



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 1, 1979

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 #532

COMPLAINANT

VS.

CHC FABRICATING CORPORATION

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman, UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of 16 January 1979, is presently before this Commission for review pursuant to a Direction for Review issued by Chairman Merle H. Stanton.

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

Merle H. Stanton  
Merle H. Stanton, Chairman

Charles B. Upton  
Charles B. Upton, Commissioner

John C. Roberts  
John C. Roberts, Commissioner

DATED: May 1, 1979  
Frankfort, Kentucky

DECISION NO. 709

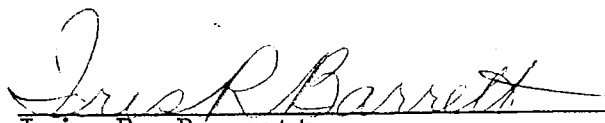
This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

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. Roger L. Church, Vice President (Certified Mail #678416)  
CHC Fabricating Corporation  
220 West North Bend Road  
Cincinnati, Ohio 45216

This 1st day of May, 1979.

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



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

January 16, 1979

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

*Decision &  
Order No. 663*

KOSHRC # 532

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CHC FABRICATING CORPORATION

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.

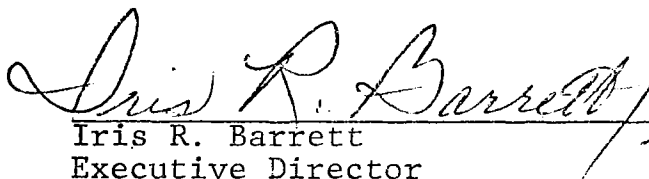
Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

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General Counsel  
Department of Labor  
U. S. 127 South  
Frankfort, Kentucky 40601  
Attention: Hon. Cathy J. Cravens  
Assistant Counsel

Mr. Roger L. Church, Vice President (Certified Mail #988972)  
CHC Fabricating Corporation  
220 West North Bend Road  
Cincinnati, Ohio 45216

  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC NO. 532

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

CHC FABRICATING CORPORATION

RESPONDENT

\* \* \* \*

Honorable Cathy J. Cravens, Office of General Counsel, Kentucky  
Department of Labor, U. S. Highway 127, Frankfort, Kentucky, 40601,  
Attorney for the Complainant.

Mr. Roger L. Church, Vice President, CHC Fabricating Corporation,  
220 West North Bend Road, Cincinnati, Ohio, 45216, Pro Se,  
Representing the Respondent.

FOWLER, Hearing Officer

\* \* \* \*

On July 24, 25, 26, and 27, 1978 Compliance Officers  
of the Department of Labor of the Commonwealth of Kentucky made a  
general scheduled inspection of premises located at the East Bend  
Power Station in Boone County Kentucky, a place at which employees  
of the Respondent Company were working.

As a result of that inspection, one citation was issued  
by the Department of Labor against the Respondent as follows:

Being an alleged violation of 29 CFR 1926.28 (a) in that  
one (1) employee standing on a beam on Elevation 569 in the Control  
Room was not required to wear personal protective equipment (i.e.  
safety belts and lifelines) to protect him from a fall of  
approximately twenty-five (25) feet to the floor level below.

The violation which is alleged to be a serious violation within the meaning of the act, an abatement date of August 22, 1978 was set and a proposed penalty of \$800.00 was made, according to the Complaint. It should be pointed out at this point that while the Complaint proposes a penalty of \$800.00 both the citation and the proof indicated a proposed penalty of \$500.00, so \$500.00 is considered as the penalty under the proof in the case afterwards described herein.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from Citations, Notifications and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty.

#### DISCUSSION OF THE PROOF

The Vice President of the Respondent company, Mr. Roger L. Church, asked at the outset of the hearing for a clarification of the proceedings and stated that he, on behalf of the Respondent, had asked for a discussion and that he was surprised by the paper work and the formality of the proceeding and had not come prepared for such a formal proceeding, but had come prepared for a clarification of a couple of points (TE 2). An explanation of the pro-

ceeding was given by the Hearing Officer (TE 3), and an opening statement was made by Counsel for the Department of Labor (TE 5).

Mr. Thomas Watkins, Compliance Officer for the Department of Labor, testified and his authority to conduct examinations was explained (TE 6 - 8); the proof indicated that it was a general scheduled inspection and that the prime contractor on the construction site was the Cincinnati Gas and Electric Company and that the Respondent, CHC Fabricating Corporation, was a subcontractor.

The proof adequately shows opening conference, walkaround inspection and representation by the Respondent Company at the various procedures including the closing conference (TE 9); Mr. Weingartner, foreman for the Respondent Company was on the job during the inspection.

The site of the construction was a power plant which was being built on an approximately 1700 acre tract, and the plant itself was built on a 25 acre tract next to the Ohio River. The employees of the Respondent Company were working inside the main power building in Control Room at elevation 569, in a room approximately forty by a hundred, with the floor area decked with temporary decking (TE 10).

The proof indicates that all employees of the Respondent Company were in the area as well as the foreman, and the Compliance Officer saw an employee of the Respondent Company standing adjacent to an open sided floor welding a bracket for temporary guardrail on a beam. The employee was standing right at the edge of the beam exposing himself to a possible fall of approximately 25 feet (TE 11); the Standard 29 CFR 1926.28 (a) was read into the record. The employee who was a basis of the citation was using an arc welder with a flip

down hood, which according to the Compliance Officer limits visibility allowing very limited peripheral vision (TE 12); a photograph was taken which is introduced as evidence and a description of the offense is described as a serious alleged violation by the Compliance Officer. (TE 13).

The Compliance Officer states that abatement could be accomplished by safety belts or lifeline, and that the person involved was an employee of the Respondent company (TE 14); penalty provisions were gone into and credits were given in accordance with the regulations, thus arriving at the \$500.00 final proposed penalty. (TE 15 - 17).

For the Respondent, Mr. Roger Church states that he expressed general concurrence with all that was said except the violation, and further states that the company had been previously inspected at Northern Kentucky State University and found in compliance. The Respondent files as an Exhibit a blueprint of the layout of the premises as a portion of his proof (TE 21).

The job being performed by the Respondent was the installation of temporary rails along the open sides of the column centers which requires working along the open edge. The open space in one direction was 32 feet between columns and in the other direction 38 feet between columns. The job entailed the installation of angle posts and cableguard rails to service the area for all other workmen who would then be working within the area (TE 23). Mr. Church asked how this



job can be performed as described in the installation of cable guardrails and still comply with the Standard as cited (TE 24).

The Respondent admits that at the column shown in the picture a six foot lanyard could be put on a man, but that it could not secure the man as he moves along the outer perimeter of the flooring and installs temporary posts along the exposed edge because there is no place to tie off any life belt line (TE 25); the Respondent states that the company cannot operate in full compliance with the Standard in installing temporary railings.

On redirect examination the Compliance Officer says that a cantenary line could be used as described in 29 CFR 1926.104 (b) and that a lifeline could be used in connection therewith (TE 28).

In response, Mr. Church states that in open type side framing with no secondary intermediate framing some exposure exist trying to secure a lifeline and that it was highly improbable that the two open spaces could be crossed because of the lack of intermediate framing and that the same hazard or an equal hazard level would be reached in trying to string a lifeline to secure lanyard lines on, assuming the installation of a cantenary line. The Respondent questions the feasibility of the use of the lifeline on the open sided floor (TE 29).

The Compliance Officer agrees that the employee can never be totally protected (TE 31); the installation of the temporary guardrail was not a part of the Respondents original

contract and his further testimony that it would be a violation to work on the floor without the installing of the guardrail (TE 33); the testimony also shows, according to the Respondent, that it would be impossible to comply with a lifeline installation without subjecting the employee to the same type of hazard as exist without the lifeline and that it is impossible to comply with the Standard in making installation of guardrails which are to be used for the safety of other employees who come after the Respondent company and perform their various tasks.

#### DISCUSSION OF THE FACTS

The Department of Labor contends that the Respondent should be held to the responsibility of attaching a life belt next to the column of the welder shown in the picture and that this is the only citation with which the Respondent is charged. While this is academically true, it does not serve the purpose of the citation nor of the facts of the case. In view of the fact that the lifeline could only apply to a six foot area and the proof indicates that the guardrails are being installed along the entire open area between the columns.

The safety necessary to be afforded to employees was not merely at the post where the employee happened to be standing at the time the picture was taken, but rather relates to the installation of guardrails along the entire open side some 32 or 38 feet as previously described.

It appears to your Hearing Officer that since some exposure has to occur in putting up the safety measures and guardrails and that the installation of safety features must

of necessity be an accomplishment of an act which would expose workers in order to provide safety for the rest of the workers.

Guardrails and safety devices do not grow, but are placed in position by workers and in doing so and in the installation of a guardrail along an open sided floor some person must expose himself to the danger of falling off the open ended floor while the guardrail itself is being installed.

Under the proof in the case it appears that it would have been impossible to comply with the Standard without subjecting the employees to a similar hazard or a greater hazard than existed under the present facts. There is no satisfactory explanation as to how compliance could have been accomplished.

In redirect examination the Compliance Officer related the specific charge of 29 CFR 1926.104 (b) which has to do with lifelines, but it must be remembered that the Respondent is not charged with that violation but rather is charged with the more general safety standard 1926.28 (a). Certainly the more general a Standard the more difficult it becomes for the Respondent to adhere.

It appears to your Hearing Officer that the facts amply support the conclusion that it would have been impossible to have installed guardrails along the sides of the open floor without exposing the persons who placed the guardrails in position to the hazard of a fall and that neither a lanyard nor a cantenary line is either feasible or practical under the facts of this case.

### DISCUSSION OF THE LAW

In a case before this Review Commission of Commissioner of Labor vs. Ambrosius Erecting Corporation, KOSHRC NO. 386, a very similar situation existed in which employees of the Respondent company were observed working on structural steel approximately 28 feet in the air without any form of fall protection. The record in that case indicated that the employees were performing connecting work and the Commission reached a conclusion that during the connecting process it is more hazardous to be tied off, and therefore, the application of the Standard would have made the work more hazardous. Similarly, in Ambrosius the Department claimed that the Respondent could have and should have protected the employees from the hazards of a fall with safety nets, as in the present case the Compliance Officer on redirect examination states that 1926.104 (b) would be an applicable standard, but as in Ambrosius the Respondent was not cited for violation of that section and that fact was only mentioned in the description of the alleged personal protective equipment violation. Similarly, as in Ambrosius the Commission did not address the question of whether the Respondent could have been found in violation of the safety net standard if properly cited because that point was not reached. The same is in the present situation, it is not necessary for your Hearing Officer to reach a conclusion as to whether or not the Respondent would have been in violation of 29 CFR 1926.104 (b) since he is not specifically charged with that offense.

As I understand the Law concerning Respondents defense

of impossibility of compliance, they are in effect two separate but related defenses. One is that the Standard cannot be complied with because the means to do so is not available and the second is that the compliance with the Standard would make the work impossible to perform. Having established that under the facts of this case it was impossible to have protected the employee from hazard performing the work that he was doing, it then becomes incumbent upon the Department to show by competent evidence that the use of the protective devices was not only possible but was feasible, and that the use of personal protective devices would not have created a greater hazard than that which existed without their use. Neither of these criteria are met in response to the impossibility to comply defense. The law appears to be that the Commissioner or the Department must prove feasibility by convincing evidence, see Alberici-Coch Laumand, CCH 22,211. There is authority to the effect that convincing evidence must be established by expert testimony, (Crawford Steel Construction Company, CCH 19,639).

Another method by which the Department may present convincing evidence of feasibility is by showing that the protective devices are an appropriate or necessary method accepted in the industry, (CJP Patti Company, Inc., CCH 21,650).

If it is impossible to comply with the Standard requiring protective devices, or if the compliance would create a greater hazard, then it is certainly unreasonable to impose that Standard upon any employer.

### FINDINGS OF FACT

It is determined that the following facts are established:

1. That jurisdiction of the subject matter in the parties existed.

2. That proper procedures were used in opening, walkaround and closing conferences and penalty provisions were adequately adhered to.

3. The facts in this case indicated that compliance with the standard was impossible or would have created a hazard greater than not complying with the standard.

4. That in every instance requiring guardrails, there is a time and place in which some person or persons must install the guardrails and under the facts in this case the installation of the guardrails for the protection of other employees created a situation that did expose employees of this company to some hazard but that it was impossible to comply with the standard or would have created a greater hazard in attempting to comply with it.

### CONCLUSIONS OF LAW

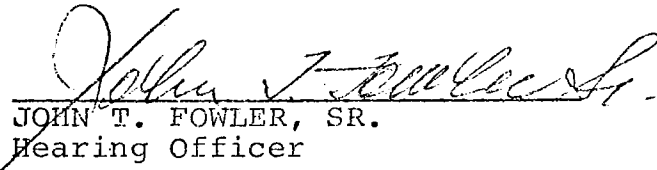
It is concluded as a matter of law as follows:

1. That under the facts of this case the Respondent proved that it was impossible to comply with the standard or that to comply with the standard would have created a greater hazard, and that it was encumbant upon the Department of Labor to show the feasibility of the use of the protective devices set forth in the alleged violation and that such proof was not adduced.

2. That the proof in this case was insufficient to show a violation of 29 CFR 1926.28 (a).

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that this action may be and the same is hereby dismissed and the penalty of \$500.00 proposed herein is hereby vacated.

  
JOHN T. FOWLER, SR.  
Hearing Officer

Dated: January 16, 1979  
Frankfort, Kentucky

DECISION NO. 663