

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

March 20, 1979

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHR #483

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROSS BROTHERS CONSTRUCTION CO.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; ROBERTS and UPTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer J. D. Atkinson, Jr., issued under date of December 4, 1978, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

The first item on review involves an alleged nonserious violation 29 CFR 1926.402(c)(1) (as adopted by 803 KAR 2:030). The Recommended Order dismisses this item based on a finding that an employer is not responsible for his employees' exposure to nonserious hazards or violations created by or under the control of another employer. A correct reading of the law, and application of the law to the facts in this case indicates that the Hearing Officer's decision on this issue is incorrect and is hereby REVERSED.

An employer is responsible for exposure of his employees to a serious or nonserious hazard or violation created or controlled by another employer. To avoid a citation under these circumstances an employer must establish that "realistic measures" were taken to avoid exposing his employees to the hazard. The record in this case does not indicate that the Respondent requested that the boxes be properly marked or that any other measure was taken to avoid employee exposure.

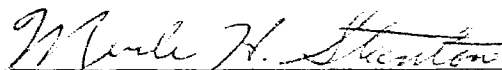
The next item on review involves an alleged nonserious violation of 29 CFR 1926.550(b)(2) (as adopted by 803 KAR 2:030). Mr. Atkinson has recommended dismissal of this item. A review of the evidence presented supports the Hearing Officer's disposition. The dismissal of Citation 1, Item 3, is hereby SUSTAINED.


An alleged serious violation of 29 CFR 1926.28(a) or 29 CFR 1926.105 (as adopted by 803 KAR 2:030) with a proposed penalty of \$800.00 is before this Commission. This item occupied the majority of the proceeding before the Hearing Officer. Mr. Atkinson has sustained a serious violation as charged but the penalty provision has been vacated due to the mitigating circumstances set forth within his discussion of the case.

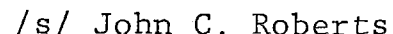
This Commission finds that a violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) has been established and the Hearing Officer's decision sustaining a violation is AFFIRMED. The mitigating factors in the record are the basis for a penalty reduction but not for a complete vacating. The Recommended Order vacating the proposed penalty for Citation Number 2 is hereby REVERSED and a penalty of \$400.00 is imposed.

The Complainant submitted a reply brief in this case before the Commission. The order granting briefing time made no provision for such a reply brief. The brief was untimely and not considered by the Commission in reaching its decision.

IT IS THE ORDER of this Commission that the dismissal of Citation 1, Item 1, is hereby REVERSED and a violation is SUSTAINED. Abatement shall occur within 10 days of this decision. The dismissal of Citation 1, Item 3, is AFFIRMED. Citation 2, a serious violation, is AFFIRMED. The vacating of the proposed penalty is REVERSED and a penalty of \$400.00 is imposed. Abatement of this violation shall be immediate.


Merle H. Stanton, Chairman


Charles B. Upton, Commissioner


John C. Roberts, Commissioner

DATED: March 20, 1979
Frankfort, Kentucky

DECISION NO. 694

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. Cathy J. Cravens
Assistant Counsel

Mr. Morris L. Griffiths (Certified Mail #678475)
Ross Brothers Construction Co.
P. O. Box 767, Route 168
Ashland, Kentucky 41101

Honorable Carl D. Edwards, Jr. (Certified Mail #678476)
VANANTWERP, HUGHES, MONGE & JONES
1416 Winchester Avenue
Ashland, Kentucky 41101

This 20th day of March, 1979.


Iris R. Barrett
Executive Director

The next item on review involves an alleged nonserious violation of 29 CFR 1926.550(b)(2) (as adopted by 803 KAR 2:030). Mr. Atkinson has recommended dismissal of this item. A review of the evidence presented supports the Hearing Officer's disposition. The dismissal of Citation 1, Item 3, is hereby SUSTAINED.

An alleged serious violation of 29 CFR 1926.28(a) or 29 CFR 1926.105 (as adopted by 803 KAR 2:030) with a proposed penalty of \$800.00 is before this Commission. This item occupied the majority of the proceeding before the Hearing Officer. Mr. Atkinson has sustained a serious violation as charged but the penalty provision has been vacated due to the mitigating circumstances set forth within his discussion of the case.

This Commission finds that a violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) has been established and the Hearing Officer's decision sustaining a violation is AFFIRMED. The mitigating factors in the record are the basis for a penalty reduction but not for a complete vacating. The Recommended Order vacating the proposed penalty for Citation Number 2 is hereby REVERSED and a penalty of \$400.00 is imposed.

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Merle H. Stanton, Chairman


Charles B. Upton, Commissioner

John C. Roberts, Commissioner

DATED: Frankfort, Kentucky

DECISION NO.

The next item on review involves an alleged nonserious violation of 29 CFR 1926.550(b)(2) (as adopted by 803 KAR 2:030). Mr. Atkinson has recommended dismissal of this item. A review of the evidence presented supports the Hearing Officer's disposition. The dismissal of Citation 1, Item 3, is hereby SUSTAINED.

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This Commission finds that a violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) has been established and the Hearing Officer's decision sustaining a violation is AFFIRMED. The mitigating factors in the record are the basis for a penalty reduction but not for a complete vacating. The Recommended Order vacating the proposed penalty for Citation Number 2 is hereby REVERSED and a penalty of \$400.00 is imposed.

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Merle H. Stanton, Chairman

Charles B. Upton, Commissioner


John C. Roberts, Commissioner

DATED: Frankfort, Kentucky

DECISION NO.



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

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

December 4, 1978

KOSHRC #483

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROSS BROTHERS CONSTRUCTION CO.

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:

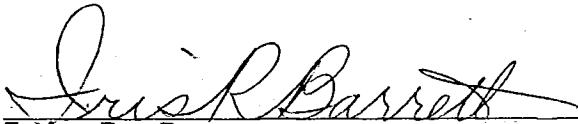
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
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Attention: Hon. Cathy J. Cravens
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Mr. Morris L. Griffiths (Certified Mail #988929)
Ross Brothers Construction Co.
P. O. Box 767, Route 168
Ashland, Kentucky 41101

Honorable Carl D. Edwards, Jr. (Certified Mail #988930)
VANANTWERP, HUGHES, MONGE & JONES
1416 Winchester Avenue
Ashland, Kentucky 41101

This 4th day of December 1978.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION.

KOSHRC DOCKET
No. 483.

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,

VS: : :

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

ROSS BROTHERS CONSTRUCTION COMPANY, INC.,

RESPONDENT.

An inspection was made on or about May 9, 1978, at the Ashland Oil Refinery near Catlettsburg, Kentucky. Respondent is a contractor with certain maintenance duties in the Ashland Oil Refinery. As a result of the inspection, Respondent was issued a citation alleging four (4) non-serious violations and also a citation alleging one (1) serious violation of the Act and Standards, as follows:

CITATION (1):

(a) Violation of 29 CFR 1926.402(c)(1) in that:

Three (3) cut-off boxes on the west wall in rear of maintenance shop were not legibly marked to indicate their purpose and were not so located or arranged so that the purpose was evident.

No penalty was proposed.

(b) Violation of 29 CFR 1926.152(g)(9) in that:

Portable gasoline dispensing tank, approximately two thousand (2,000) gallons, on the east side of the maintenance shop, did not have conspicuous and legible signs prohibiting smoking in the area.

No penalty was proposed.

(c) Violation of 29 CFR 1910.180(h)(3)(i)(6) in that:

Forty (40) foot of pipe, approximately six (6) inch pipe on the west side of structure No. 24-D-28 on the Southeast side of Ashland Oil Plant was being hoisted overhead by truck crane that was not secured and properly balanced in the sling before being lifted.

No penalty was proposed.

Amended to \$50 (2) per 1926.550 (16) (2) per

- delet*
- (d) Violation of 29 CFR 1910.180(h)(4)(ii) in that:

Employee, on the west side of structure No. 24-D-28 on the Southeast side of Ashland Oil plant, was working underneath load attached to sling of truck crane.

A penalty of \$50.00 was proposed.

CITATION (2)

- (a) Violation of 29 CFR 1926.28(a) in that:

Two (2) employees engaged in welding were permitted to work on a metal beam approximately twelve (12) inches wide and approximately thirty (30) feet above the ground level at the pipe rack between lubrication plant and new crude unit on the South side of Ashland Oil plant No. 1, were not protected against falls by the use of safety lines and safety belts.

OR, in the alternative,

A violation of 29 CFR 1926.105(a) in that:

Two (2) employees engaged in welding were permitted to work on a metal beam approximately Twelve (12) inches wide and approximately Thirty (30) feet above the ground level at the pipe rack between lubrication plant and new crude unit on South side of Ashland Oil plant No. 1 were not protected against falls by the use of safety nets.

A penalty of \$800.00 was proposed.

The pertinent procedural information is as follows:

- (1) Inspection was conducted on or about May 9, 1978, by the Commissioner at the above mentioned location.
- (2) Two citations were issued on May 17, 1978, alleging four non-serious and one serious violations. The proposed penalty of \$50.00 for one of the non-serious violations was vacated because less than ten violations were cited as a result of the inspection, leaving a proposed penalty of \$800.00 for the alleged serious violation.
- (3) Notice of Contest was received on May 22, 1978.
- (4) Notice of Receipt of Contest was mailed on May 25, 1978, and Certification of

employer form does not appear in the Record.

- (5) Complaint was filed on June 6, 1978, and Answer of Respondent was filed on June 15, 1978..
- (6) Amended Citation was filed on June 23, 1978, deleting Item Number 4 of Citation Number One (1) and assigning a different CFR Section to Item #3 of Citation No. One (1), CFR 1926.550(b)(2) instead of CFR 1910.180(h)(3)(ii).
- (7) Amended Complaint was filed on June 23, 1978, to reflect the amendment of the citation.
- (8) Answer to the Amended Complaint was filed on June 30, 1978.
- (9) Case was assigned to a Hearing Officer on July 7, 1978, and Notice of hearing issued on that date.
- (10) Complainant's motion to re-set hearing was filed on July 20, 1978, and Revised Notice of hearing issued on that date.
- (11) Hearing was held as re-scheduled on August 3, 1978, at the Ashland State Vocational-Technical School, Ashland, Kentucky.
- (12) Notice of Receipt of Transcript and Briefing Order was issued on August 28, 1978.
- (13) Complainant's Motion for extension of time was filed on September 27, 1978.
- (14) Order granting Complainant extension of time was filed on September 29, 1978.
- (15) Brief for Complainant was filed on October 3, 1978.
- (16) Brief for Respondent was filed November 2, 1978.
- (17) Reply Brief for Respondent was filed November 10, 1978, and case stands submitted.

DISCUSSION OF THE CASE+

The first alleged violation involved three electrical cut-off boxes that were on the west wall in the rear of the maintenance shop "That were not legibly marked to indicate their purpose, and were not so located or arranged that their purpose was evident." The maintenance shop was described by the Compliance Officer as a building approximately forty feet in width and seventy to seventy-five feet in length. The maintenance shop contained office rooms and also work space that was used by Respondent and also by employees of Prichard Electric Company, another Ashland Oil contractor.

When asked whether Respondent's employees were using electrical tools or machines, he said "At the time there was some work going on. I don't recall exactly what type occupation was going on at the time, but there was work being performed."

The Compliance Officer stated that in his opinion the hazard created by the lack of labelling was that in case an electrical tool malfunctioned, a properly labelled cut-off box would reduce the hazard of an electrical shock.

Respondent's witnesses testified that all of the electrical wiring, including the cut-off boxes, were solely under the jurisdiction of Prichard Electric and that only Prichard Electric was allowed to do any electrical work, and that Ross Brothers had no jurisdiction over the cut-off boxes.

Upon a reading of the case of Grossman Steel and Aluminum Corporation, OSHRC Docket No. 12775 CCH Paragraph No. 20,691 (1976) and the Anning-Johnson case cited by Complainant, the Hearing Officer is of the opinion that while there are situations in which an employer may be held responsible for a situation created by another contractor or under the control of another contractor, where his employees are subjected to serious hazards as a result, an employer is not responsible for non-serious hazards or violations under the control or created by another employer. The cut-off boxes here do not constitute such a serious hazard that Respondent

should bear the responsibility for the omission of another contractor.

On the question of whether or not the gasoline tank was properly labelled with no smoking warnings, the Compliance Officer stated that there were two portable gasoline tanks located almost directly across from the front of the maintenance shop: one tank belonged to Respondent, Ross Brothers, and one to Prichard Electric. The Compliance Officer was asked: "Did either tank have any type of sign saying NO SMOKING on it?" (TR. p. 16). He answered: "Not to my recollection".

Respondent's witnesses testified that the tanks were painted silver, and that each tank had "NO SMOKING" painted in red letters on the ends and on the sides in two-inch letters.

In view of this testimony and the lack of certainty of the testimony of the Compliance Officer, the Hearing Officer finds that there was no violation as to lettering on the tanks.

Concerning the third alleged non-serious violation, the Compliance Officer alleged that a pipe 60 feet in length was being lifted by a crane in an unbalanced position, to a pipe rack. It appeared from the testimony of the Compliance Officer that it would not have been possible for the pipe to be raised by the crane to the rack in a horizontal position because of the interference of the rack. (TR. p. 39). The Compliance Officer testified further that there was no choker on the pipe, that the pipe was attached only to a hook near the center of the pipe. He testified a choker would have tightened up on the pipe by the weight of the pipe and secured it. (TR. p. 40).

Respondent's witnesses testified that a choker was used, that the pipe weighed 2600 lbs.; that the choker was attached in the center of the pipe and that there was no possibility of slippage from the choker. The witness further testified

that it would have been impossible to raise the pipe by the bare hook as testified to by the Compliance Officer, since the hook had only a 3-inch opening and the pipe was 6-inches in diameter. The Hearing Officer finds from the evidence that the load was not unbalanced and that it was properly secured.

Coming now to the alleged serious violation. This involved two ironworkers who were welding on a steel beam in the Oil Refinery adjacent to a pipe rack. The beam was approximately 25 feet above the ground. The men were wearing safety belts but were not tied off. There was no safety net and the Compliance Officer testified a net could not have been used in this situation. The two ironworkers were J. W. Nichols and Marshall Logue. Mr. Nichols, a general foreman of Ironworkers, testified as follows:

"Q 13 Does Ross Brothers, Jay, do they furnish safety belts and personal safety equipment?

A. Yes, Sir.

Q 14 Do they make them available to all employees?

A. Yes, sir.

Q 15 And does Ross Brothers or do you yourself instruct them to wear this safety equipment?

A. No, I don't.

Q 16 Would you explain why?

A. Well, because I have worked in a refinery for eighteen years and I have had several explosions under me in lines and if I can go out on top where they have ignited and you don't have time to unhook yourself and get away.

Q 17 You are talking about ironworkers that will be in the air-----

A. Right.

- Q 18 -- working in the operating refinery?
- A. Right. Yes, sir.
- Q 19 What, in your judgment, is the incidence of fires and explosions in an operating refinery such as Ashland Oil? I mean how often do they occur?
- A. You never know when they are going to occur. That is one thing we don't know.
- Q- 20 Is that the reason, in your judgment, that ironworkers won't tie off?
- A. Yes, sir.
- Q 21 What happens if an ironworker is tied off and is in close proximity to such a fire or explosion?
- A He is a goner. That is all there is to it. No way of getting away."
(TR. pages 71-72)

Mr. Logue, an ironworker who was one of the employees observed at the time of the alleged violation stated:

"You are aware, I assume, by now of the violation with which Ross Brothers has been charged?

Right.

Were you engaged in that particular operation on the date of the Department's inspection, up in the air?

I was with a welder.

Okay. You were up on this particular beam?

Right.

What was the welder doing?

He was welding the extending pipe rack going up.

"Okay, and what were you doing?

Chipping the slag off the weld.

So you were the one doing the chipping of the slag?

Right.

And not the welder himself?

Right.

Approximately how high were you, Marshall?

I figure about twenty or twenty-five feet. It may not have been that high. I didn't pay that much attention to it.

Was this particular beam adjacent to a pipe rack?

Right.

To your knowledge, was there petroleum contained in those pipes?

There was something in those pipe. What, I do not know.

Were you tied off with a safety belt?

No.

Why not?

In case of an explosion, I want room to move. I don't want to be sitting there tied down.

Does Ross Brothers furnish safety belts?

They do.

Do they tell you to wear them?

They do.

And is the only reason that you don't wear them is because of the increased hazard in your judgment?

Right. "

(TR. pages 74-76)

The Hearing Officer is well aware of the attitudes of most ironworkers toward safety belts. They are very independent minded craftsmen, who work mostly out of local union halls and hire on with various employers. They have little particular loyalty to any given employer because their services are in such demand they can always hire on to another job. The only means an employer has of disciplining an ironworker who will not wear safety belts is to fire him. This is a difficult situation, because the employees truly believe they know what is safest for them and they refuse to wear belts in this situation. While the Hearing Officer finds the Respondent technically guilty of a violation of this Standard in failing to enforce the use of safety belts in the face of refusal of employees to comply, the penalty should be vacated because of these mitigating circumstances.

CONCLUSIONS OF LAW.

It is concluded as a matter of law as follows:

- (1) That jurisdiction of the subject matter and parties exists.
- (2) That opening, walk-around, and closing conferences were held in accordance with the provisions of the Act.
- (3) That the evidence is not sufficient to show that Respondent committed the three alleged non-serious violations set out in Citation No. 1.
- (4) That the evidence shows a violation of Citation No. 2, but that substantial mitigating factors exist which require that the proposed penalty therefore be vacated.
- (5) That the mitigating factors, amounting to a belief in the minds of Respondent's employees that a greater hazard exists in wearing safety belts than in not wearing them, do not amount to convincing proof that such believed greater hazard actually exists.

RECOMMENDED ORDER.

IT IS ORDERED that the citation No. 1, alleging three non-serious violations, be dismissed.

IT IS FURTHER ORDERED that Citation No.2 alleging one serious violation be sustained, but that the penalty provision proposed therefor be vacated because of mitigating circumstances set forth herein.

IT IS FURTHER ORDERED AND ADJUDGED that abatement of the citation shall be within Thirty (30) days of the effective date of this order.



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

Dated: December 4, 1978
Frankfort, Kentucky

DECISION NO. 643

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION.

KOSHRC DOCKET
No. 483.

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,

VS: : :

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

ROSS BROTHERS CONSTRUCTION COMPANY, INC.,

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(c) Violation of 29 CFR 1910.180(h)(3)(i)(6) in that:

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OR, in the alternative,

A violation of 29 CFR 1926.105(a) in that:

Two (2) employees engaged in welding were permitted to work on a metal beam approximately Twelve (12) inches wide and approximately Thirty (30) feet above the ground level at the pipe rack between lubrication plant and new crude unit on South side of Ashland Oil plant No. 1 were not protected against falls by the use of safety nets.

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DISCUSSION OF THE CASE+

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When asked whether Respondent's employees were using electrical tools or machines, he said "At the time there was some work going on. I don't recall exactly what type occupation was going on at the time, but there was work being performed."

The Compliance Officer stated that in his opinion the hazard created by the lack of labelling was that in case an electrical tool malfunctioned, a properly labelled cut-off box would reduce the hazard of an electrical shock.

Respondent's witnesses testified that all of the electrical wiring, including the cut-off boxes, were solely under the jurisdiction of Prichard Electric and that only Prichard Electric was allowed to do any electrical work, and that Ross Brothers had no jurisdiction over the cut-off boxes.

Upon a reading of the case of Grossman Steel and Aluminum Corporation, OSHRC Docket No. 12775 CCH Paragraph No. 20,691 (1976) and the Anning-Johnson case cited by Complainant, the Hearing Officer is of the opinion that while there are situations in which an employer may be held responsible for a situation created by another contractor or under the control of another contractor, where his employees are subjected to serious hazards as a result, an employer is not responsible for non-serious hazards or violations under the control or created by another employer. The cut-off boxes here do not constitute such a serious hazard that Respondent

should bear the responsibility for the omission of another contractor.

On the question of whether or not the gasoline tank was properly labelled with no smoking warnings, the Compliance Officer stated that there were two portable gasoline tanks located almost directly across from the front of the maintenance shop: one tank belonged to Respondent, Ross Brothers, and one to Prichard Electric. The Compliance Officer was asked: "Did either tank have any type of sign saying NO SMOKING on it?" (TR. p. 16). He answered: "Not to my recollection".

Respondent's witnesses testified that the tanks were painted silver, and that each tank had "NO SMOKING" painted in red letters on the ends and on the sides in two-inch letters.

In view of this testimony and the lack of certainty of the testimony of the Compliance Officer, the Hearing Officer finds that there was no violation as to lettering on the tanks.

Concerning the third alleged non-serious violation, the Compliance Officer alleged that a pipe 60 feet in length was being lifted by a crane in an unbalanced position, to a pipe rack. It appeared from the testimony of the Compliance Officer that it would not have been possible for the pipe to be raised by the crane to the rack in a horizontal position because of the interference of the rack. (TR. p. 39). The Compliance Officer testified further that there was no choker on the pipe, that the pipe was attached only to a hook near the center of the pipe. He testified a choker would have tightened up on the pipe by the weight of the pipe and secured it. (TR. p. 40).

Respondent's witnesses testified that a choker was used, that the pipe weighed 2600 lbs.; that the choker was attached in the center of the pipe and that there was no possibility of slippage from the choker. The witness further testified

that it would have been impossible to raise the pipe by the bare hook as testified to by the Compliance Officer, since the hook had only a 3-inch opening and the pipe was 6-inches in diameter. The Hearing Officer finds from the evidence that the load was not unbalanced and that it was properly secured.

Coming now to the alleged serious violation. This involved two ironworkers who were welding on a steel beam in the Oil Refinery adjacent to a pipe rack. The beam was approximately 25 feet above the ground. The men were wearing safety belts but were not tied off. There was no safety net and the Compliance Officer testified a net could not have been used in this situation. The two ironworkers were J. W. Nichols and Marshall Logue. Mr. Nichols, a general foreman of Ironworkers, testified as follows:

"Q 13 Does Ross Brothers, Jay, do they furnish safety belts and personal safety equipment?

A. Yes, Sir.

Q 14 Do they make them available to all employees?

A. Yes, sir.

Q 15 And does Ross Brothers or do you yourself instruct them to wear this safety equipment?

A. No, I don't.

Q 16 Would you explain why?

A. Well, because I have worked in a refinery for eighteen years and I have had several explosions under me in lines and if I can go out on top where they have ignited and you don't have time to unhook yourself and get away.

Q 17 You are talking about ironworkers that will be in the air-----

A. Right.

- Q 18 -- working in the operating refinery?
- A. Right. Yes, sir.
- Q 19 What, in your judgment, is the incidence of fires and explosions in an operating refinery such as Ashland Oil? I mean how often do they occur?
- A. You never know when they are going to occur. That is one thing we don't know.
- Q- 20 Is that the reason, in your judgment, that ironworkers won't tie off?
- A. Yes, sir.
- Q 21 What happens if an ironworker is tied off and is in close proximity to such a fire or explosion?
- A He is a goner. That is all there is to it. No way of getting away."
(TR. pages 71-72)

Mr. Logue, an ironworker who was one of the employees observed at the time of the alleged violation stated:

"You are aware, I assume, by now of the violation with which Ross Brothers has been charged?

Right.

Were you engaged in that particular operation on the date of the Department's inspection, up in the air?

I was with a welder.

Okay. You were up on this particular beam?

Right.

What was the welder doing?

He was welding the extending pipe rack going up.

"Okay, and what were you doing?

Chipping the slag off the weld.

So you were the one doing the chipping of the slag?

Right.

And not the welder himself?

Right.

Approximately how high were you, Marshall?

I figure about twenty or twenty-five feet. It may not have been that high. I didn't pay that much attention to it.

Was this particular beam adjacent to a pipe rack?

Right.

To your knowledge, was there petroleum contained in those pipes?

There was something in those pipe. What, I do not know.

Were you tied off with a safety belt?

No.

Why not?

In case of an explosion, I want room to move. I don't want to be sitting there tied down.

Does Ross Brothers furnish safety belts?

They do.

Do they tell you to wear them?

They do.

And is the only reason that you don't wear them is because of the increased hazard in your judgment?

Right. "

(TR. pages 74-76)

The Hearing Officer is well aware of the attitudes of most ironworkers toward safety belts. They are very independent minded craftsmen, who work mostly out of local union halls and hire on with various employers. They have little particular loyalty to any given employer because their services are in such demand they can always hire on to another job. The only means an employer has of disciplining an ironworker who will not wear safety belts is to fire him. This is a difficult situation, because the employees truly believe they know what is safest for them and they refuse to wear belts in this situation. While the Hearing Officer finds the Respondent technically guilty of a violation of this Standard in failing to enforce the use of safety belts in the face of refusal of employees to comply, the penalty should be vacated because of these mitigating circumstances.

CONCLUSIONS OF LAW.

It is concluded as a matter of law as follows:

- (1) That jurisdiction of the subject matter and parties exists.
- (2) That opening, walk-around, and closing conferences were held in accordance with the provisions of the Act.
- (3) That the evidence is not sufficient to show that Respondent committed the three alleged non-serious violations set out in Citation No. 1.
- (4) That the evidence shows a violation of Citation No. 2, but that substantial mitigating factors exist which require that the proposed penalty therefore be vacated.
- (5) That the mitigating factors, amounting to a belief in the minds of Respondent's employees that a greater hazard exists in wearing safety belts than in not wearing them, do not amount to convincing proof that such believed greater hazard actually exists.

RECOMMENDED ORDER.

IT IS ORDERED that the citation No. 1, alleging three non-serious violations, be dismissed.

IT IS FURTHER ORDERED that Citation No.2 alleging one serious violation be sustained, but that the penalty provision proposed therefor be vacated because of mitigating circumstances set forth herein.

IT IS FURTHER ORDERED AND ADJUDGED that abatement of the citation shall be within Thirty (30) days of the effective date of this order.



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

Dated: December 4, 1978
Frankfort, Kentucky

DECISION NO. 643