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(69 (1975))

JULIAN M. CARROLL
~~WENDELL G. HOFFORD~~
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892
August 4, 1975

H. L. STOWERS
CHAIRMAN
MERLE H. STANTON
MEMBER
CHARLES B. UPTON
MEMBER

KOSHRC # 69

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

C. E. PENNINGTON COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

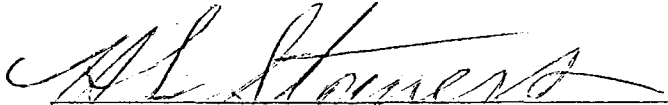
Before STOWERS, Chairman; UPTON and STANTON,
Commissioners.

PER CURIAM:

Complainant's Petition for Discretionary Review in
this case was filed March 12, 1975, and the Recommended Order
of Hearing Officer Riggs is before this Commission.

After careful consideration of the facts and issues
it is the finding of this Commission that the open-sided wall
in question was within the working area of the employees,
thereby creating a hazard. Therefore, it is the decision of
this Commission that both the citations and penalties as
originally proposed by the Department of Labor be affirmed and
reinstated. The part of the Hearing Officer's decision sus-
taining a violation of 29 CFR 1916.451(a)(4) shall be and
hereby is AFFIRMED, and that part of the decision dismissing a
violation of 29 CFR 1926.500 (d)(1) shall be and hereby is
REVERSED.

In all other respects the decision of the Hearing Officer is affirmed.



H. L. Stowers, Chairman

/s/ Charles B. Upton

Charles B. Upton, Commissioner

/s/ Merle H. Stanton

Merle H. Stanton, Commissioner

DATED: August 4, 1975
Frankfort, Kentucky

DECISION NO. 144


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
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Earl Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

C. E. Pennington Company (Certified Mail #469048)
340 South Broadway
Lexington, Kentucky 40508
Attention: Gary L. Pennington

This 4th day of August, 1975.


Iris R. Barrett
Executive Director

Stowers

69(93)



JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

March 3, 1975

KOSHRC # 69

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

vs.

C. E. PENNINGTON COMPANY

RESPONDENT

NOTICE OF RECEIPT OF DECISION,
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND 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 of our hearing officer, the Honorable Lloyd Graper, has been received and 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.

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 by the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, 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 filed 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
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
OSHA Coordinator

Earl M. Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Peter J. Glauber
Assistant Counsel

C. E. Pennington Company (Certified Mail #775244)
340 South Broadway
Lexington, Kentucky 40508
Attention: Gary L. Pennington

This 3rd day of March, 1975.



Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 69

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

C. E. PENNINGTON COMPANY

RESPONDENT

* * * * *

Hon. Peter J. Glauber, Assistant Counsel, Department of Labor,
Frankfort, Kentucky, for Complainant.

Mr. Gary L. Pennington, Lexington, Kentucky, for Respondent.

GRAPER, Hearing Officer.

An inspection was made on May 21, 1974, by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located at Vine Street and Broadway, Lexington, Kentucky, described as erecting of steel and construction of a hotel building. On the basis of such inspection, Citations were issued for four (4) separate non serious violations and one serious violation, all of which were uncontested. On June 26, 1974, a follow-up inspection at the same place of employment was made. Based upon such reinspection, it was alleged in Citations dated July 3, 1974, that Respondent repeated the violations hereinafter specified:

The Citation for the repeated (serious) alleged violation alleged a violation of Standard 29 CFR 1926.451(a) (4) (as adopted by OSH 12-2) described as "A scaffold work platform more than ten (10) feet above the floor or ground level was not provided with a standard guard rail nor were safety belts and life lines being used. (Two (2) employees were working from a scaffold platform two (2) feet wide and fifteen (15) feet long, subjected to a fall of twenty-eight (28) feet). (Repeat of Serious Violation, Citation number 2, Item number 1, issued June 6, 1974)." The date by which the alleged violation must be corrected was July 15, 1974. A penalty of \$950.00 was proposed.

The Citation for the repeated (non serious) alleged violation alleged a violation of Standard 29 CFR 1926.500(d) (1) (as adopted by OSH 12-2) described as "Open sided floors six (6) feet or more above adjacent floors or ground level were not provided with standard guard railing. (East Garage area, third floor; north side of garage area, third floor; seventh floor area). (Repeat of Nonserious Violation, Citation number 1, item Number 4, issued June 6, 1974)." The date by which the alleged violation must be corrected was July 15, 1974. A penalty of \$808.00 was proposed.

A Notice of Contest was received on July 30, 1974, which, together with a copy of the Citations and the Notice of Proposed Penalty, were transmitted to the Kentucky Occupational Safety and Health Review Commission on July 31, 1974, and received on August 1, 1974. A Complaint was filed on August 5, 1974. A Motion to Dismiss for failure to file an Answer was received on August 27, 1974. The motion

was overruled and the equivalent of an Answer was filed on September 13, 1974.

A Notice of Receipt of Contest was mailed on August 1, 1974, and a Certification of Employer form was filed on August 7, 1974, setting out the name and address of each local union representing affected employees. The case was assigned to the Hearing Officer on August 27, 1974. On September 17, 1974, a Notice of Hearing was mailed pursuant to which a hearing was held on Monday, September 30, 1974, at 10:00 a.m., at the office of the Hearing Officer, 109 North Mill Street, Lexington, Kentucky, under the provisions of KRS 338.071(4), one of the provisions of Chapter 338 of the Kentucky Revised Statutes 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 the procedural aspect of its hearings. Under the provisions of KRS 338.081, hearing authorized by the provisions of such Chapter may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal, the Review Commission may sustain, modify, or dismiss a citation or penalty.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits and the stipulations, and the representations of the parties, it is concluded that the substantial evidence on the record considered as a whole supports the following findings of fact:

FINDINGS OF FACT

1. It is found that a scaffold work platform, more than ten feet above the floor or ground level, was not provided with a standard guard rail nor were safety belts and life lines being used. Two employees working on the scaffold, which measured two feet wide by fifteen feet long, were subject to a fall of twenty-eight feet. There was a substantial probability that death or serious physical harm could result from such condition which the employer did, or could with the exercise of reasonable diligence, know of the presence of the violation. The violation is a repeat of a prior serious violation.

2. It is found that while open-sided floors did exist, six feet or more above adjacent floors or ground level, there was no evidence of employee exposure to such hazard.

Upon the basis of the foregoing, the Hearing Officer makes the following:

CONCLUSIONS OF LAW

1. As to the repeated serious violation, the Commissioner of Labor gave effect to the prescribed criteria and gave them proper weight under the circumstances in assessing the proposed penalty. The Commissioner has met his burden of proof and the citation for the repeated serious violation, the proposed abatement date of ten days, and the proposed penalty of \$950.00 should stand.

2. As to the alleged repeated other than serious violation, it is clear that the employer's duty is imposed solely for the protection of his employees. It follows that an employer may have a hazard in

his place of employment without violating his duty if his employees are not exposed to such hazard. The Commissioner has not met his burden of proof in that he failed to show employee exposure and the citation for the other than serious alleged violation, the proposed abatement date of ten days, and the proposed penalty of \$808.00 should be dismissed.

RECOMMENDED ORDER

IT IS ORDERED that the citation for the repeated serious violation, the proposed abatement date of ten days, and the proposed penalty of \$950.00 shall be and the same hereby are SUSTAINED, and IT IS FURTHER ORDERED that the citation for the alleged repeated other than serious violation, the proposed abatement date of ten days, and the proposed penalty of \$808.00 shall be and the same hereby are DISMISSED with prejudice.



LLOYD GRAPER
HEARING OFFICER, KOSHRC

DATED: March 3, 1975
Frankfort, Kentucky

Decision No. 93