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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

May 15, 1979

KOSHRC #491

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JONES-TEER CONSTRUCTION COMPANY

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 February 1, 1979, is presently before this Commission for review pursuant to Petitions for Discretionary Review filed by the Complainant and Respondent.

Item 1 of Citation 1 is on review. The Hearing Officer has dismissed this item finding that the evidence does not establish whether the bay areas constitute one of the specified types of areas mentioned in the standard. We agree with this dismissal and affirm.

The Hearing Officer has also dismissed Item 3 of Citation 1 concerning the stairway from the dock to the top of the coffer dam. Mr. Shapiro has stated: "Thus the failure to equip the stair railing in question with an intermediate rail is a violation of the Act, regardless of whether the stairway is opensided or enclosed." (R.O. 11). This is not an accurate reading of the standards. According to 1926. 500 (e)(1)(i), a stairway with both sides enclosed requires a hand-rail, preferably on the right side descending. The standard defines a handrail; it is mounted to a wall or partition and does not have an intermediate rail.

KOSHRC #491
Decision and Order
of Review Commission

As noted by the Hearing Officer, the real concern of the Complainant regarding this item was that the railing that was present on one side was not equipped with an intermediate rail. The citation was made under 1926.500 (e)(1)(iii) but the proof was directed to a possible violation of 1926.500 (e)(1)(ii). Due to the confusion created, the Hearing Officer's dismissal is affirmed.

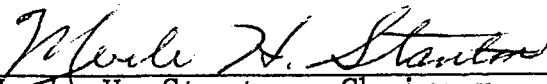
Item 5 of the first citation, which was sustained by Mr. Shapiro, is on review pursuant to the Respondent's petition. The Hearing Officer's disposition of this item was based on this Commission's decision in Myers Thompson Displays, Inc., KOSHRC #321 (1977). Review of the evidence in this case indicates that a violation has been established and the decision is affirmed.

Citation 2, Item 1, involves a repeat non-serious violation with a proposed penalty of \$200. The Hearing Officer has sustained a violation as alleged and has found the proposed penalty to be reasonable considering the repeat nature of the violation. We agree with the findings of fact and conclusions regarding this item and the penalty proposal.

The Recommended Decision, due to a clerical error, incorrectly cites this item as 29 CFR 1926.561(f). (R.O. 16). The proper citation is noted in the text of the decision (R.O. 14) and the Recommended Decision is hereby amended, a violation of 29 CFR 1926.651(t) is sustained.

Mr. Shapiro has sustained the serious violation alleged in Citation 4, Item 1. The proposed penalty of \$800 is found to be reasonable considering the serious nature of the violation. We affirm the Hearing Officer's findings and conclusions on this item.

IT IS THE ORDER of this Commission that the Hearing Officer's Recommended Order, dismissing Items 1 and 3 and sustaining a violation of Item 5 of Citation 1 be AFFIRMED. The decision regarding Citation 2, Item 1 is AFFIRMED, a repeat nonserious violation of 29 CFR 1926.651(t) with a penalty of \$200. Citation 4, Item 1, a serious violation of 29 CFR 1926.451(m)(6) is AFFIRMED with a penalty of \$800.


Merle H. Stanton, Chairman

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

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

DATED: May 15, 1979
Frankfort, Kentucky

DECISION NO. 720

Copy of this Decision and Order has been served by mailing or messenger service on the following:

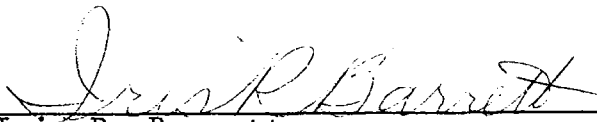
Commissioner of Labor
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health (Messenger Service)

Hon. Kenneth E. Hollis
General Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Cathy Cravens
Assistant Counsel (Messenger Service)

Mr. Richard A. Olson
J. A. Jones Construction Co.
One South Executive Park
Charlotte, North Carolina 28231 (Certified Mail #678436)

Hon. Richard A. Vinroot
Fleming, Robinson, Bradshaw & Hinson
Attorneys at Law
2500 Jefferson First Union Plaza
Charlotte, North Carolina 28282 (Certified Mail #678437)

This 15th day of May, 1979.



Iris R. Barrett
Executive Director

W/W PDR FILED 2/20
By c



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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

February 1, 1979

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #491

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

JONES TEER CONSTRUCTION COMPANY

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

see
K/O
15
16
typos

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:

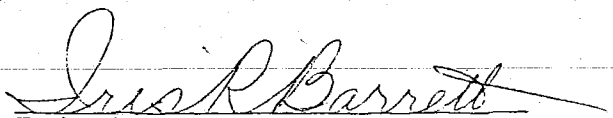
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
U. S. 127 - South
Frankfort, Kentucky 40601
Attention: Hon. Cathy Cravens
Assistant Counsel

Mr. Richard A. Olson (Certified Mail #676342)
J. A. Jones Construction Co.
One South Executive Park
Charlotte, North Carolina 28231

Hon. Richard A. Vinroot (Certified Mail #676343)
Fleming, Robinson, Bradshaw & Hinson
Attorneys at Law
2500 Jefferson First Union Plaza
Charlotte, North Carolina 28282

This 1st day of February, 1979.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #403

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

JONES TEER CONSTRUCTION COMPANY

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of four citations issued May 17, 1978, against the Jones-Teer Company, hereinafter referred to as "Jones-Teer", by the Commissioner of Labor, hereinafter referred to as "Commissioner", for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On May 3, 4 and 5, 1978, a Compliance Officer for the Commissioner made an inspection of a construction site on the Ohio River near Smithland where Jones-Teer was constructing a lock and dam. As a result of the inspection, the Commissioner issued four citations on May 17, 1978, charging Jones-Teer with seven nonserious violations of the Act, two repeated nonserious violations and one serious violation, and proposing a total penalty therefor of \$1,080.00.

On June 5, 1978, and within 15 working days from receipt of this citation, Jones-Teer filed a notice with the Commissioner contesting the citations. Notice of the contest was transferred to this Review Commission on June 8, 1978, and notice of receipt of the contest was sent by the Review Commission to Jones-Teer on the same day. Thereafter, on June 15, 1978, the Commissioner filed its Complaint.

On June 22, 1978, the Commissioner amended its citation by amending item 7 of Citation 1. A copy of the amended citation was received by this Review Commission on the same date. The Commissioner on June 23, 1978, filed an Amended Complaint which reflected the amendment to the citation. No further pleadings were filed and on July 17, 1978, this matter was assigned to a Hearing Officer and scheduled for hearing to be held on August 9, 1978. On motion of Jones-Teer the hearing was continued by Order dated August 4, 1978, to August 23, 1978. The hearing was held in Benton on August 23, 1978, pursuant to KRS 338.070(4). That section of the statute authorizes this Review Commission to rule on appeals from citations, notifications and variances to the Act, and to promulgate and adopt 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 to represent it in this manner. The decisions of Hearing Officers are subject to discretionary review by this Review Commission on appeal timely filed upon either party, or upon the Review Commission's own motion.

The standards (as adopted by 803 KAR 2:030) allegedly violated, a description of the alleged violation, and the penalty proposed for same are as follows:

29 CFR 1926.25(a)	Form and scrap lumber and debris were not kept cleared from work area. (Scrap lumber, steel, etc., cluttered work area)	(Gate Bays 5, 10 & 11)	\$0.00
29 CFR 1926.602 (a)(4)	A Michigan End Loader 35A was not provided with a service breaking system capable of stopping and holding the equipment fully loaded. (Coffer Dam).		\$0.00
29 CFR 1926.500 (e)(1)(iii)	A stairway having four or more rises less than forty four (44) inches wide having both sides open was not provided with a standard stair railing (or the equivalent) on each open side (No intermediate railing; stairway leading from river to Coffer Dam)		

29 CFR 1926.350 (j) As it adopts ANSI Z49.1 - 1967	Oxygen cylinders in storage were not separated from fuel-gas cylinders by a minimum distance of twenty (20) feet or by a noncombustible barrier at least five (5) feet high, having a fire resistance rating of at least one-half (1/2) hour (Iron Workers Shack)	\$0.00
29 CFR 1926.500 (d)(1)	Open-sided platforms six (6) feet or more above adjacent floor level were not guarded by standard railings or the equivalent, as specified in Paragraph (f)(i) of this section. (Warehouse #2)	\$0.00
29 CFR 1926.304(f) As adopted ANSI O1.1 Safety requirements for work and machinery 6.1.9.4.1	A limit chain or other equally effective device was not provided to prevent the saw blade from extending beyond the edge of the table; or the table was not extended to eliminate over-run. (DeWalt Radial Saw; Carpenter Shop)	\$0.00
29 CFR 1926.401 (a)(1) Adopting National Elec- trical Code Article 250-45 (d)(1)	Noncurrent-carrying metal parts of a cord and plug connected GM refrigerator were not grounded in that the power supply cord and the plug did not contain an equipment grounding conductor. (Carpenter Shop)	
29 CFR 1926.651(t)	Open pits were not barricaded or covered. Pits were approximately seven (7) feet in depth; (Piers 5, 7 & 11)	
	This is cited as a repeat violation of Item 1 of Citation 1, issued December 12, 1977.	\$200.00
29 CFR 1926.350 (a)(1)	Valve Protection caps were not in place and secured on fuel gas cylinders in storage (Acetylene and propane cylinders; Yard Area)	
	This is cited as a repeat violation of Item 5, Citation 1, issued October 15, 1976.	\$ 80.00
29 CFR 1926.451 (m)(6)	Standard guardrails and toeboards (or the equivalent) were not installed on all open ends on carpenters' bracket scaffolds at Pier No. 10, thereby exposing five (5) employees to falls of approximately 120 to 130 feet.	\$800.00

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

Jones-Teer is a joint venture engaged in constructing a lock and dam on the Ohio River near Smithland. The J. A. Jones Construction Co. of Charlotte, North Carolina is the managing partner of the venture.

The dam under construction consists of a series of gate bays which are numbered consecutively. During the course of his inspection, the Compliance Officer observed considerable quantities of debris such as form lumber, steel rods, welding cables and paper cups cluttered on the ground in Gate Bays 5, 10 and 11. No employees were observed working in these areas, but there were about 20 employees working in the near vicinity of at least one of them, and other employees would pass by them. In addition, in one of the gate bays an employee had left a cooler which indicated that employees did enter the area on occasion.

The debris observed, for the most part, resulted from work being done in pouring concrete and putting up and taking down the forms used in that work. The debris which accumulated on the construction site was periodically cleaned up by company laborers, but it was not established how long the debris observed had been in the gate bays.

During the inspection, the Compliance Officer and a trainee assisting him were informed by one of the company employees that the brakes on a Michigan end loader were not operating properly. The trainee requested that the operator of the machine move it a few feet then apply the brakes. When the operator did so the machine did not stop immediately. The test was performed on ground that was wet, muddy and bumpy.

This same machine had been tested during the preceding month by the U. S. Corps of Engineers under whose supervision the project is being

conducted. At that time the machine was found to be in good operating condition.

One of the means of gaining access to the construction site is by boat. There is a dock attached to the dam with a set of stairs leading to the top of the dam. The set of stairs consist of two separate stairways built in sections of eight ^{actually wood w/ metal grating} metal steps, each 36 inches wide. There was a wooden platform or landing between each section and a wooden framework enclosed each stairway. The framework consisted of cross pieces on the sides and the front and back of each section and two horizontal pieces on the sides of the landings. There was also a stair railing on one side of each set of stairs. The stair railing had no intermediate rail.

One of the buildings on the construction site is used by the ironworkers, employed on the job. In this building the Compliance Officer observed eight oxygen cylinders and four acetylene cylinders. The oxygen and acetylene were in separate groups about five feet apart from each other. There was no barrier separating them.

The tanks observed by the Compliance Officer were for use in cutting and welding operations. They were intended to be used by the ironworkers within the next eight to 16 hours after they were observed. When not in use, the oxygen and acetylene tanks are normally kept about 150 feet apart in a different area of the construction site.

In one of the warehouses on the construction site, the Compliance Officer found materials stored on an open-sided platform 7-1/2 feet high. There was a dirt floor adjacent to the platform with materials stored on it as well. Access to the platform was gained by means of a fixed ladder attached to one end. The platform was not equipped with guardrails and employees who were required to deliver or pick up materials from it did not wear safety belts while upon it. Because it was used only for storage, no employee worked regularly upon the platform and employees were on it infrequently.

There was a Carpenter Shop on the project which was equipped with a DeWalt Radial Saw attached to a table. This saw was used for cutting wood. The blade moved up and back on a track mounted above the table and when brought forward to the end of the track, the blade extended about four inches beyond the edge of the table. A set screw prevented it from coming out further. The blade was equipped with a guard so that even when extended beyond the table the maximum distance permitted by the set screw, the cutting edge was not exposed.

The Carpenter Shop also had a refrigerator which was used by the employees to store their drinks or lunches. This refrigerator was not owned by the company but was there with the company's permission. The refrigerator was equipped with a two prong plug and an impedance test conducted on it showed that it was not grounded.

There were several pits or cavities located along the dam. These were the result of an excavation which had been made earlier along the entire length of the dam on the downstream side. The excavation was made between the dam and a service road running parallel to the dam. Later parts of the excavation were backfilled to allow heavy equipment to be moved from the road up to the face of the dam. The cavities were formed out of those areas of the excavation which had not been backfilled

Three of these cavities were found by the Compliance Officer at Piers 5, 7 and 11. They were approximately 7-1/2 feet deep and had steep sloping sides. One of these cavities had an electrical panel within it and other items of equipment were found in the other cavities. There was also debris in the cavities, such as rocks and pieces of concrete. None of these three cavities were barricaded or covered to protect employees from accidentally falling into them.

The Compliance Officer observed seven acetylene tanks and ten propane tanks in a storage rack on the site. These tanks were not equipped with valve protection caps. Although they presented no hazard while in

the storage rack, they did present a hazard if moved without valve caps.

The last condition cited was the failure to install guardrails and toeboards, or equivalent protection, at the ends of the scaffolds being used to pour concrete for the vertical piers making up the dam. The scaffolds in use were an integral part of the concrete forms. These forms had to be aligned precisely to within 1/1000 of a prescribed measurement. As a result, wooden guardrails could not be installed at the ends of the scaffolds until the alignment was completed.

When observed by the Compliance Officer, the employees working on the scaffolds were in the process of aligning the forms. The scaffolds they were working on were 120 to 130 feet in the air and the ends of the scaffolds were open.

The failure to barricade or cover the cavities or pits was cited as a violation of 29 CFR 1926.561(t). Jones-Teer was previously cited as being in violation of this standard on October 12, 1977. Because of the previous citation, this was cited as a repeat violation and a penalty was proposed for it in the amount of \$200.00.

The failure to equip the acetylene and propane cylinders with valve protection caps was cited as a violation of 29 CFR 1926.350(a)(1). Jones-Teer on October 15, 1976, was also cited as being in violation of this same standard. Thus, this too was cited as a repeat violation and a penalty was proposed for it in the amount of \$80.00.

The failure to install guardrails and toeboards at the end of the scaffolds on the piers was cited as a serious violation because it exposed employees to a fall of 120 to 130 feet. A penalty was proposed for the violation in the amount of \$800.00.

In proposing the penalties, the Compliance Officer followed guidelines established by the Commissioner to achieve uniformity in the penalties proposed under the Act. These guidelines prescribe procedures which are different for serious and nonserious violations.

In computing the proposed penalty for nonserious violations, the Compliance Officer first determines the gravity of the violation. The criteria used to determine the gravity are the likelihood of injury. The severity of injury likely to result and the system. A value of one to nine is assigned to each of these criteria then added together and divided by three. A chart is then used which translates the resulting average into an unadjusted penalty.

The unadjusted penalty may then be reduced by up to 50% using three factors. These factors are the "Good Faith" of the employer in attempting to comply with the Act, the "History" of the employer in terms of his past compliance with the Act, and the "Size" of the employer in terms of the number of persons employed. A maximum of 20% is allowed for Good Faith and a maximum of 20% is allowed for History. Employers with less than 20 employees are allowed 10% for Size, those with 20 to 99 employees are allowed 5% and those with more than 99 employees are not allowed any reduction.

The Compliance Officer in proposing the penalty for failing to barricade the open pits determined that the likelihood of injury was moderately high due to the number of employees exposed to the hazard and he assigned it a value of six. He also determined that the severity of injury likely to result from an accident was moderately high and assigned it a value of four. However, he also found that it was an isolated incident since most of the pits at the site were covered and he assigned it a value of three for system. The average value thus arrived at was four, which according to the Commissioner's chart translated into an unadjusted penalty of \$125.00.

In adjusting the penalty the Compliance Officer allowed only 10% for Good Faith and 10% for History. This seemed to be largely due to the fact that Jones-Teer had been inspected on previous occasions and cited for other violations. No allowance was made for Size because the company had more than 99 employees. This reduced the penalty to \$100.00. However,

because it was a repeat violation, the penalty was doubled to the proposed amount of \$200.00.

In proposing the penalty for failing to use valve protection caps, the Compliance Officer determined that the gravity of the hazard presented was not sufficient to justify a penalty. However, because it was a repeat violation the Commissioner's guidelines provide that a minimum unadjusted penalty of \$100.00 be proposed. Applying the same adjustment factors used in proposing the penalty for failing to barricade the open pits, resulted in the \$80.00 penalty proposed in the citation.

Under the Commissioner's guidelines, serious penalties are computed in a slightly different manner. Each such penalty carries an adjusted penalty of \$1000.00. However, the same adjustment factors used in non-serious violations are used in serious violations, which in this case, reduced the penalty to \$800.00, the amount proposed.

CONCLUSIONS OF LAW

29 CFR 1926.25(a) provides:

Housekeeping. . . . During the course of construction alteration or repairs, form and scrap lumber with protruding nails and all other debris, shall be kept cleared from work areas, passageways, and stairs in and around buildings or other structures.

The evidence establishes that Gate Bays 5, 10 and 11, the areas cited as being in violation, were cluttered with debris. The evidence also establishes that employees of Jones-Teer were working or passing through them or in the vicinity of them. The presence of a water cooler also indicated that employees entered the Gate Bays on occasion.

~~The standard, however, does not apply to the entire construction~~ site. Instead, it confines itself to three specific types of areas namely: work areas, passageways and stairs. The Gate Bays were certainly not stairs and the evidence does not establish whether they are work areas or passageways. Thus, the citation charging a violation of this standard should be vacated.

29 CFR 1926.602(a)(4) provides in part:

Earthmoving equipment All earthmoving equipment mentioned in this 1926.602(a) shall have a service braking system capable of stopping and holding the equipment fully loaded, as specified in Society of Automotive Engineers SAE-J237 Loader Dozer, 1971 Brake systems for self-propelled rubber tired off highway equipment manufactured after January 1, 1972 shall meet the applicable minimum performance criteria set forth in the following Society of Automotive Engineers Recommended practices
Front End Loaders and Dozers SAE J237 1971

SAE J237 - 1971 prescribes minimum performance criteria for braking systems on off highway equipment , such as the Michigan end loader cited by the Commissioner. It also specifies the manner of testing the equipment to determine if it meets the criteria. In this case, however, the tests specified were not used. Instead, the Compliance Officer relied upon what he referred to as a "logical" or "common sense approach". This approach does not satisfy the requirements of the standard and the citation should be dismissed.

29 CFR 1926.500(e)(1)(iii) provides:

Guardrails, handrails and covers Stairway railings and guards. . . .Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified below, the width of the stair to be measured clear of all obstructions except handrails. . . .

On stairways less than 44 inches wide having both sides open, one stair railing on each side.

29 CFR 1926.500(f)(1) defines a "standard railing" as consisting of a top rail 42 inches high, an intermediate rail, a toeboard and posts.

The stairway cited leads from the dock to the top of the coffer dam. and it was equipped with a stair railing on one side. The basis for the citation was that the stair railing had no intermediate rail. The Compliance Officer contended that the failure to equip the stair railing

with an intermediate rail exposed the employees using the stairway to the hazard of falling into the river. Jones-Teer disputes the contention, arguing instead that the stairway is enclosed and presents no danger to employees of falling into the river.

Both parties seem to take the position that the issue to be decided is whether the stairway in question is fully enclosed, as Jones-Teer contends, or is open sided, as the Commissioner contends. Both parties almost agree that if it is enclosed no intermediate rail is necessary, but if it is open sided, an intermediate rail is required by the standard. This resolution of the issues by the parties ignores the dictates of the standard.

29 CFR 1926.500(e) requires that all stairways less than 44 inches wide be equipped with a standard railing. Such a railing by definition, includes an intermediate rail. Thus, the failure to equip the stair railing in question with an intermediate rail is a violation of the Act, regardless of whether the stairway is opensided or enclosed. NO

The citation fails, however, because it fails to meet the requirements of the statute. KRS 338.141(1) requires that each citation describe the alleged violation. It is not sufficient to merely recite the standard allegedly violated, the reason being that the citation is intended to inform an employer of the facts of the situation upon which the citation is based so that he may take the proper corrective action or, if he disagrees, contest. L.E. Myers Company, CCH-OSHD ¶19,522 (1975). The citation fails to do this.

~~The citation implies that Jones-Teer could comply with the standard cited by installing an intermediate rail on the stair railing. This is also what the Commissioner contends. The standard cited requires more than that. It requires if the stairway is opensided there must be two standard railings, one on each side of the stairway. Thus, even if we assume, as the Commissioner contends, that the stairway in question is~~

opened, the installation of the intermediate rail would not bring it into conformity with the standard. Thus, the citation, is misleading and should be vacated.

29 CFR 1926.350(j) provides:

Gas welding and cutting For additional rules not covered in this subpart, applicable technical portions of American National Standards Institute, Z49-1-1967. Safety in Welding and Cutting, shall apply.

The referenced safety standard, ANSI Z49-1 - 1971 provides:

Oxygen cylinders in storage shall be separated from fuel gas cylinders or combustible materials, especially oil or grease, a minimum distance of twenty feet, or by a noncombustible barrier at least five feet high having a fire resistance rating of at least one-half hour.

The issue presented here is whether the oxygen cylinders and the acetylene cylinders were "in storage" or "in use". This precise issue was presented in Commissioner of Labor vs. C. E. Lummus, KOSHRC 367, (1978). In that case, the employer was cited for violating 29 CFR 1910.252(a)(2)(IV) (e) which is the standard prescribing the same requirements for storage of fuel gas cylinders in general industry. There the cylinders had actually been used on the day of the inspection, which was conducted after the employees had left for the day, and were to be used again when the employees returned. Although, the citation was dismissed on other grounds, this Review Commission stated that under the circumstances of the case, the cylinders were probably "in storage".

In this case, the cylinders were in the iron workers shack to be used within the next 16 hours. Thus, under the C. E. Lummus decision, they were "in storage" in violation of the standard and the citation should be sustained.

29 CFR 1926.500(d)(1) provides in part:

Guardrails, handrails and covers Guarding of open-sided floors, platforms and runways Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded

by a standard railing, or the equivalent on all open sides, except where there is entrance to a ramp, stairway or fixed ladder.

The citation refers to a platform in the warehouse approximately 7-1/2 feet above the ground which was used for the storage of materials. This precise question of whether such platforms are required to have guardrails was raised in Commissioner of Labor vs. Myers Thompson Displays, Inc., KOSHRC #321, (1977). That case involved 29 CFR 1910.23(c)(1)(i) which is the general industry standard equivalent to the standard involved here. There this Review Commission sustained a citation against an employer for failing to equip a storage platform with a guardrail that conformed to the standard. On the basis of that decision, the citation here should be sustained.

29 CFR 1926.304(f) provides:

Woodworking tools Other requirements
All woodworking tools and machinery shall meet other applicable requirements of American National Standards Institute, 01.1 - 1961 Safety Code for Woodworking Machinery.

The standard refers to the 1961 ANSI standard while the citation refers to the 1975 standard. For this reason, the Commission has properly requested that the citation for violation of this standard be vacated.

29 CFR 1926.401(a)(1) provides:

Grounding and bonding Portable and/or cord and plug-connected equipment The noncurrent-carrying metal parts of portable and/or plug-connected equipment shall be grounded.

National Electrical Code, Article 250-45(d)(1) provides in part as follows:

Under any of the following conditions, exposed non-current carrying metal parts of cord and plug connected equipment which are liable to become energized shall be grounded refrigerators, freezers and air conditioners.

) The standard cited makes no mention of the section of the National Electrical Code also cited. Thus, it is difficult to understand why the Code section was cited. In any event, the issue presented is whether a

refrigerator, owned by the employees and used by the employees to store lunches and drinks, which does not comply with the standard constitutes a violation on the part of the employer.

The purpose of the Act is to require employers to furnish places of employment free from recognized hazards. An ungrounded refrigerator would produce an unsafe condition. Therefore, even though the refrigerator is not owned by the employer, if the employer permits its use the employer then has an obligation to take reasonable precautions to see that it conforms to the Act. The failure to do so is a violation of the Act, and the citation should be sustained.

29 CFR 1926.651(t) provides:

Specific excavation requirements Adequate barrier physical protection shall be provided at all remotely located excavations. All wells, pits, shafts, etc., shall be barricaded or covered. Upon completion of exploration and similar operations, temporary wells pits, shafts, etc., shall be backfilled.

Jones-Teer contends that the excavated areas cited are not pits, but the result of partially backfilling what was once a large excavation which ran the entire length of the dam. A pit is generally defined as a "cavity in the ground". Websters Third New International Dictionary. The areas cited were clearly "cavities in the ground" no matter how they were formed and the failure to barricade or cover them was a violation of the standard. Furthermore, in view of the repeat nature of the violation, the penalty proposed was reasonable under the circumstances.

29 CFR 1926.350(a)(1) provides:

Gas welding and cutting Transporting moving and storing compressed gas cylinders Valve protection caps shall be in place and secured.

The acetylene and propane cylinders without valve caps which were cited by the Compliance Officer were in clear violation of the standard. Jones-Teer, however, contends that this was the result of employee misconduct in failing to replace these caps and the caps then getting lost. As a result, the company was not able to maintain a sufficient number of caps for all cylinders.

Employee misconduct in some situations can serve as a defense to a citation. For example, when an employee, in defiance of a company rule and without the employers knowledge, creates a hazard for himself, the employer is not in violation of the Act because of the hazard the employee created. But that is not the case here. Regardless of the reason, Jones-Teer elected to use cylinders for which it had no valve caps. It is the company which violated the standard and the fact that employee misconduct led to the violation is no defense. Thus, the citation should be sustained. Furthermore, because of the repeat nature of the violation, the penalty proposed was reasonable under the circumstances.

29 CFR 1926.451(m)(6) provides in part:

Scaffolding Carpenter's bracket scaffolds
. . . . Guardrails made of lumber, not less than 2
to 4 inches (or other materials providing equivalent
protection), approximately 42 inches high, with a
midrail of 1 x 6 inch lumber (or other material
providing equivalent protection) and toeboards, shall
be installed at all open sides and ends on all
scaffolds more than 10 feet above the ground or
floor.

The scaffolds cited were an integral part of the forms being used to pour the concrete that formed the vertical piers of the coffer dam. The condition cited was the failure to install the required guardrails at the end of the scaffold before employees began working on them. Jones-Teer maintains that the citation is improper on two grounds.

First, Jones-Teer maintains that the scaffolds were not "carpenter's bracket scaffolds" within the meaning of the standard. Such "scaffolds" are defined by 29 CFR 1926.542(b)(5) as "scaffolds consisting of wood or metal brackets supporting a platform". This broad definition easily embraces the scaffolds in question.

The second ground relied upon by Jones-Teer is that it is not possible to comply with the standard and perform the work. This is because the forms to which the scaffolds are attached must first be aligned to a prescribed measurement which often requires minute adjustments. If guard-

rails described in the standard are installed before the forms are aligned, Jones-Teer contends they would prevent or restrict the proper alignment of the forms.

Impossibility of compliance is a defense to a citation provided there are no alternative means of protection available. In this case, proper alignment was probably not feasible if guardrails filling the description of the standard were attached to the ends of the scaffolds. However, equivalent means of protection could have been used. For example, chains or ropes could have been attached to the ends of the scaffold which would not have restricted the alignment process, but which would have afforded protection. In addition, safety belts and lifelines could also have been employed. Thus the citation should be sustained. Furthermore, in view of the serious nature of the violation, the penalty proposed was reasonable under the circumstances.

RECOMMENDED DECISION

NOW, THEREFORE, on the basis of the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, it is hereby ordered:

1. That the citation issued May 17, 1978 charging the nonserious violation of ¹⁻¹ 29 CFR 1926.25(a), ¹⁻² 29 CFR 1926.602(a)(4), ¹⁻³ 29 CFR 1926.500 (e)(1)(iii) and ¹⁻⁶ 29 CFR 1926.304(f) (as adopted by 803 KAR 2:030) be and are hereby dismissed.

2. That the citation issued May 17, 1978 charging the nonserious violation of ¹⁻⁴ 29 CFR 1926.350(j) and ¹⁻⁵ 29 CFR 1926.500(d)(1) (as adopted by 803 KAR 2:030) be and are hereby sustained.

3. That the amended citation issued June 22, 1978, charging a ¹⁻⁷ nonserious violation of 29 CFR 1926.401(a)(1) (as adopted by 803 KAR 2:030) be and is hereby sustained.

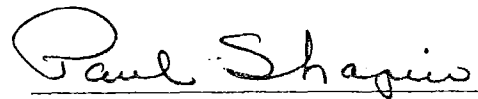
4. That the citation issued May 17, 1978 charging a nonserious violation of ²⁻¹ 29 CFR 1926.561(f) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of \$200.00, be and is hereby sustained.

*Should read
651(t)*

5. That the citation issued May 17, 1978, charging a nonserious repeated violation of 29 CFR 1926.350(a)(1) and proposing a penalty therefor of \$80.00, be and is hereby sustained.

6. That the citation issued May 17, 1978, charging a serious violation of 29 CFR 1926.451(m)(6) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of \$800.00, be and is hereby sustained.

7. That the citations sustained shall be abated and the penalties paid without delay, but no later than 30 days from the date hereof.



PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: February 1, 1979
Frankfort, Kentucky

Decision No. 674