parties have agreed that abatement of these two violations has already been accomplished.

(2) That the citation (c) alleging a violation of 1910.23(c)(1) and KRS. 338.031(1)(a) be dismissed and the proposed penalty set forth in said citation is vacated.



J. D. ATKINSON, JR., Greenup, Kentucky 41144

HEARING OFFICER.

DATED: May 18, 1978.

DATED: May 24, 1978  
Frankfort, Kentucky  
DECISION NO. 574