

Leave

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

April 11, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 70

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WHITTENBERG ENGINEERING &
CONSTRUCTION COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

Respondent's Petition for Discretionary Review having been filed March 26, 1975, the Recommended Order of Hearing Officer Lloyd Graper, dated March 5, 1975, is before this Commission for review upon its own vote.

Upon thorough review of the entire record in this case, including due consideration of the documents submitted in support of Respondent's Petition for Discretionary Review, it is the unanimous order of this Commission that the decision of the Hearing Officer shall be, and it hereby is AFFIRMED in all respects not inconsistent with this opinion.


H. L. Stowers, Chairman

/s/ Merle H. Stanton
Merle H. Stanton, Commissioner

/s/ Charles B. Upton
Charles B. Upton, Commission

Date: April 11, 1975
Frankfort, Kentucky

DECISION NO. 104

(70) 104

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
OSHA Coordinator

Honorable Earl Cornett, General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

Whittenberg Engineering & Construction Company
2209 South Floyd Street
Louisville, Kentucky 40217
Attention: Mr. George Howell
Safety Director

(Certified Mail #775301)

This 11th day of April, 1975.



Iris R. Barrett
Executive Director

Done



70(95)

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

March 5, 1975

H. L. STOWERS

CHAIRMAN

MERLE H. STANTON

MEMBER

CHARLES B. UPTON

MEMBER

KOSHRC # 70

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WHITTENBERG ENGINEERING &
CONSTRUCTION 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
Attention: Robert D. Hawkins
Assistant Counsel

Whittenberg Engineering & (Certified Mail #775246)
Construction Company
2209 South Floyd Street
Louisville, Kentucky 40217
Attention: Mr. George Howell
Safety Director

This 5th day of March, 1975.



Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NO. 70

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

WHITTENBERG ENGINEERING &
CONSTRUCTION COMPANY

RESPONDENT

* * * * *

Hon. Robert D. Hawkins, Assistant Counsel, Department of Labor,
Frankfort, Kentucky, for Complainant.

Mr. George Howell, Safety Director, Louisville, Kentucky, for
Respondent.

GRAPER, Hearing Officer.

An inspection was made on July 16, 1974, by the Kentucky Department of Labor, Division of Occupational Safety and Health, of a place of employment located at Blue Cross-Blue Shield-Delta Dental Building, Lynn Station Road, Jeffersontown, Kentucky, whereat the respondent was described as general contractor. On the basis of such inspection, it was alleged in a Citation issued July 25, 1974, that respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in that the standard

allegedly violated was 29 CFR 1926.500(d)(1) (as adopted by OSH 12-2); the description of the alleged serious violation was: "The rear of the fourth floor of the Blue Cross-Blue Shield-Delta Dental Building did not have a standard railing where adjacent ground level was forty-five (45) feet below; and did not have a standard toeboard to protect personnel moving below (three men working near the edge of the floor were not protected from falling by standard railings, safety belts, nor safety nets)."; the date by which the alleged violation must be corrected was immediately upon receipt of the citation; and the proposed penalty was \$600.00. Two other than serious violations were also charged but the respondent contested only the alleged serious violation.

The Notice of Contest was received from the Employer on August 1, 1974, which, together with a copy of each Citation and the Notice of Proposed Penalty, was transmitted to and received by the Kentucky Occupational Safety and Health Review Commission on August 5, 1974. A Notice of Receipt of Contest was mailed on August 5, 1974, and a Certification of Employer form indicating the name and address of each local union representing affected employees was filed on August 9, 1974. A Complaint was filed on August 13, 1974. On September 3, 1974, the case was assigned to the Hearing Officer and, on the same date, a Notice of Hearing was mailed. Pursuant to such Notice, a hearing was held on Wednesday, September 18, 1974, at 10:00 a.m., at the Kentucky Department of Highways District Office, 977 Phillips Lane, Louisville, 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. Briefs were filed on behalf of both parties.

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

The fact that there was no standard railing was not disputed nor was the fact that there was employee exposure in dispute. Respondent argues that for the violation of the cited standard to constitute a serious violation, complainant must prove that the respondent employer knew or could, with the exercise of reasonable diligence, have known of the violation.

In this connection, it is not necessary to determine if the respondent employer knew that his employees were not wearing safety belts. It is enough if it is shown that respondent employer knew or could, with the exercise of reasonable diligence, have known that there were no standard railings. This was shown. It is therefore

found that the employer knew, or with the exercise of reasonable diligence, should have known of the presence of the violation. It is also found that there was a substantial probability that death or serious physical harm could result from such condition in use in such place of employment.

While it may have been argued that safety belts would have provided the employees with protection equivalent to the standard railing, absent the wearing of such safety belts, there can be no such argument.

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

CONCLUSIONS OF LAW

As to this serious violation, the Compliance Officer, as an agent of the Commissioner of Labor, in assessing the civil penalty gave due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. The Commissioner has met his burden of proof and the citation, the proposed penalty, and the proposed abatement date should stand.

RECOMMENDED ORDER

IT IS ORDERED that the citation charging a serious violation of Standard 29 CFR 1926.500(d)(1) (as adopted by OSH 12-2),

the proposed immediate abatement date, and the proposed penalty of \$600.00 shall be and the same hereby are SUSTAINED.



LLOYD GRAPER
HEARING OFFICER, KOSHRC

Dated: March 5, 1975
Frankfort, Kentucky

Decision No. 95