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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

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

KOSHRC #500

COMPLAINANT

VS.

UNION BOILER COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer J. D. Atkinson, Jr., issued under date of 3 January 1979, is presently before this Commission for review of the Hearing Officer's findings and conclusions of law with respect to Citation No. 2, Item 1, pursuant to a Petition for Discretionary Review filed by the Respondent.

Finding no error in the application of the law to the facts herein, and that the evidence appears to adequately support the findings and conclusions of the Hearing Officer, it is the unanimous ORDER of the Review Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED.

Merle H. Stanton
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. 719

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. William E. Rader (Certified Mail #678434)
Corporate Safety Director
Union Boiler Company
P. O. Box 425
Nitro, West Virginia 25143

Honorable Ricklin Brown (Certified Mail #678435)
BOWLES, MCDAVID, GRAFF & LOVE
1200 Commerce Square
P. O. Box 1386
Charleston, West Virginia 25325

This 15th day of May, 1979.


Iris R. Barrett
Executive Director



500

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

January 3, 1979

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*Decision &
Order No. 655*

KOSHRC # 500

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

UNION BOILER COMPANY

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. Cathy J. Cravens
Assistant Counsel

Mr. William E. Rader (Certified Mail #988951)
Corporate Safety Director
Union Boiler Company
P. O. Box 425
Nitro, West Virginia 25143

Honorable Ricklin Brown (Certified Mail #988952)
BOWLES, McDAVID, GRAFF & LOVE
1200 Commerce Square
P. O. Box 1386
Charleston, West Virginia 25325

This 3rd day of January, 1979.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION.

KOSHR # 500

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY,

COMPLAINANT.

VS: : : :

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

UNION BOILER COMPANY,

RESPONDENT.

On or about May 9th. and 10th., 1978, a Compliance Officer of the Department of Labor conducted an inspection at the Ashland Oil Company refinery at Catlettsburg. The subject of the inspection was the workplace occupied by various contractors doing maintenance or construction work in the Refinery, including Respondent. As a result of this inspection, Respondent was issued two (2) citations alleging one (1) non-serious violation and one (1) serious violation of the Act and Standards, as follows:

(a) Violation of 29 CFR 1926.651(i)(1) in that:

An excavation approximately Seven and one-half (7½) feet deep which an employee was required to enter did not have the excavated material effectively shored or retained at least two (2) feet or more from the edge of the excavation.

No penalty for this alleged violation was proposed.

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

Appropriate personal protective equipment such as lifelines, safety belts and lanyards, or other suitable equipment was not worn by an employee walking on six (6) two (2) inch pipes on a pipe rack on the job site, approximately thirty (30) feet above the ground level.

Or in the alternative:

) Violation of 29 CFR 1926.105(b) in that:

An employee walking on Six (6) two (2) inch pipes on a pipe rack on the job site, approximately Thirty (30) feet above the ground level, was not protected against falls of approximately thirty (30) feet by the use of safety nets.

A penalty of \$800.00 was proposed for this alleged violation.

The pertinent procedural information is as follows:

- (1) Inspection was conducted on May 9th. and May 10th., 1978, by the Commissioner at the above location.
- (2) Two citations were issued as above mentioned on June 8, 1978.
- (3) Notice of contest was received on June 20, 1978.
- (4) Notice of Receipt of contest was mailed on June 26, 1978, and Certification of Employer form was received on July 3, 1978.
- (5) Complaint was filed on June 29, 1978, and no formal answer was filed by Respondent.
- (6) Notice of hearing was issued on July 31, 1978, and the case was assigned to the Hearing Officer on that date.
- (7) On motion of the Complainant, a Revised Notice of hearing was issued on August 9, 1978.
- (8) The Hearing was held as re-scheduled on September 28, 1978, at the Ashland Area Vocational School, Ashland, Kentucky.
- (9) Transcript was received on October 11, 1978, and Notice of Receipt of Transcript and Briefing Order was issued on that date.
- (10) Respondent's Brief was received on November 5, 1978, and the case stood submitted on that date.

DISCUSSION OF THE CASE.

) On the first point in contention, the alleged non-serious violation, the Compliance Officer observed one employee working in an excavation or trench approximately 7½ feet deep that was partially shored with plywood forms, and with

some loose dirt piled some undetermined height above the shoring. The end of the excavation which was being continually advanced by a backhoe, was not shored. However the testimony of Respondent was that employees worked only in the portion that was shored and that the unshored portion was only excavated that morning. It appears that there was no hazard to employees here because none was exposed to working in the unshored part of the excavation or trench.

On the question of the serious violation, the Compliance Officer observed an employee of the Respondent walk across a pipe rack consisting of six (6) two (2) inch pipes, or a total surface of twelve inches, using another pipe running parallel to the rack and about shoulder height above it as a hand rail. The employee was using this pipe rack as a means of getting to his work station, which was a standard platform and conceded by the Compliance Officer to meet the requirements of a safe place to work. The Compliance Officer estimated the rack on which he saw Respondent's employee walking to be 25 to 30 feet above the ground. He admittedly did not measure the height of the rack and admitted it might not have been 25 feet above the ground. Since the burden of proof has not been met as to whether or not safety nets would be required in this situation, we can dispose of the alleged violation of 29 CFR 1926.105(a) and concentrate on the alternative alleged violation, the failure to use personal protective equipment (safety belts) in this situation.

~~Although there is no testimony by the Complainant that belts could have~~ been used in assisting the employees across this catwalk to their work platform, there was no defense of impossibility of performance raised. In fact, the hazard here could have been eliminated by moving the ladder 25 feet, so that instead of climbing the ladder, then crossing 25 feet of pipe to their work platform, the men could have climbed the ladder directly to their work platform. In fact, the

Respondent testified that the men had previously been instructed to do exactly this. The particular platform had only been erected that morning. The men were equipped with safety belts. The employer has a good safety program with continuous supervision. No one has been hurt. On the other hand, a defense of isolated instance of employee misconduct cannot be made here, although some of the elements are present. Apparently three or four employees had used this route to get onto the work platform that particular day. If the foreman had seen them, he would have required them to move the ladder. Perhaps the foreman should have been more observant. Nevertheless, the men were wearing safety belts while welding at the work station, as was testified by Respondent's witnesses. It is the opinion of the Hearing Officer that the violation has been proven, but that the proposed penalty is too severe in this instance, under all the circumstances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Hearing Officer finds that there has been no violation of 29 CFR 1926.651(i)(1) concerning the storing of excavated material.

The Hearing Officer further finds that there has been a violation of 29 CFR 1926.28(a) in that employees of the Respondent failed to wear and use safety belts and lanyards in a situation where their use was required. The Hearing Officer is of the opinion that the penalty proposed by the Compliance Officer in the amount of \$800.00 is too severe in light of all the circumstances of this case and recommends the penalty be reduced to \$300.00.

RECOMMENDED ORDER.

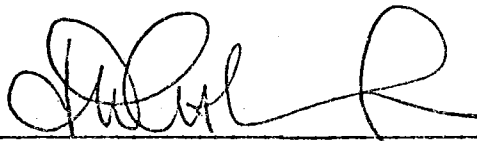
Now, therefore, upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire Record,

IT IS HEREBY ORDERED (1) That the citation charging a violation of 29 CFR 1926.651(i)(1) is ordered vacated.

(2) That the citation charging a violation of 29 CFR 1926.28(a) is hereby affirmed, but that the proposed penalty therefor of Eight Hundred Dollars (\$800.00) be reduced to Three Hundred Dollars (\$300.00).

That, if not already abated, the non-abated violations must be abated within Thirty (30) days of the receipt of this Recommended Order.

That the total penalty therefor in the amount of Three Hundred Dollars (\$300.00) be paid without delay, but in no event more than Sixty (60) days from the date of this Recommended Order.



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

HEARING OFFICER.

Dated: January 3, 1979
Frankfort, Kentucky

DECISION NO. 655