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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
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CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

October 19, 1979

KOSHRC #547

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

BOB GRAHAM CONSTRUCTION COMPANY, INCORPORATED — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Charles A. Goodman III, issued under date of 6 July 1979, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

Hearing Officer Goodman dismissed the citation and penalty issued against the Respondent herein for an alleged violation of 29 CFR 1926.28(a)(as adopted by 803 KAR 2:030), finding that the Department of Labor failed to establish a feasible means of compliance with the requirements of the standard.

The parties stipulated to the pertinent facts as they were presented into evidence by Complainant's Exhibits No. 1 through No. 7, which are photographs of the alleged violation.

The Respondent's unprotected employees were performing two job operations at an elevation of approximately twenty-one feet: in the first instance they were in the process of aligning and straightening or strengthening bar joists; in the second instance employees were tack welding roof decking. All employees were engaged in welding and wore welding helmets.

The Complainant contends that Hearing Officer Goodman erred in finding that the "burden of persuasion is on the Commissioner once the employer sets forth one or more affirmative defenses." The Complainant contends that feasibility of compliance is an element of its prima facie case, and that in this instance, Complainant in fact proved feasibility. Complainant argues that Respondent's attempt to establish a defense of either impossibility or creation of a greater hazard was unsuccessful.

The Respondent contends that the use of safety belts, lifelines and/or lanyards in this instance would be impossible and/or impractical, and that there would be a greater hazard involved in attaching and unattaching to the lifelines than in performing the operation unprotected.

We commend the Hearing Officer and the parties for their excellent research and analysis concerning the legal principles involved in the application of the requirements of 1926.28(a) to various fact situations.

The difficulties in the application of the requirements of 1926.28 (a) have resulted, however, not from any difficult or mysterious legal labyrinth, but because almost every case can be distinguished from preceding cases both factually and in the quality of proof presented by both the Complainant and Respondents.

A party makes or breaks his case depending upon whether he has and develops the necessary factual detail for the record. It appears that the apparent confusion over the legal elements involved in the proof of a 1926.28(a) case has been compounded by a mounting confusion caused by testimony by both the Compliance Officers and Respondents' witnesses which has generally tended to be less than a clear statement for the record of the specific factual details which are necessary to establish the elements of either a prima facie case or a defense.

We reaffirm herein the holding in Roark Mechanical Contractors, KOSHRC #419, in which it was held that: "It is incumbent upon the Complainant not only to allege and prove a violation of the act, but also it must show specific measures the employer should have taken to have avoided the citation and the feasibility and utility of those measures."

In making an initial showing of feasibility, it is not necessary for the Department of Labor to anticipate and negate a Respondent's affirmative defenses. It is necessary, however, for the Department to make a credible showing that the means for attaching and using lifelines, safety belts and/or lanyards are, or circumstantially appear to be available.

Once such a credible showing is made, the Complainant has made out a prima facie case. The Respondent may, of course, defend by rebutting the initial showing of feasibility. Once a Respondent rebuts the Complainant's initial showing of feasibility, a balancing approach must then be used to determine whether the Respondent's rebuttal evidence in fact outweighs, or disproves, the Complainant's initial showing of feasibility.

We distinguish the case of CHC Fabricating Corporation, KOSHRC #532, which was cited by Hearing Officer Goodman in this Recommended Order in this case as a basis for his findings and conclusions. The Complainant's proof in CHC Fabricating was somewhat weaker in that case than was the Respondent's rebuttal. The Respondent in CHC Fabricating also introduced proof of other defenses which tended to weigh in his favor. Other proof of similar weight was not presented by the Respondent in this case.

We find that the Department of Labor did in fact make out an initial showing that compliance was in fact feasible in this case.

The Compliance Officer testified that the employees who were tack-welding on the roof frame could have tied off to the steel beams at points marked on Complainant's Exhibits No. 3 and No. 4., which are photographs of the alleged violation.

Contrary to the finding of the Hearing Officer that the Department of Labor failed to establish that compliance was feasible along the entire scope of the area in which the work was being performed, we find that the Compliance Officer's testimony sufficiently established that the beams which he indicated were appropriate tie-off points were available along the entire scope of the area. The Compliance Officer testified that the beams marked on Complainant's Exhibits No. 3 and No. 4 were not the only beams available for tie-off, but were merely illustrative of the type of beams available for tie-off on the roof frame (Transcript of Record, p. 15). This testimony by itself established an initial showing of feasibility of compliance.

We further find that the testimony by the Compliance Officer that was illustrated demonstratively by markings on Exhibit No. 7 to the effect that the employees working on the roof decking could tie off at one end established an initial showing of feasibility.

We therefore find that the Complainant met its initial burden of proving a prima facie violation against the Respondent, and therefore we reverse the Hearing Officer's findings and conclusions on this issue.

We next turn to the question of whether the Respondent established a sufficient defense to the alleged violation.

The Respondent may defend against an alleged violation of 1926.28(a) by either 1) proving that it would be impossible to perform the particular job operation if the particular protective equipment were used or 2) by showing that use of safety belts, lifelines and/or lanyards in his particular case would create a greater hazard to his employees than the non-use of the equipment, or 3) by rebutting the Complainant's initial showing of feasibility.

It is the finding of this Commission that while the Respondent testified that use of the protective equipment may be difficult or impractical under the circumstances, proof of impracticability is not tantamount to proof of impossibility and has been rejected as a defense to a 1926.28(a) citation by this Commission in D-E Erectors, Inc., KOSHRC #266.

The Respondent further contends that to use safety belts and lifelines would create a greater hazard under the circumstances than non-use of the equipment. The Respondent contends that the tack welders would have been exposed to a greater hazard by virtue of having to attach and unattach to the lifelines. The Respondent also claims that the roof deckers were exposed to a greater hazard.

We reject the Respondent's arguments, and find that he did not prove that being tied off in this instance would have created a greater hazard.

We adopt the reasoning of the Federal Review Commission in C. Kaufman, Inc., 1977-1978 CCH OSHD Para. 22,481 (1978) in which the Review Commission held that tack welders exposed to a fall of nineteen feet would not have been exposed to a greater hazard had they been tied off. The Federal Review Commission said in that case that

> . . . although tying off would have required a momentary lapse in safety belt protection while the employee changed positions to tie off again, the fall hazard from this cannot be said to be greater than the hazard of not tying off at all. C. Kaufman, Inc., supra, at 27,101.[1]

We further find that the Respondent's proof was insufficient to establish that the roof deckers would have been exposed to a greater hazard had they been tied off.

We find no other evidence sufficient to establish a defense of impossibility, nor sufficient to rebut the Complainant's showing that there was a feasible method of compliance under these facts.

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[1]We further note Footnote 14 in that case, in which the Federal Review Commission distinguished the facts of that case from the facts involved in U. S. Steel Corp. v. OSHRC, 537 F 2d 780 (3d Circuit 1976) where it was claimed that "the process of erecting a safety net would
(Cont. on next page)

Accordingly, IT IS ORDERED by this Commission that the Hearing Officer's Recommended Order vacating the citation and the proposed penalty issued against the Respondent herein is hereby REVERSED. The alleged violation of 29 CFR 1926.28(a)(as adopted by 803 KAR 2:030) is hereby SUSTAINED. The proposed penalty of $550 is therefore REINSTATED. Abatement shall be immediate. All other findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.

Merle H. Stanton, Chairman

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

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

DATED: October 19, 1979
Frankfort, Kentucky
DECISION NO. 774

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[1](Cont.) have exposed other employees installing the net to falls." That "Catch-22" argument was similar to the argument made by the Respondent in CHC Fabricating Corp., supra, and we therefore make mention of it in order to distinguish this case on the facts from the situation involved in CHC Fabricating.

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

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

Honorable Cathy C. Snell (Messenger Service)
Assistant Counsel
Deparment of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Mr. Robert G. Graham, Jr., Pres. (Cert. Mail #783434)
Bob Graham Construction Company
219 Whitsett Avenue
Nashville, Tennessee 37211

This 19th day of October, 1979.

Iris R. Barrett
Executive Director

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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
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JOHN C. ROBERTS
MEMBER

July 6, 1979

KOSHRC # 547

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

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

Mr. Robert G. Graham, Jr., Pres. (Cert. Mail #P10 9897787)
Bob Graham Construction Company
219 Whitsett Avenue
Nashville, Tennessee 37211

This 6th day of July, 1979.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

KOSHRC DOCKET
NO. 547

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY — COMPLAINANT

V.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

BOB GRAHAM CONSTRUCTION, INC. — RESPONDENT

* * *

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

FOR RESPONDENT: Mr. Robert G. Graham, Jr., President
Bob Graham Construction, Inc.
219 Whitsett Avenue
Nashville, Tennessee 37211

GOODMAN, HEARING OFFICER

On or about August 23, 1978, an inspection was conducted by a Compliance Officer on behalf of the Commissioner of Labor (hereinafter referred to as "Commissioner"), said inspection being upon a construction site located in Bowling Green, Warren County, Kentucky, at or near the "Scottsville Road," said site being the location of the construction of the Greenwood Mall. At said time and place, employees of Bob Graham Construction, Inc. (hereinafter referred to as "Graham"), were engaged in erecting the structural steel framework for the Mall, Graham functioning in a subcontractor capacity.

As a result of that inspection, the Commissioner issued two (2) citations on September 20, 1978, Citation No. 1 charging Graham with four (4)

non-serious violations, and Citation No. 2 charging Graham with one (1) serious violation of the Kentucky Occupational Safety and Health Act (hereinafter referred to as "Act"), and proposing a penalty for the alleged serious violation in the amount of Five Hundred Fifty Dollars ($550.00).

The pertinent procedural information is as follows:

1) Inspection was conducted on or about August 23, 1978, by the Commissioner at the above-mentioned location.

2) Two (2) citations were issued on September 20, 1978, Citation No. 1 containing four (4) non-serious violations, with no proposed penalty therefor, and Citation No. 2 containing one (1) serious violation with a proposed penalty of Five Hundred Fifty Dollars ($550.00).

3) Notice of Contest received October 2, 1978, contesting only the alleged serious violation contained in Citation No. 2.

4) Notice of Receipt of Contest mailed October 4, 1978, and Certification of Employer Form received October 13, 1978.

5) Complaint received October 17, 1978, with no Answer being filed by Graham.

6) Motion For Show Cause Order received November 9, 1978.

7) Notice of Assignment to Hearing Officer and Notice of Hearing were mailed on November 22, 1978.

8) Commissioner's Motion For Extension of Time received December 8, 1978, and Order of Postponement and Rescheduling Hearing was mailed on that same date.

9) Hearing was conducted on December 28, 1978, at the District No. 3 Bureau of Highways office, Morgantown Road, Bowling Green, Kentucky.

10) Transcript of testimony at hearing was received by Hearing Officer on January 26, 1979, and Notice of same was mailed on that date.

11) Brief for Complainant was received on February 16, 1979, with no brief being filed on behalf of Graham.

The above-mentioned hearing was held pursuant to KRS 388.071(4), which authorizes the Review Commission to hear and rule on appeals from Citations, notifications and variances issued under the provisions of the Act, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 388.081, the within hearing was authorized by the provisions of said Chapter and same may be conducted by a Hearing Officer appointed by the Review Commission upon appeal timely filed by either party, or upon its own Motion, subsequent to which the Review Commission may sustain, modify or dismiss a Citation or penalty.

The alternative Standards alleged to have been violated in Citation No. 2, as adopted by KRS Chapter 338, the description of the alternative alleged violations, and the penalty proposed for same are as follows:

| | | |
|---|---|---|
| 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) | Appropriate personal protective equipment (i.e., safety belts, lifelines or equivalent) was not worn by two employees while working from structural steel, and three employees working near edge of roof decking, who were exposed to falling from heights of approximately 21 feet. | $550.00 |
| | OR, IN THE ALTERNATIVE, | |
| 29 CFR 1926.105(a) (as adopted by 803 KAR 2:030) | Safety nets were not provided for the protection of two employees working from structural steel, and three employees working near edge of roof decking who were exposed to falling from heights of approximately 21 feet. | |

29 CFR 1926.28(a), as adopted by 803 KAR 2:030, reads as follows:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

29 CFR 1926.105(a), as adopted by 803 KAR 2:030, reads as follows:

> Safety nets shall be provided when work places are more than 25 feet above the ground or water surface or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Jurisdiction of the parties and the subject matter and due and timely notice of the hearing is found by this Hearing Officer.

Upon review of the pleadings, testimony, evidence and brief herein, the following Findings of Fact, Conclusions of Law and Recommended Order are hereby made.

## FINDINGS OF FACT

On the day of the inspection, the Compliance Officer observed two (2) employees of Graham standing atop structural steel horizontal beams which were to eventually serve as support for the mall's roof decking (Transcript of Hearing [hereinafter TR], p. 11).

Counsel for Commissioner introduced into evidence various photographs taken by the Compliance Officer at the time of inspection depicting an employee of Graham balanced atop a steel girder while performing spotwelding operations, these being introduced as Complainant's Exhibits 1 through 4. Said photographs also depicted the employee wearing a welding helmet which partially obstructed his vision.

As demonstrated by the photographs, the width of the beams upon which the employee was working and walking was no more than 3 to 4 inches (TR, p. 13), and the beams were spaced approximately 4 feet apart. The total height at which the man was standing, i.e., the distance from the beams to the ground,

was approximately 21 feet (TR, p. 14). The employee was without the benefit of any form of personal protective equipment by which a fall from that height could have been prevented (TR, p. 14).

It was the opinion of the Compliance Officer that a fall from that height could result in serious physical harm or death to an employee (TR, p. 14). Further, the Compliance Officer felt that the hazard could be abated by the use of safety belts or lifelines (TR, p. 14). By use of the photographs, the Compliance Officer pointed out two vertical beams rising above the elevation of the horizontal beams on which the employee was standing which supposedly could be utilized as tie-off points for safety belts (TR, p. 14, 15, 16 and 17). The Compliance Officer further stated that there were various other similar vertical beams in the work area (TR, p. 15).

By use of a photograph introduced into evidence as Complainant's Exhibit 5, the Compliance Officer testified as to the additional reason for which Graham was issued a citation for apparent violation of the Act. The photograph depicts an employee of Graham in the process of tack-welding roof decking, standing upon the decking itself at a point on the roof's surface no more than three (3) feet from the edge (TR, p. 17, 18). Another photograph was introduced into evidence as Complainant's Exhibit 6, which demonstrated an alleged tripping hazard posed by a raised section of untacked decking. Again, it was the testimony of the Compliance Officer that abatement could be effected by the use of safety belts or lifelines (TR, p. 19). The Compliance Officer vaguely suggested tie-off points for securing the lifelines (TR, p. 21). Again, for the reasons above given, this was considered a serious hazard, as defined by prevailing policy guidelines.

The Compliance Officer then entered into testimony as to why Graham was cited for violation in the alternative of 29 CFR 1926.105(a), as adopted by 803 KAR 2:030 (TR, p. 22). Although his testimony in this regard is rather unclear, it seems that the Commissioner chose to include the aforementioned Standard as an alternative means of abatement rather than an alternative alleged violation (TR, p. 26).

Under the policy guidelines promulgated by the Commissioner, if a violation is found to be a serious violation, the unadjusted penalty therefor shall be One Thousand Dollars ($1,000.00). Adjustments were made by use of the OSHA 10 Form, entered into evidence, taking into account the good faith, size and history of Graham. This resulted in an adjusted penalty of Five Hundred Fifty Dollars ($550.00), or a forty five percent (45%) reduction by the Compliance Officer, five percent (5%) less than the maximum allowed by said policy guidelines.

Upon cross-examination by Mr. Graham, the Compliance Officer stated that the employees in question were tack welding "bridging" across the horizontal steel girders, and the approximate time for each weld was 3 to 4 minutes (TR, p. 30). The nature of Mr. Graham's questioning of the Compliance Officer was actually more in the manner of testimony on his behalf as to the fact that the men performing the operation of pulling the bridging across the horizontal beams required continuous mobility in order to accomplish their task. Mr. Graham did elicit some testimony from the Compliance Officer as to good faith on behalf of Graham (TR, p. 39, 40).

Upon examination by this Hearing Officer, the Compliance Officer testified that, in his experience with safety inspections, he had never

witnessed the use of lifeline/safety belts in connection with steel and roof construction of the magnitude of the Greenwood Mall (TR, p. 44).

On behalf of the construction company, Mr. Graham testified that he does furnish lifelines for his employees when the occasion demands, but that the type of operation in question is not a particularly hazardous operation considering the level of skill of the employees and the rather close spacing of the horizontal beams (TR, p. 48). Mr. Graham emphasized (as he did through the entire course of the hearing) that the use of lifelines/safety belts would be impractical (TR, p. 49). He also stated that there would be more hazard involved attaching and unattaching lifelines than in simply performing the operation unprotected (TR, p. 49).

## CONCLUSIONS OF LAW

The facts as above given were undisputed except for the question of the stability of the vertical beams by which tie-off was proposed by the Compliance Officer, and whether tie-off could be effected by use of the vertical beams. The primary dispute involved in the within matter is not one of facts, but one of application of law.

It was noted by this Hearing Officer at the hearing and is again noted in the above Findings of Fact that the apparent alternative violation of 29 CFR 1926.105(a), as adopted by 803 KAR 2:030, was, in actuality, an alternative means of abatement of the apparent violation of 29 CFR 1926.28(a), as adopted by 803 KAR 2:030, in that 1926.105(a) only applies to work places in excess of twenty five (25) feet. Therefore, the alternative alleged violation of the "safety net" standard is dismissed at this point without the necessity

of further examination or analysis.

We are then left with 1926.28(a), which has a history with regard to its enforcement by the Commissioner as to structural steel and flat roof construction analogous to that of the ancient Greek myth of the multi-headed Hydra, which grew two new heads to replace each one severed by Hercules. Indeed, the task of grasping with the application of this Standard to structural steel construction and flat roof work has grown into an Herculean effort for Hearing Officers and the Review Commission of this state, as well as Administrative Law Judges and Review Commissions on the federal level. No sooner is one decision entered which seemingly disposes of a question than there appears upon the scene two more similar but sufficiently distinguishable factual circumstances which demand adjudication.

A brief review of some of the cases dealing with the above matter in this state is illustrative of the quandry which exists.

As set forth by this Hearing Officer in Commissioner of Labor v. J. F. Wagner Sons Company, Inc., KOSHRC Docket No. 385, in April of 1978, and affirmed by the Review Commission on June 20, 1978, it was held that, if a Respondent-Employer sufficiently establishes the affirmative defense of creation of a greater hazard and/or impossibility of compliance, the Commissioner must then show by competent, clear and convincing evidence, i.e., expert testimony, that the use of personal protective devices in a particular situation was not only possible, but feasible, and that their use would not have created a greater hazard than that which existed without their use.

The very next case on the docket, Commissioner of Labor v. Ambrosius

Erecting Corp., KOSHRC Docket No. 386, was one in which the Review Commission reversed a Hearing Officer's decision and held that employees working on structural steel, performing connecting work, would be exposed to a greater hazard by the use of safety belts.

However, rather than laying to rest the question of personal protective devices as applied to structural steel and flat roof construction, these two cases merely provided fuel to be fed to the seemingly inexhaustible conflagration of subsequent contests before this Commission.

In Commissioner of Labor v. Roark Mechanical Contractors, Inc., KOSHRC Docket No. 419, an employee fell to his death while in the process of replacing corroded steel beams some sixteen (16) feet above ground level. The Hearing Officer stated that the Commissioner must show specific measures of abatement and prove the feasibility and utility of same as measured by appropriate or necessary methods of protection as accepted in the industry. It was the opinion of the Hearing Officer that the Compliance Officer failed to demonstrate a feasible method of abatement, and therefore the Citation was dismissed. This decision has been undisturbed by the Review Commission.

In Commissioner of Labor v. Pearce-Phelps Roofing, Inc., KOSHRC Docket No. 421, this Hearing Officer dismissed a Citation charging violation of subject Standard issued due to employees working on the surface of a flat roof spreading hot tar and gravel. In reaching this decision, this Hearing Officer relied upon the rationale of Wagner, supra, and no action was taken thereon by the Review Commission.

In Commissioner of Labor v. M & B Fabricators, Inc., KOSHRC Docket No. 479, an employer was cited with alleged violation of subject Standard in that

certain employees were installing a metal roof at a height of sixteen (16) feet without benefit of any personal protective devices. Apparently, the Respondent provided testimony as to Impossibility of Compliance (the employees being in constant motion) and this testimony was unrebutted by the Commissioner. Relying upon Wagner, the Hearing Officer dismissed the citation, stating that the factual situation was quite similar to Wagner, and that the Commissioner had failed to introduce any evidence whatsoever as to feasibility of compliance. On December 27, 1978, the Review Commission unanimously reversed the Hearing Officer's decision, stating simply that the record "supported" the finding of a violation of 1926.28(a).

In the case of Commissioner of Labor v. Badger Plants, Inc., Ellis D. Harmon, KOSHRC Docket No. 482, the Hearing Officer in that case ruled that structural steel workers not having personal protective devices performing post connecting work were in "technical violation" of subject Standard, and sustained the violation, but vacated the penalty due to mitigating circumstances. No authority was cited. On May 15, 1979, the Review Commission reversed the decision of the Hearing Officer, stating that, although compliance with the subject Standard is not required of steel workers engaged in "connecting" work, this did not apply to two employees who were engaged in "bolting up" operations. The reversal dealt with the vacating of the penalty by the Hearing Officer. Apparently, steel workers must be in the actual process of connecting, in order for the "exemption" to automatically and fully apply.

In the very next case, Commissioner of Labor v. Ross Brothers Construction Company, KOSHRC Docket No. 483, the Review Commission also reversed a decision

which was virtually indistinguishable from the one previous, and made by the same Hearing Officer.

In Commissioner of Labor v. Pelco Structures, Inc., KOSHRC Docket No. 490, the Review Commission reversed a decision in which this Hearing Officer applied the analysis of Wagner, supra, to the situation of roofers installing decking on a slightly slanted roof, the Commission suggesting in its decision that something less than expert testimony on behalf of the Commissioner may be sufficient to establish feasibility in rebuttal to the affirmative defenses, and also intimating that the Wagner decision may not apply to slanted roofs, however slight the degree of pitch.

In Commissioner of Labor v. The Merrick Company, KOSHRC Docket No. 501, the Hearing Officer, in employing a roughly parallel analysis with that of Wagner, dismissed an alleged violation of the Standard based upon the defense of impossibility of compliance, even though a worker was admittedly laboring at the edge of a very high platform. No action was taken on this decision by the Review Commission.

In Commissioner of Labor v. CHC Fabricating Corporation, KOSHRC Docket No. 532, the Hearing Officer was faced with an alleged violation of subject Standard by an employee standing adjacent to an open sided floor welding a bracket for temporary guardrail on a beam some 25 feet above ground level. The Commissioner, through the Compliance Officer, suggested feasibility of compliance by use of a cantenary line, along which a lifeline could run. The Respondent-Employer countered with the claim of Impossibility of Compliance.

Although admitting that the photograph introduced into evidence portrayed a vertical post by which a lifeline could be attached, the Hearing Officer stated that 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 along the entire open side along which work was being performed, some 32 or 38 feet. Concluding that a greater hazard would exist in the installation of safety devices than that which existed without them, and that the Commissioner introduced no satisfactory explanation as to how abatement could have been effected, the Hearing Officer, citing Ambrosius, dismissed the violation upon the grounds of impracticality and infeasibility. On May 1, 1979, this decision was unanimously affirmed by the Review Commission.

In Commissioner of Labor v. Ross Brothers Construction Co., Inc., KOSHRC Docket No. 543, a Hearing Officer was faced with the situation of alleged violation of the Standard by a welder and a welder's helper spotwelding while standing on a 12 to 16 inch board 25 feet above ground level without personal protective devices. In affirming the violation, the Hearing Officer stated that the affirmative defense of creation of a greater hazard is quite narrow in scope, and that the evidence presented by the Respondent in that particular case did not meet the level of proof necessary to firmly establish the greater hazard. As to the defense of impossibility of compliance, the Hearing Officer seemed to indicate that, in this situation at least, all the Commissioner need show was that compliance would not have been impossible, rather than an affirmative showing of practicality or feasibility.

In Commissioner of Labor v. A. C. Dellovade, Inc., KOSHRC Docket No. 548, another Hearing Officer found that an employee working on the edge of a roof

and another standing on a steel beam forming the framework of the building violated subject Standard and affirmed both the citation and the proposed penalty. Apparently in this case, the employer did not raise either of the two above-mentioned affirmative defenses.

In Commissioner of Labor v. Louisville Gas & Electric Co., KOSHRC Docket No. 550, an employer was cited with alleged violation of subject Standard by allowing certain steel workers standing on a beam directing a large I-beam in place, said employees being unprotected by any safety device. The Hearing Officer, citing Roark, supra, stated that, in order for the Commissioner to establish a violation of the Standard in the particular situation, it must be shown that the condition is hazardous, and that there are feasible and specific measures available to the employer to avoid the hazard. The Compliance Officer found that an angle iron could have been welded to a beam and a safety line stretched from the angle iron to a vertical column at the other end. This the Hearing Officer determined to be sufficiently established feasible means of abatement, and therefore the alleged violation and proposed penalty therefor were upheld.

Commissioner of Labor v. M & O Steel Erection, Inc., KOSHRC Docket No. 559, involved a situation wherein an employer was cited for apparent violation of subject Standard due to steel workers bolting, or connecting, steel I-beams without benefit of any personal protective device. Citing Wagner, supra, and Ambrosius, supra, the Hearing Officer stated that employees performing connecting work in iron construction do not need to be tied off since it would have been more hazardous to do so and it would have been impossible to use safety nets as a protective device in that there was no

place from which they could be attached. This decision has not been the subject of review by the Commission.

An attempt at formulating a set of consistent legal principles from the above array of cases concerning 1926.28(a) violations could very well give rise to a great deal of confusion and perhaps a small amount of dismay.

There are, however, certain consistent legal principles which this Hearing Officer believes may be derived from an analysis of these cases:

A. In the factual circumstance of employees engaged in actual connecting work in steel construction, the procedural requirement of the employer establishing an affirmative defense is dispensed with, and there exists an "automatic exemption" to the application of the Standard.

B. In those cases where steel workers are performing operations other than actual connecting, the employer must set forth one or both of the affirmative defenses, which must then be overcome by the Commissioner with a showing of feasibility.

C. In flat roof cases, the Wagner affirmative defense/feasibility procedural guidelines are to be utilized.

Yet there still remains one major outstanding question: What is the measurement of sufficiency for the Commissioner's showing of feasibility in rebuttal to the affirmative defense? In Wagner, this Hearing Officer stated that the degree of proof must consist of evidence on behalf of the Commissioner which is clear and convincing, i.e., expert testimony. However, in subsequent cases (Louisville Gas & Electric, Ross Brothers, Pelco), that Standard has apparently been softened to the point that an adequate showing by the Compliance Officer of feasibility may suffice.

It will not be necessary for purposes of deciding the within matter for this Hearing Officer to reach the question of whether any testimony by any Compliance Officer, no matter how clear, convincing or specific, satisfies the

requirement of proof of feasibility imposed upon the Commissioner to satisfactorily rebut the imposition of one or both of the affirmative defenses. This question need not be reached in that it is the opinion of this Hearing Officer that the testimony of the Compliance Officer in the within case as to feasibility of compliance did not satisfy even minimal requirements. In rebuttal to the raising of the two (2) affirmative defenses of Impossibility of Compliance/Creation of a Greater Hazard (which this Hearing Officer finds as a matter of law were satisfactorily proven by Graham), the only evidence introduced by the Commissioner was the testimony of the Compliance Officer, based upon a set of photographs entered into evidence, that tie-off could be effected by the use of certain vertical steel beams. Granted, tie-off may have been feasible at the two locations at which the photographs were taken, but the record shows that employees of Graham were also performing their duties virtually across the entire span of the roof. This presents a set of factual circumstances very similar to CHC Fabricating Corporation, supra, in which the Hearing Officer found that feasible means of compliance must be shown not simply at one isolated location of the job site, but along the entire scope of the area in which the work was being performed by the Respondent's employees.

The fact that an employee was also depicted in a photograph standing very near the roof's edge does not alter the requirement that feasibility be clearly and convincingly shown by the Commissioner. The question is not one of existence of a hazard but rather is one of whether abatement by use of personal protective devices is feasible in light of either or both of the two (2) affirmative defenses.

Again, it is emphasized that this Hearing Officer does not reach the

question of whether it would ever be possible for the testimony of a Compliance Officer, in and of itself, to satisfy the requirement of establishing feasible compliance, in that the record at hand only discloses that the Compliance Officer failed to even approach the required degree of specificity and clarity.

For the reasons above given, it is the opinion of this Hearing Officer that dismissal is mandated.

RECOMMENDED ORDER

NOW THEREFORE, IT IS HEREBY ORDERED:

That the Citation charging a serious violation of 29 CFR 1926.28(a), or, in the alternative, a serious violation of 29 CFR 1926.105(a), is hereby dismissed, and the proposed penalty therefor in the amount of Five Hundred Fifty Dollars ($550.00) is hereby vacated.

CHARLES A. GOODMAN III
HEARING OFFICER

CAG:dc

DATED: July 6, 1979
Frankfort, Kentucky

DECISION NO. 739