

Wayne

FV

511



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON  
CHAIRMAN

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

104 BRIDGE ST.  
FRANKFORT, KENTUCKY 40601  
PHONE (502) 564-6892

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

July 2, 1979

KOSHRC #511

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MIDWESTERN CONSTRUCTION COMPANY, INC.

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 March 12, 1979, is presently before this Commission for Review pursuant to a Petition for Discretionary Review filed by the Complainant.

At issue is the Hearing Officer's dismissal of the citation alleging a serious violation of 29 CFR 1926.451(d)(10) and the vacating of the proposed penalty of \$750.

Hearing Officer Shapiro, at page 9 of the Recommended Order, concludes; "Here; the scaffold in question was approximately 19 feet high and did not have a guardrail or toeboard meeting the specifications of the standard. As a result, employees working on the scaffold were exposed to the hazard of falling, and employees working below the scaffold were exposed to the hazard of being struck by objects falling from the scaffold."

We find that this conclusion is amply supported by the record.

The Hearing Officer further concludes that; "In this case, it would seem that both the guardrails and toeboards would have made it impossible to load the scaffold. Therefore, the citation should be dismissed."

This conclusion is not supported by the evidence introduced and we hereby reverse.

The Compliance Officer testified that in similar situations he has seen removable guardrails employed where loading takes place at all areas or at different areas along the platform. A section can be lowered to allow loading at a particular point and when they are not loading the guardrails should be up. (Recommended Order pp. 62-63).

This uncontradicted testimony establishes that, by the use of removable rails, the employees could have been protected against the fall hazard and the loading task could still have been accomplished. A serious violation has been established.

A review of the circumstances in this case indicates that the penalty proposed for this violation is inappropriate. We hereby find that a penalty of \$350 shall be imposed.

IT IS THE ORDER of this Commission that the Hearing Officer's dismissal of the serious violation of 29 CFR 1926.451(d)(10) is hereby REVERSED. A serious violation is SUSTAINED as charged. A penalty of \$350 is hereby imposed.

  
Merle H. Stanton, Chairman

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

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

DATED: July 2, 1979  
Frankfort, Kentucky

DECISION NO. 737

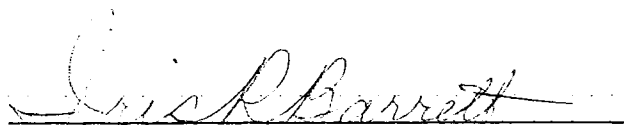
Copy of this Order has been served by mailing or personal delivery on the following:

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 Cathy Cravens Snell (Messenger Service)  
Assistant Counsel  
Department of Labor  
U. S. 127 South  
Frankfort, Kentucky 40601

Mr. Kenneth L. Greenwood, Vice-Pres. (Cert. Mail #P10 9897780)  
Midwestern Construction Co., Inc.  
130 Production Court  
Louisville, Kentucky 40299

This 2nd day of July, 1979.

  
Iris R. Barrett  
Executive Director

Copy of this 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: Larry D. Hamfeldt  
Assistant General Counsel

Mr. R. D. Basham, Jr. (Certified Mail #678461)  
Company Safety Officer  
Whalen Erecting Co. of Ohio, Inc.  
7231 Longview Avenue  
Cincinnati, Ohio 45216

Hon. Tom Thole (Certified Mail #678462)  
Attorney at Law  
7736 Beachmont Avenue  
Cincinnati, Ohio 45230

This 14th day of March, 1979.

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

WJW  
check  
on the 11/5

511



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 12, 1979

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC # 511

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

MIDWESTERN CONSTRUCTION COMPANY, INC.

RESPONDENT

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

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

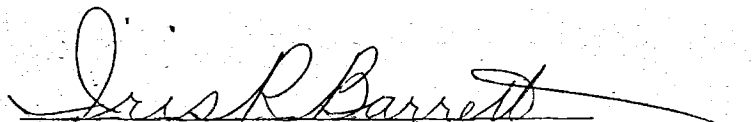
Copy of this Notice and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
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. Kenneth L. Greenwood, Vice-Pres. (Certified Mail #676360)  
Midwestern Construction Co., Inc.  
Post Office Box 5231  
Louisville, Kentucky 40205

This 12th day of March, 1979.

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
KOSHRC #511

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDED DECISION

MIDWESTERN CONSTRUCTION COMPANY, INC.

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of two citations issued July 11, 1978, against Midwestern Construction Company, Inc., hereinafter referred to as "Midwestern", by the Commissioner of Labor, hereinafter referred to as the "Commissioner", for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On July 5, 1978, a Compliance Officer for the Commissioner made an inspection of a construction site in Louisville, where Midwestern was engaged as a subcontractor in the construction of two industrial warehouses. As a result of the inspection, the Commissioner issued two citations on July 11, 1978, charging Midwestern with five nonserious violations of the Act, and one serious violation of the Act, and proposing a total penalty therefor of \$750.00.

On July 18, 1978, and within 15 working days from receipt of the citation, Midwestern filed a notice with the Commissioner contesting the citation. Notice of the contest was received by this Review Commission on July 20, 1978, and notice of receipt of the contest was sent by this Review Commission to Midwestern on July 21, 1978. Thereafter, on July 27, 1978, the Commissioner filed its Complaint.

On August 22, 1978, this matter was assigned to a Hearing Officer and scheduled for hearing to be held on October 4, 1978. Upon motion of the Commissioner, the hearing was rescheduled by Order dated September 21, 1978, to October 19, 1978.

On October 6, 1978, the Commissioner issued an amended citation against Midwestern to correct a typographical error in the original citation. On October 10, 1978, the Commissioner then moved to amend its complaint to reflect the amendment in the citation, which motion was sustained at the hearing over the Respondent's objection.

On October 11, 1978, Midwestern moved to continue the hearing and by Order dated October 12, 1978, the hearing was continued to November 14, 1978.

At the hearing, the commissioner moved to dismiss one item of the citation under contest on the grounds that the citation contained an incorrect reference. That motion was also sustained.

The hearing was held in Louisville on November 14, 1978, pursuant to KRS 338.070(4). That section of the statutes authorizes this Review Commission to rule on appeals from citations, notifications and variances to the Act, and to promulgate and adopt rules concerning the conduct of those hearings. KRS 338.081 further authorizes the 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 by 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:



1926.100(a)	Hard hats were not worn by all employees at all times while engaged in construction work at the south end of the job site.	-0-
1926.152(a)(1)	A container other than an approved metal safety can was used for the storage of a flammable liquid (gasoline) in quantities greater than one (1) gallon.	-0-
1926.300(c)	The employee using a masonry saw, at the southwest corner of the job site, was exposed to the hazards of concrete block chips being blown into his eyes and face, and was not wearing protective eye or face equipment meeting the requirements of Sub-part E of this Section.	-0-
1926.450(a) (10)	The portable sectional aluminum ladder, used to gain access to the tubular welded scaffold at the south end of the job site, was not tied, blocked, or otherwise secured to prevent its being displaced.	-0-
1926.451(d) (10)	Standard guardrails and toeboards were not installed at all open sides and ends of the tubular welded frame scaffold material platform, where three (3) employees were exposed to a fall of 19 feet six (6) inches to a concrete floor at the south wall of the job site.	\$750.00

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

Prior to making the inspection, the Compliance Officer advised Midwestern's job foreman of his right to refuse entry and demand a search warrant. The job foreman, after being informed of his rights, elected to allow the Compliance Officer to make the inspection without a warrant.

Midwestern at the time of the inspection was erecting the brick or block walls of the buildings under construction. The blocklayers and their helpers were working on tubular weld scaffolds which had two tiers on each level. The blocklayers worked on the lower tier which was adjacent to the wall under construction and the upper tier was immediately behind them. The blocklayers' helpers worked on the upper tier which was used to store the mortar, blocks and other masonry material being used.

During his inspection, the Compliance Officer observed several blocklayers and material handlers on the scaffold. None of these men were wearing hard hats. Even though, no one was working above them, the Compliance Officer was of the opinion that the failure to wear hard hats exposed these employees to a hazard of falling objects when they were ascending or descending the scaffold or working on the ground below.

Midwestern's field foreman explained why the blocklayers were reluctant to wear hard hats. He stated that in the course of their work, the blocklayers and material handlers are required to bend up and down constantly. Although the company furnishes hard hats, the constant bending makes them uncomfortable, and as a result, the blocklayers and material handlers refuse to wear them unless there are other people working above them.

Midwestern was using a gasoline powered mixer to make the mortar for the blocks and bricks. The gasoline for the mixer was kept in five to 10 metal gallon containers located about 15 feet from the mixer. These containers were not equipped with selfclosing lids designed to prevent leakage, or with flame arrestors in their spout which are designed to contain any flame that develops inside the container.

One of Midwestern's employees was observed using a masonry saw to cut block and brick. While cutting the block or brick, this employee was not wearing safety glasses or any other protective device to prevent chips or dust dislodged during the sawing process from flying into his eyes.

Midwestern provided safety glasses to its employees using the saw, but they refused to wear them. Midwestern's field foreman explained that the employees maintained that water, apparently used as a lubricant in the sawing process, would splash onto the glasses obscuring the employees vision and hindering the work.

To gain access to the scaffold the employees either climbed the frame of the scaffold itself or used a portable aluminum ladder which was not tied

off or blocked to prevent its being displaced. The ladder was offered some stability by rubber feet attached to it at the bottom.

All of the conditions just discussed were cited as nonserious violations. Since there were less than 10 such violations, no penalty was proposed.

A penalty of \$750.00 was proposed for the condition cited as a serious violation. This condition involved the failure to install a standard guardrail and toeboards on the upper level of the tubular welded scaffold which was used to store materials.

When the inspection was made, Midwestern's employees were working on the third tier of the scaffold. The upper level of this tier was approximately 19 feet above a concrete floor. Employees working as material handlers were observed walking on the scaffold which was not equipped with a standard guardrail. The employees observed were subjected to a possible hazard of falling 19 feet to the concrete below.

The scaffold in question was 75 feet long. Materials were ordinarily lifted to the scaffold by a fork lift truck, then removed from the truck by material handlers and stacked on the scaffold. The materials were stored along the entire length of the scaffold and when it contained the quantity necessary to complete the work, standard guardrails were installed. At the time of the inspection, Midwestern had not completed stacking the materials on the scaffold and therefore, the guardrails had not been installed.

The Compliance Officer in assessing the penalty for this condition, followed guidelines established by the Commissioner to ensure uniformity, in the imposition of penalties. Under these guidelines, each serious violation is assessed a \$1000.00 unadjusted penalty. The penalty may then be reduced by up to 20% based on the good faith shown by the employer in attempting to comply with the Act, by up to 10% based on the size of the employer in terms of the number employed, and by up to 20% based on the history of the employer in complying with the Act.

Here, because Midwestern had been cited for violation of this same standard on a previous occasion, it was allowed only 10% for "good faith". Midwestern had also been cited for other violations on previous occasions and was allowed only 10% for history. Since Midwestern employed between 20 and 99 employees according to the Commissioner's guidelines it qualified for a 5% adjustment for size. The total of 25% reduced the proposed penalty to \$750.00.

#### CONCLUSIONS OF LAW

Midwestern contends that the citations should be dismissed because the Compliance Officer failed to obtain a search warrant prior to making his inspection. The record shows, however, that the field foreman for Midwestern was fully informed of the company's rights relative to a search warrant and the right to refuse entry to the Compliance Officer and that he then willingly gave his permission for the inspection. The field foreman, as the only management official of the company on the job, elected to act as the company spokesman, and in giving permission to make the inspection, the requirement of a search warrant was waived by Midwestern and the inspection was proper.

29 CFR 1926.100(a) provides:

Hard hats conforming to specifications of the American National Standards Institute, safety requirements for industrial head protection Z 89.1 (1971) shall be worn by all employees at all times engaged in the type of work covered by the scope of this safety standard.

The standard as quoted herein, was only recently amended. Prior to the amendment, it stated specifically that employees were required to wear "head protection" when exposed to a hazard of "flying or falling objects" or from "head injury by impact". By phrasing the amended standard in general language the Standards Board apparently intended to broaden its application to any hazard which might be protected against by a hard hat. This includes the hazards specifically mentioned in the standard prior to its amendment.

Here the evidence establishes that, although the employees while working on the scaffolds were not exposed to any hazard of flying or falling objects, they were exposed to falling objects while ascending and descending the scaffold. Thus, the failure to wear hard hats while doing so was a violation of the standard. Powell Construction Co. CCH-OSHD ¶ 21.129 (1976).

Midwestern contends that although it did not make the use of hard hats mandatory, it fulfilled its obligations under the Act by furnishing them to its employees. This same argument relative to an employer's duty under the Act has often been raised with respect to safety equipment and just as often it has been rejected by this Review Commission and the United States Review Commission. It is now well established that an employer must do more than furnish safety equipment for his employees, he must also require the employees to use the equipment and the failure to do so is a violation of the Act. Reinhart Plumbing & Heating, Inc. CCH-OSHD ¶22.083 (1977) Clarence M. Jones d/b/a C. Jones Co., CCH-OSHD ¶ 23.131 (1978).

29 CFR 1926.152(a)(1) provides in part:

Flammable and combustible liquids . . . .  
General requirements. . . . . Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved metal safety cans shall be used for the handling and use of flammable liquids in quantities greater than one gallon, except that this shall not apply to those flammable liquids which are highly viscid (extremely hard to pour), which may be used in original shipping containers.

29 CFR 1926.155(1) defines a safety can as an "approved closed container, of not more than 5 gallons capacity, having a flash arresting screen, spring closing lid and spout cover, and so designed that it will safely relieve internal pressure when subjected to fire exposure". Here, the condition cited involves the use of metal cans to store gasoline. The capacity of the cans was not established except that they were between five and 10

gallons. It was established, however, that the cans did not have flame arresting screens or a self closing lids, and therefore, they were in violation of the standard and the citation should be sustained.

29 CFR 1926.300(c) provides in part:

Personal protective equipment . . . . Employees using hand power tools and exposed to the hazard of falling, flying, abrasive and splashing objects . . . . shall be provided with the particular protective equipment necessary to protect them from the hazard.

It is undisputed that the Midwestern employee using the masonry saw was exposed to flying chips as well as splashing objects dislodged from the bricks or blocks he was cutting. The defense offered is that the company furnished protective equipment, but that the employee refused to use it. However, as noted earlier in connection with the same defense raised concerning the use of hard hats, the law requires that the employers do more than furnish the equipment. The employer must also make the use of the equipment mandatory and the failure to do so is a violation of the Act and the citation should be sustained.

29 CFR 1926.450(a)(10) provides:

Ladders . . . . General requirements . . . .  
Portable ladders in use shall be tied, blocked or otherwise secured to prevent their being displaced.

Here, also, it is undisputed that the ladder observed by the Compliance Officer which served as a means of access to the scaffold upon which Midwestern's employees were working was not tied or otherwise secured. Although, the ladder was equipped with safety feet, they were not sufficient to offset the requirement of tying or blocking and the citation should be sustained. Smith Masonry Contractors, Inc. CCH-OSHD ¶ 20.862 (1976).

29 CFR 1926.451(d)(10) provides in part:

Scaffolding . . . . Tubular welded frame scaffolds  
. . . . Guardrails made of lumber, not less than  
2 x 4 inches (or other material providing equivalent

protection), and 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 . . . .

Here, the scaffold in question was approximately 19 feet high and did not have a guardrail or toeboard meeting the specifications of the standard. As a result, employees working on the scaffold were exposed to the hazard of falling, and employees working below the scaffold were exposed to the hazard of being struck by objects falling from the scaffold. Midwestern contends, however, that at the time of the inspection, it was in the process of loading the scaffold with materials and that the installation of guardrails and toeboards would have made it difficult if not impossible to do this.

A case in point is Somogyi Construction Co. CCH-OSHD ¶ 22.319 (1977). There the employer at the time of the inspection was loading a scaffold with lintils. These were described as devices 12 feet in length used to support masonry work over windows and doors. The scaffold was not equipped with a guardrail or toeboard and was cited for violating this standard. The employer contended that the installation of guardrails and toeboards would have made the loading impossible. The United States Review Commission agreed with the employer in part and dismissed the citation with respect to the guardrails, finding that they would have prevented the loading of the materials. However, the citation involving the toeboards was sustained because it was found that they would not have prevented the lintils from being loaded.

In this case, it would seem that both the guardrails and the toeboards would have made it impossible to load the scaffold. Therefore, the citation should be dismissed.

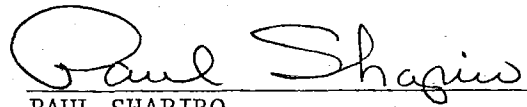
#### RECOMMENDED DECISION

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 alleging nonerious violations of 29 CFR 1926.100(a), 1926.152(a)(1), 1926.300(c) and 1926.450(a)(10) (as adopted by 803 KAR 2:030) be, and is hereby sustained.

2. That the citation alleging the serious violation of 29 CFR 1926.451 (d)(10) (as adopted by 803 KAR 2:030) and fixing a penalty therefor of \$750.00 be, and is hereby dismissed.

3. That the violations sustained should be abated without delay and no later than 30 days from the date hereof.



PAUL SHAPIRO  
HEARING OFFICER  
KOSHRC

DATED: March 12, 1979  
Frankfort, Kentucky

DECISION NO. 688