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465

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

Decision #650

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

December 27, 1978

KOSHRC #465

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

M. C. WEBB, INCORPORATED

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman, and UPTON, Commissioner. ROBERTS, Commissioner, disqualified himself due to a possible conflict of interest.

A Recommended Order of Hearing Officer J. D. Atkinson, Jr., issued under date of 31 October 1978, is before this Commission for review pursuant to an Order by this Commission granting Complainant's Petition for Discretionary Review.

It is the finding of this Commission that the Hearing Officer's decision to dismiss Citation No. 6, Item 1 in its entirety is erroneous.

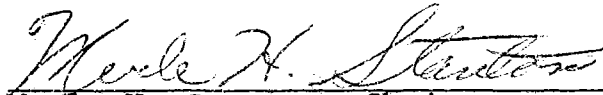
The Respondent herein did not contest the citations, but only the penalties. Thus the question before this Commission is whether the Hearing Officer, as an agent of this Commission, had subject-matter jurisdiction to rule on the merits of Citation No. 6.

KRS Chapter 338.141(1) provides that "If within fifteen (15) working days from the receipt of the citation an employer fails to notify the Commissioner that he intends to contest the citation, then the citation shall be deemed a final order of the Commission and not subject to review by any court or agency." In Edwards and Webb Construction Co., Inc., KOSHRC #284, this Commission held that "any ruling on the merits" of a citation which was not contested is "without the scope of the jurisdiction of this Commission pursuant to KRS 338.141(1)." Therefore this Commission finds that Citation No. 6, Item 1 herein became a final order fifteen days from Respondent's receipt of the citation, and

therefore cannot be considered on its merits by this Commission.

The Commission finds no error in Hearing Officer Atkinson's decision to vacate the proposed penalty under Citation No. 6.

Accordingly, it is ORDERED that the Hearing Officer's Recommended Order of 31 October 1978, insofar as it rules on the merits of Citation No. 6, Item 1, is without the jurisdiction of this Commission and is therefore without legal effect. Abatement of Citation No. 6, Item 1, which is a violation of 29 CFR 1926.350 (a)(9) (as adopted by 803 KAR 2:030), shall be immediate. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.


Merle H. Stanton, Chairman

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

Dated: December 27, 1978
Frankfort, Kentucky

DECISION NO. 650

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. Frederick G. Huggins
Deputy General Counsel

Hon. P. Joseph Clarke (Certified Mail #988936)
Attorney-at-Law
120 North Third Street
Danville, Kentucky 40422

Mr. M. C. Webb, President (Certified Mail #988937)
M. C. Webb, Inc.
P. O. Box 104
Danville, Kentucky 40422

This 27th day of December, 1978.



Iris R. Barrett
Executive Director



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 31, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC # 465

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

M. C. WEBB, INCORPORATED

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:

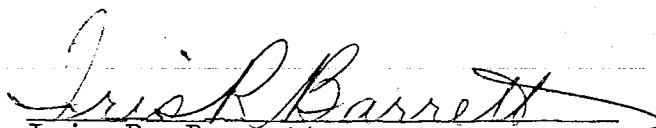
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Frederick G. Huggins
Deputy General Counsel

Hon. P. Joseph Clarke (Certified Mail #458406)
Attorney-at-Law
120 North Third Street
Danville, Kentucky 40422

Mr. M. C. Webb, President (Certified Mail #458407)
M. C. Webb, Inc.
P. O. Box 104
Danville, Kentucky 40422

This 31st day of October, 1978..


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION.

KOSHRC # 465.

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,
(PLAINTIFF)

VS: : : :

FINDING OF FACT, CONCLUSION OF LAW,
AND RECOMMENDED ORDER.

M. C. WEBB, INCORPORATED,

RESPONDENT.

On or about January 5, 1978, an inspection was made of a highway construction site on U. S. Highway No. 23 about twelve miles South of Catlettsburg, Kentucky. At said time and place, employees of M. C. Webb, Incorporated, were engaged in constructing concrete bridge piers.

As a result of that inspection, the Commissioner, on January 13, 1978, issued citations against Edwards and Webb Construction Company, Inc., of Box 223, Danville, Kentucky, alleging eleven non-serious violations, one repeat serious violation, and four repeat non-serious violations of the Act and Standards. On January 25, 1978, these same citations were re-issued, directed to M. C. Webb, Incorporated, of P. O. Box 104, Danville, Kentucky. Then, on February 27, 1978, amended citations were again issued to M. C. Webb, Inc., alleging the same violations. Since the citations for non-serious non-repeated violations were not contested, it will not be necessary to discuss them herein.

Citation No. 2, as amended, contained one alleged repeated serious violation of the Act with a proposed penalty therefor of \$1,600.00, and citations 3, 4, 5 and 6 each contained one alleged repeat non-serious violation of the Act, each with a proposed penalty in the amount of \$80.00. Thus the proposed penalty for all the alleged violations was in the total amount of \$1,920.00.

The pertinent procedural information is as follows:

(1) Inspection was conducted on or about January 5, 1978, by the Commissioner at the above mentioned work site.

(2) Original citations were issued on January 13, 1978, alleging one repeated serious and four repeated non-serious violations by Edwards and Webb Construction Company.

(3) Citations were re-issued on January 25, 1978, alleging one repeated serious and four repeated non-serious violations by M. C. Webb, Incorporated.

(4) Amended citations were issued against M. C. Webb, Inc., on February 27, 1978, alleging one repeated serious and four repeated non-serious violations.

(5) Notice of contest was received on March 16, 1978.

(6) Notice of Receipt of contest was mailed on March 22, 1978, and Certification of Employer form was received April 12, 1978.

(7) Complaint was received March 29, 1978, and Respondent's answer and motion to suppress the evidence on grounds of an illegal search was received on April 7, 1978.

(8) Response to Respondent's motion to suppress the evidence was received on April 11, 1978.

(9) Notice of assignment to a Hearing Officer and Notice of hearing were mailed on April 18, 1978.

(10) Amended Complaint was filed on April 27, 1978.

(11) Respondent's Motion for continuance was received on April 27, 1978.

(12) Revised Notice of Hearing was mailed on April 28, 1978.

(13) Second Revised Notice of Hearing was mailed on May 23, 1978.

(14) Hearing was held as re-scheduled on June 6, 1978, at the KOSH Review Commission, Conference Room, in Frankfort, Kentucky.

(15) Notice of Receipt of Transcript and Briefing order was issued on July 3, 1978.

(16) Complainant's Brief was mailed on July 21, 1978.

(17) Respondent's Brief was mailed on August 10, 1978.

(18) Complainant's Reply Brief was mailed on August 15, 1978.

THE ALLEGED VIOLATIONS.

As to Item No. 1 contained in Citation No. 2, the Standard alleged to have been violated, the description of the alleged violation, and the penalty proposed for same, are as follows:

(a) 29 CFR 1926.28(a)

Personal protective equipment, such as safety belts and lanyards or other adequate safety equipment, was not provided for three (3) employees working on the top of a bridge pier, located on U. S. 23 at Bear Creek, approximately fifty (50) feet long and four (4) feet wide and approximately forty (40) feet above the ground level;

or 1926.500(d)(1)

Three (3) employees were permitted to work on top of a bridge pier, used as a platform, approximately fifty (50) feet long and four (4) feet wide and approximately forty (40) feet above the ground level, that was not provided with a standard railing and toeboard;

or 1926.104(a)

Lifelines, safety belts, and lanyards were not used for employee safeguarding against falls of approximately forty (40) feet;

or 1926.105(a)

Three (3) employees were not protected against falls of more than twenty-five (25) feet by the use of safety nets or appropriate protective equipment.

) The proposed penalty for this violation was \$1,600.00.

(b) Violation of CFR 1926.402(a)(11) in that:

An extension cord, approximately one hundred fifty (150) feet long, run from a box near the tool trailer to the Column II site, was not protected against accidental damage as may be caused by traffic or rocks.

The proposed penalty for this violation was \$80.00.

(c) Violation of CFR 1926.500 (e)(1)(iii) in that:

A stairway leading to the tool trailer, approximately forty-two (42) inches wide, with seven (7) risers and both sides open, was not equipped with a standard railing on each open side.

The proposed penalty for this violation was \$80.00.

(d) Violation of CFR 1910.252(a)(2)(iv)(c) in that:

Oxygen and acetylene cylinders stored together in the tool trailer were not separated by a minimum distance of twenty (20) feet or by a noncombustible barrier at least five (5) feet high and having a fire resistance rating of at least one-half (1/2) hour.

The proposed penalty for this violation was \$80.00.

(e) Violation of CFR 1926.350(a)(9) in that:

One (1) oxygen and one (1) acetylene cylinder, on the ground under the tool trailer, were not secured in an upright position.

The proposed penalty for this violation was \$80.00.

DISCUSSION OF THE CASE.

The first question that must be decided since it is raised by Respondent in a motion to suppress the evidence, is whether there was an illegal search of the premises of Respondent incident to the inspection of January 5, 1978.

The facts on this point are that the Compliance Officer, Irma J. Robinette, presented her credentials on the job site and asked for the person in charge.

She was directed to a Mr. Simpson, a foreman, and stated that she wanted to make an OSHA inspection on the job site. No request was made to see a search warrant

and the Compliance Officer admittedly did not have one, nor did she inform the foreman that he had a right to object to a warrantless search. She asked Mr. Simpson if he would like to accompany her on her walk around on inspection and he said he would like to do so.

Although Yocum vs. Burnett, 566 SW2d 755, requires a search warrant before a search can be made if there is an objection to a search, a warrantless search may be made where the Respondent consents. At this date the Courts have not gone so far as to require a Compliance Officer to warn an employer of his right to object to a warrantless inspection of his premises. It is the opinion of the Hearing Officer that no warrant was required under the fact situation as stated. The Respondent's Motion to Suppress the evidence is, therefore, overruled.

A much more serious question is raised as to whether the violations cited are in fact repeat violations. The basis for the Complainant's assertion that these are repeat violations is the fact that the Edwards and Webb Construction Company, Inc., was cited for similar violations on June 7, 1976. It was at first the Complainant's impression that it was dealing with Edwards and Webb Construction Company on January 5, 1978. When Complainant learned subsequent to the inspection that the contractor was in fact M. C. Webb, Incorporated, new citations were issued in that name.

Proof was introduced at the hearing that these are in fact two different corporations, with different ownership, and different addresses, and although Mr. M. C. Webb is interested in both Corporations, the extent of his interest is not the same. This is not a case of Edwards and Webb having changed its name to M. C. Webb, Inc., since both Corporations are still in business. The Hearing Officer is of the opinion that the Complainant is in error in asserting violations previously committed by one

Corporation can be the basis for citing repeat violations against a different corporation.

As to the alleged serious violation, the facts were that employees were working on top of a bridge pier some forty feet above ground level, which pier was approximately fifty feet long and four (4) feet wide. The Compliance Officer stated that there was no railing around the perimeter of the pier, nor were the employees wearing safety belts or otherwise protected by nets. The bridge pier was covered by a large tarpaulin, and in response to the Compliance Officer's assertion, the Respondent stated that the railings were in place under the tarps. Whether or not this is the case, the photographs introduced by the Compliance Officer clearly show that there is nothing to protect the employees from a dangerous fall of approximately forty feet, and if present under the tarps, the effectiveness of any railings has been nullified. The Hearing Officer is of the opinion that the alleged serious violation was proved.

Citation #3 asserted that an extension cord approximately 150 feet long was not protected against accidental damage from traffic or rocks. Mrs. Robinette stated that this cord was laying on the ground and she could see tracks of vehicles crossing the cord. Mr. Simpson, when asked, stated that possibly two or three vehicles per day were crossing the cord. Mr. Webb stated that the cord was a "Super heavy" extension cord and he knew of no reason for traffic to be crossing the cord. This cord was used by employees of Respondent in attaching various power tools. In the opinion of the Hearing Officer there was a possible hazard here to which employees of Respondent could have been exposed, although it was not shown to have been actually damaged.

Citation No. 4 alleged that a stairway to the tool trailer 42 inches wide and having seven risers, was not equipped with a standard railing on each open side. Mrs. Robinette testified that these steps were approximately four and one-half feet high at the top and were used by employees of Respondent for access to the tool shed. Since there was obviously rain, mud, ice and snow present at a highway construction site in the winter time, it is obvious that there was a hazard to Respondent's employees here for lack of handrails on these steps.

Citation No. 5 alleges that oxygen and acetylene cylinders stored together in the tool trailer were not separated the proper distance nor protected by a sufficient fire resistant barrier. Testimony of the Compliance Officer sufficiently established this violation and Respondent offered no proof on this particular citation.

Citation No. 6 alleges that one oxygen and one acetylene cylinder were on the ground under the tool shed and not secured in an upright position. Mrs. Robinette testified that the hazard here is the danger of dropping an object on the valve stems and knocking it off. The cylinders being under pressure, she said would cause them to act as a torpedo. Mr. Webb testified that the cylinders were empty and that the valves were open so that they did not contain any pressure and could not constitute any hazard. The Hearing Officer agrees that the empty cylinders with open valves lying on the ground under a shed do not constitute any hazard to employees of Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of fact are as set forth hereinabove. The Hearing Officer finds as a matter of law the following:

(1) The Motion by Respondent to suppress the evidence on grounds of an illegal search is overruled.

(2) None of the alleged serious and non-serious repeat violations are sustainable as repeat violations.

(3) That Citation No. 2 charging a repeat serious violation of 29 CFR 1926.28(a) or 1926.500(d)(1) or 1926.104(a) or 1926.105(a) is affirmed as a non-repeated serious violation, and the penalty therefor reduced to \$800.00.

(4) That Citation No. 3 charging a repeat non-serious violation of 29 CFR 1926.402(a)(11) is affirmed as a non-repeat non-serious violation and the penalty therefor vacated.

(5) That Citation No. 4 alleging a repeat non-serious violation of 29 CFR 1926.500(e)(1)(iii) is affirmed as a non-repeat non-serious violation and the penalty therefor is vacated.

(6) That Citation No. 5 alleging a repeat non-serious violation of 29 CFR 1910.252(a)(2)(iv)(c) is affirmed as a non-repeat non-serious violation and the penalty therefor vacated.

(7) That Citation No. 6 alleging a repeat non-serious violation of 29 CFR 1926.350(a)(9) is hereby dismissed.

RECOMMENDED ORDER.

NOW, THEREFORE, IT IS HEREBY ORDERED:

That Citation No. 2 charging a repeat serious violation of 29 CFR 1926.28(a) or 1926.500(d)(1) or 1926.104(a) or 1926.105(a) is affirmed as a non-repeat serious violation and the penalty therefor is \$800.00.

That Citation No. 3 charging a repeat non-serious violation of 29 CFR 1926.402(a)(11) is affirmed as a non-repeat non-serious violation and the proposed penalty therefor is vacated.

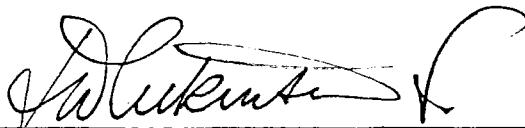
That Citation No. 4 charging a repeat non-serious violation of 29 CFR 1926.500(e)(1)(iii) is affirmed as a non-repeat non-serious violation and the proposed penalty therefor is vacated.

That Citation No. 5 charging a repeat non-serious violation of 29 CFR 1910.252(a)(2)(iv)(c) is affirmed as a non-repeat non-serious violation and the proposed penalty therefor is vacated.

That Citation No. 6 charging a repeat non-serious violation of 29 CFR 1926.350(a)(9) is hereby dismissed and the proposed penalty therefor vacated.

That, if not already abated, said violations that have been affirmed must be abated immediately upon receipt of this Recommended Order.

That the total penalty therefor in the amount of Eight Hundred Dollars (\$800.00) be paid without delay, but in no event more than thirty (30) days from the date of this Recommended Order.



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

HEARING OFFICER.

DATED:

OCTOBER 27., 1978.

DATED: October 31, 1978
Frankfort, Kentucky

DECISION NO. 629