KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

John Y. Brown, Jr.
GOVERNOR
IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN
CHARLES B. UPTON
MEMBER
JOHN C. ROBERTS
MEMBER

June 16, 1980

KOSHRC #613

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

OBERLE JORDRE COMPANY, INC. — 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 January 29, 1980, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Respondent, Oberle Jordre.

Hearing Officer Fowler has sustained both serious citations of the Kentucky Occupational Safety and Health Act (hereinafter, the "KOSH Act), issued against the Respondent herein by the Commissioner of Labor.

Citation Number 1, Items 1 and 2 allege a serious violation for Respondent's failure to comply with KOSH standards located at 29 CFR 1926.500(b)(7) and 29 CFR 1926.500(d)(1)(both and all standards as adopted by 803 KAR 2:030). The Hearing Officer has recommended a penalty reduction from $600 to $300 for the citation of 29 CFR 1926.500(b)(7). The parties on review have not contested the Hearing Officer's findings and conclusions regarding Citation Number 1.

Citation Number 2 alleges a double repeat serious violation of 29 CFR 1926.28(a), with penalty proposed at $4000. Hearing Officer Fowler has sustained the citation, but has found mitigating circumstances sufficient to justify a recommended penalty reduction in the amount of $2000.

The issues on review in this matter are

(I) Whether the Respondent was denied his Fourth Amendment right to a reasonable inspection;

(II) Whether the Commissioner established a prima facie violation of 29 CFR 1926.28(a) as alleged, and, if so, whether the Respondent's affirmative defense that the use of safety belts, lifelines and lanyards would have in fact created a greater hazard than it would have prevented is properly before this Commission, and, if so, whether the Respondent did in fact establish that defense;

(III) Whether the Complainant established that the alleged violation of 29 CFR 1926.28(a) was in fact a double instance repeated violation; and

(IV) Whether the recommended penalty reduction was in fact appropriate under the circumstances of the case.

We find that the inspection in issue was initiated and conducted in a manner not violative of the Fourth Amendment.

We affirm the Hearing Officer's finding that the proof establishes violations of the citations at issue.

This Commission has duly considered any and all other issues and arguments advanced by the parties herein, and finds that the Hearing Officer's Recommended Order has disposed of them appropriately.

We set forth our findings of fact and conclusions of law on review of this matter as follows.

I

Opening conference prior to a KOSH inspection was commenced by a Compliance Officer for the Department of Labor on May 2, 1979, at a construction site off U. S. Highway 42 at Ghent, Kentucky, where the Respondent company was engaged as general contractor during the construction of a Kentucky Utilities Power Plant.

At the opening conference, the Compliance Officer notified Mr. Zwolak, President of Oberle Jordre, that a KOSH inspection would be taking place. The CSHO testified that he identified himself to Mr. Zwolak, whom he had met before, and that he explained to Mr. Zwolak that he would return later to inspect the Oberle Jordre site.

Neither on 2 May at the opening conference nor at any time during the 8 May inspection did Mr. Zwolak or any other Oberle Jordre representative raise an objection to the inspection or to the fact that the Compliance Officer did not present a warrant prior to the inspection, nor was a warrant requested or demanded. Pat Deegan, the assistant project manager on the site, did not protest the inspection or request a warrant during his participation in the May 8 inspection.

Mike Vire, who was the safety inspector on the project, accompanied the Compliance Officer during the inspection on May 8.

There is a dispute in the record concerning when and to whom the Compliance Officer presented his credentials. The CSHO testified that he presented credentials on May 8 to the Vice President of Blount Brothers, a subcontractor on the site, and that he was "almost positive" that he had possessed his credentials on his person at the opening conference on May 2.

While Mr. Vire testified that he did not at any time see the inspector's credentials, and that they were not presented on May 8 as requested by the representative of Blount Brothers, it was conceded by Mr. Vire that both he and Mr. Zwolak had noted that individual inspector's identity on prior inspections of Oberle Jordre, and did in fact identify him in his official capacity on May 2 and May 8, 1979.

The Respondent does not argue that the Compliance Officer entered the Respondent's worksite over the objection of Oberle Jordre.

The Respondent, rather, contends that the inspection was violative of the Fourth Amendment because (1) the Compliance Officer failed to present his credentials to the appropriate personnel on both May 2 and May 8, and (2) Mike Vire, safety director for the entire construction project, consented to the inspection on May 8, and in so doing, exceeded the perimeters of his authority and therefore gave an invalid consent.

We find that the failure of both Mr. Zwolak and Pat Deegan to timely object to the alleged omitted, improper, inadequate presentation of credentials and warrantless inspection at the May 2 opening conference and the May 8 walkaround inspection renders the Respondent's Fourth Amendment arguments without merit.

The Fourth Amendment mandates that a search be reasonable. It has been established by the Kentucky Court of Appeals and this Review Commission that a warrant is required in order for an inspection to comply with the Fourth Amendment right to a reasonable search, unless the employer consents to a warrantless search. Yocum v. Burnette Tractor Company, Inc., (Ky.) 566 SW 2d 755 (1979), Commissioner of Labor v. Yellow Cab Company, Inc., KOSHRC #468, DEOC, Kentucky Decisions, Vol. 5.

We find that unless a Respondent can show circumstances tantamount to coercion or manifestly unreasonable behavior on the part of the Compliance Officer, a failure by the Respondent to object at the time of the inspection to either a warrantless inspection or presentation of credentials will constitute a valid consent to the inspection and a waiver by the Respondent of his entitlement to a warrant and to presentation of credentials.

We base our decision herein upon the reasoning adopted by the Federal Occupational Safety and Health Review Commission (hereinafter the "Federal Review Commission") in the cases of Poughkeepsie Yacht Club, Inc., 1979 CCH OSHD Paragraph 23,888 (1979) and Western Waterproofing Company, Inc., 1976-1977 CCH OSHD Paragraph 20,805 (1976). While the decisions of the Federal Review Commission are not binding on this Commission, they are nevertheless persuasive and will be considered where apropos.

In the Poughkeepsie case, the Federal Review Commission affirmed an Administrative Law Judge's finding that *"since the Respondent raised no objection to the absence of a warrant at the time of the inspection,"* the warrantless inspection was "constitutionally infirm." (Italics quoted.) Poughkeepsie Yacht Club, Inc., supra, at 28,968.

The Western Waterproofing case held that the right to presentation of credentials granted under Section 8(a) of the Federal Act at Title 29 U. S. Code Section 657 (which is the parent provision of 803 KAR 2:020 Sections 1 and 4 providing for inspection procedures including presentation of credentials) is coextensive with those granted under the Fourth Amendment.

Since the Federal Review Commission has held that failure to timely object a warrantless search is tantamount to consent (Poughkeepsie Yacht Club, Inc., supra), it follows that failure to timely object to inadequate, improper or omitted presentation of credentials would also constitute a waiver of the right to object under the rationale of Western Waterproofing, supra, and we so hold.

The Respondent has not argued that the Compliance Officer's behavior at any time during the opening conference or the inspection program was coercive or manifestly unreasonable, and we do not find it to have been so.

We find Hearing Officer Fowler's findings and conclusions regarding Mike Vire's authority to waive the Respondent's Fourth Amendment right to object to a warrantless search to be immaterial to a just disposition of this issue. Had Mr. Vire been the only alleged management representative of Respondent's to have been contacted by the Compliance Officer, a consideration of his authority to consent to a warrantless search might be apropos.

We find, however, that in this instance a valid consent to a warrantless inspection was given by Mr. Zwolak, President of Oberle Jordre, on May 2, and by Pat Deegan on May 8.

It is thus the holding of this Commission that under the facts of this case there was no abrogation of the Respondent's Fourth Amendment right to a reasonable inspection.

II

We now turn to the substantive issues involved herein.

We find that the record supports the Hearing Officer's findings and conclusions that violations of 29 CFR 1926.500(b)(7) and 1926.500 (d)(1) were established by the Complainant. We affirm the reduction in penalty for Item Number 1 of Citation Number 1.

We now review the issues involved in the proof of Citation Number 2, which alleges a double repeated violation of 29 CFR 1926.28(a).

Citation No. 2 alleges a failure by the Respondent to enforce the use of safety belts, lifelines and lanyards in two instances. The first instance involved five employees who were allegedly exposed to a fall of 232 feet when observed squatting on an eight (8) inch beam directing an employee below them who was tying off a piece of material with a rope. The second instance involved four employees at an elevation of approximately 188 feet above the ground. These employees were in the process of attaching a float scaffold to a beam.

The Respondent has alleged that the Complainant has failed to establish a feasible means of compliance to 1926.28(a); the Complainant has alleged that the Hearing Officer incorrectly considered Respondent's affirmative defense in making a disposition of the case.

In the case of Commissioner of Labor v. Bob Graham Construction Company, KOSHRC #547, DEOC, Kentucky Decisions, Vol. 5, this Commission established the following test to determine whether the Commissioner has established an initial showing of feasibility of compliance with the 1926.28(a) requirements:

> 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.
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> 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. Commissioner of Labor v. Bob Graham, supra.

We find that the record establishes that the Commissioner made out a "credible showing that the means for attaching and using lifelines, safety belts and/or lanyards are, or circumstantially appear to be available," as required by the Bob Graham test.[1]

We find that the Respondent offered no substantial rebuttal to the initial feasibility showing.

We thus conclude that the Commissioner of Labor established a prima facie showing that the Respondent was not in compliance with the requirements of 29 CFR 1926.28(a) during the inspection on May 8, 1980.

We now turn to the question of whether the Respondent's affirmative defense of greater hazard is appropriately before the Commission, and if so, whether it was in fact established.

We note initially that the Respondent asserted the defense against only one of the two instances which comprised the substance of the citation; therefore, even if we resolve both the issue of whether the defense is appropriately before the Commission and the merits of the defense in favor the Respondent, the Respondent will still be in violation of 1926.28(a), as the defense was not asserted against both instances cited by the Compliance Officer. The defense, if proven, would of course be considered as a possible mitigating factor when determining the appropriateness of the recommended penalty.

With that consideration in mind, we now turn to the Complainant's argument.

The Complainant seeks to have suppressed Respondent's evidence concerning allegations that it would have been more hazardous than not to have tied off to the 188 foot beam. The Complainant contends that this issue is an affirmative defense not properly plead in accordance with Rule 8.03 of the Kentucky Rules of Civil Procedure.

Contrary to the Complainant's allegations, it appears that the "greater hazard" issue was initially raised not by the Respondent, but by the Department of Labor. See the Transcript of Record, p. 26, where the Compliance Officer in his direct testimony states that he was told by a foreman at the site that "it would be more hazardous to have tied off and then tied the ropes on than it would have been to have tied off and then attached the float."

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[1]We refer the parties to the Transcript of Record pp. 23-25, for the relevant testimony concerning proof of feasibility.

While this Commission has held that where an employer files no answer in a case that the case will not be dismissed nor judgment granted on the pleadings unless the Complainant can show prejudice by Respondent's failure to file an Answer (Active Constructors, KOSHRC #486; Whalen Erecting Company, Inc., KOSHRC #516, both at DEOC, Kentucky Decisions, Vol. 5), we have not yet ruled on the issue of whether an Answer which contains a general denial will preclude an employer from raising an affirmative defense at the hearing.

We do not reach this issue in this matter, however, as we find that the Compliance Officer's initial direct testimony concerning the defense constitutes an implied consent to trial of the issue and a waiver of any objection to rebuttal evidence by the Respondent.

As the Federal Review Commission held in the case of Charles Cohen, Inc., 1974-1975 CCH OSHD Paragraph 19,479(1975), we also hold in this case that this Commission "need not consider whether the question is properly presented on this record."[2]

Considering the Respondent's evidence in its most favorable light, however, we find it insufficient to establish that employees moving and attaching a float scaffold to an eight (8) inch steel beam approximately 188 feet above the ground would have been exposed to a greater hazard had they been tied off to a lifeline than they were without the benefit of appropriate personal protective equipment. The affirmative defense that compliance would create a greater hazard than non-compliance is quite narrow in scope, and simply has not been established by the record herein.

III

The Respondent urges that the proof was insufficient to sustain Mr. Fowler's finding that the Labor Department proved that Citation Number 2 was a double instance repeated violation.

We find that the record establishes that Citation Number 2 was in fact a double instance repeated violation.

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[2]In the Cohen case the Federal Review Commission had the following to say about the trial of issues by consent: "Labor also contends that Respondent did not raise the reasonable promptness defense in a timely manner and therefore waived it. It is true that the issue was not raised in the issue formulation stage, as required by Chicago Bridge & Iron Co., supra. Labor, however, fully participated in the trial of the facts relevant to this issue and can be considered to have tried the issue by consent."

See also Gannett Rochester Newspaper Corp., 1976-1977 CCH OSHD Para. 20,915 (1976), where the Federal Review Commission cited Federal Rule of Civil Procedure 15(b) in support of trial of an issue by consent of the parties.

The Complainant introduced a Stipulation and Settlement Agreement entered into by the parties and approved by Hearing Officer Fowler on December 7, 1978, in which the Respondent withdrew his notice of contest to a citation of 1926.28(a) which was substantially similar to the citation herein. In that agreement the Respondent has admitted that "Said Item is a repeat serious violation . . . "

While the Labor Department did not introduce evidence establishing the existence of the May 9, 1978, citation which gave rise to the repeated citation which was the subject of the 7 December 1978 Recommended Order, we find that the Complainant's introduction into evidence of the 7 December Final Order is sufficient to establish an admission by the Respondent of the repeated nature of that citation.

In the recent landmark case of Potlatch Corporation, 1979 CCH OSHD Para. 23,294 (1979), the Federal Review Commission has announced several principles which it applies in determining whether the Department of Labor has proved a repeated violation. In that case the Review Commission stated, "A violation is repeated . . . if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." Potlatch Corporation, supra, at 28,171.

We find that the Potlatch analysis is applicable to the facts here and that the Department of Labor has met the criteria established in the Potlatch rule.

We therefore sustain Citation Number 2 alleging a violation of 29 CFR 1926.28(a) as a double instance repeated citation.

IV

The Hearing Officer has recommended a reduction in the proposed penalty assessment for Citation Number 2 from $4000 to $2000. We uphold his recommended reduction on the basis that the Respondent has in this instance demonstrated a good faith effort to implement a comprehensive safety effort.

Accordingly, and for the reasons set forth herein, IT IS ORDERED by this Commission that the Hearing Officer's Recommended Order sustaining the citations issued against Respondent herein and reducing the penalty for Citation Number 1, Item 1 from $600 to $300 and reducing the penalty for Citation Number 2 from $4000 to $2000 be and it is hereby SUSTAINED. All findings and conclusions of the Hearing Officer not inconsistent with this opinion are 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: June 16, 1980
Frankfort, Kentucky

DECISION NO. 881

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
Department of Labor
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Frederick G. Huggins (First Class Mail)
Deputy General Counsel
Department of Labor
801 West Jefferson Street
Louisville, Kentucky 40202

Mr. C. E. Hartman, Secretary (First Class Mail)
Oberle Jordre Company, Inc.
612 Tri-State Building
Cincinnati, OH 45202

Hon. W. M. Otter (Cert. Mail #P15 5401385)
Shiloh Lane, Rte. #1
Prospect, Kentucky 40059

This 16th day of June, 1980.

Iris R. Barrett
Executive Director