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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
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FRANKFORT, KENTUCKY 40601
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JOHN Y. BROWN, Jr.
GOVERNOR

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

May 18, 1981

KOSHRC #731

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

HUGHES MASONRY CO., INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of February 19, 1981, is presently before this Commission for review, pursuant to an Order of Direction for Review issued by former Commission Chairman Merle H. Stanton.

The Respondent in this matter was cited for a violation of 29 CFR 1926.451(h)(15) (as adopted by 803 KAR 2:030) midrail and toeboard requirements when a Compliance Safety and Health Officer spotted one of Respondent's employees at Respondent's worksite at 1400 Willow Lane in Louisville, Kentucky, working from a scaffold which had a guardrail with top rail only.

The citation for violation of Section 1926.451(h)(15) alleged that Hughes Masonry failed to provide midrail and toeboards at all open sides and ends of the multiple point suspension scaffold, thereby exposing employees of a fall from the twenty-first level of the apartment complex. The citation further alleged that the absence of toeboards exposed employees passing below to the hazard of falling materials.

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From the ground level the Compliance Officer observed three employees on the scaffold. During the walkaround inspection the inspector ascended to the twenty-first level of the building via elevator, just as an employee was coming off the scaffold. While lifelines were anchored to a separate connection on the roof, the CSHO testified that the observed employee had not been tied off.

The Respondent's foreman admitted that the employees had been working on the scaffold and were coming off due to threat of inclement weather. The foreman could not verify that safety belts were in use by employees on the scaffold at that time.

The Compliance Officer testified on cross examination that the Respondent's employees were in the final stages of masonry work on the project, and that bricks and blocks weighing from sixty (60) to two-hundred fifty (250) pounds were being placed at the very top of the building at the time. After placement of the blocks, the scaffold was then to be dismantled.

There was testimony by the Respondent's foreman that the tools used on the scaffold were tied down.

I

At issue in this matter is whether the Hearing Officer erred in finding that the Respondent's employees were not exposed to a hazardous condition and therefore dismissing the serious citation and penalty of $490. We find the Hearing Officer's reasoning in error. We further find that a violation of the cited standard was established, and that the Respondent failed to establish any defenses thereto. We therefore reverse the Hearing Officer's Recommended Order and reinstate the citation and penalty.

It is well settled by occupational safety and healty decisions that generally the promulgation of a specific standard presupposes the existence of a hazard. Blue Grass Industries, KOSHRC #724, (February 24, 1981), Greyhound Lines-West and Greyhound Lines, Inc., v. Ray Marshall, Secretary of Labor and Occupational Safety and Health Review Commission, 575 F.2d 759 (9th Cir. 1978), 1978 CCH OSHD Paragraph 22,814; Lee Way Motor Freight Company, 511 F.2d 864 (10th Cir., 1975), 1974-1975 CCH OSHD Paragraph 19,320.

We hold that by its express terms Section 1926.451(h)(15) contemplates the existence of a hazard when its terms are not met. See Thermo Tech, Inc., 1977-1978 CCH OSHD Paragraph 22,281 (October 27, 1977), where the Federal Review Commission held that Section 1926.451(c)(13) assumes the existence of a hazard and that the Secretary of Labor was not

"required to prove that an employee or tools could have fallen from the 50-foot-high scaffolding on which 17 employees worked. The employer contended industry practice did not require midrails and toeboards, but the standard unequivocally requires them."

We find that the Commissioner of Labor met the burden of proving that the scaffold in question did not comply with the midrail and toeboard requirements set forth in 1926.451(h)(15).

We therefore reverse the Hearing Officer's conclusion that the subject employees were not exposed to a hazardous condition.

II

We now turn to the question of whether the Respondent established a defense to the citation.

The Respondent contends on review that the Recommended Order should be upheld because alternative protection in the form of safety belts, lifelines and lanyards is permitted by the standard and was in fact provided by the Respondent.

We find insufficient proof in the record to establish that safety belts were provided and their use enforced. Even if the proof were sufficient, we find that an employer may not defend against non-compliance with scaffold guarding requirements by proving compliance with section 1926.28(a), absent extenuating circumstances. See Wander Iron Works, Inc., 1980 CCH OSHD Paragraph 24,457, (April 30, 1980), in which the Federal Review Commission held likewise.

In that case a limited exception to guardrail requirements was noted, in that proof of the enforced use of alternative equivalent protection is relevant to a defense to a citation for failure to provide guardrails where an employer can establish the elements of one of three defenses: impossibility of compliance or performance, greater hazard, or multi-employer worksite defenses in their relevant aspects.

While the Respondent does not specifically assert any of the three defenses, he contends that the employees were in the process of dismantling the scaffold. We find that the weight of the evidence indicates that actual dismantlement was not in progress at the time of the inspection. The record establishes by admission of the Respondent that employees had been working on the scaffold on the day of the inspection (Transcript of Record, hereinafter T.R., p. 127) and that six or eight large 60 to 250 pound blocks were still to be laid directly in front of the scaffold (T.R., pp. 95, 116). Thus it appears from the record that work preliminary to dismantlement of the scaffold was in fact in process at the time of the inspection.

Because the Respondent did not establish a defense that would necessitate the use of alternative forms of protection, we find that the tying down of tools on the scaffold will not excuse an employer from the toeboard requirement under 1926.451(h)(15).

We distinguish the case of Miller Druck Company, 1980 CCH OSHD Paragraph 24,582 (June 16, 1980) cited in the Recommended Order. That case involved an emergency situation where loose marble pieces were falling from the face of the building, injuring pedistrians below. The facts therein indicated that the situation in that case was so dangerous that the area below had been barricaded to all persons. We find no such emergency or total barricade indicated herein.

Accordingly, and for the reasons set forth herein, 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 1926.451(h)(15) (as adopted by 803 KAR 2:030) is hereby SUSTAINED. The proposed penalty of $490 is therefore REINSTATED. Abatement shall be immediate. All findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.

John C. Roberts, Chairman

s/Carl J. Ruh
Carl J. Ruh, Commissioner

s/Charles E. Braden
Charles E. Braden, Commissioner

DATED: May 18, 1981
Frankfort, Ky.

DECISION NO. 1007

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

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

Hon. Hugh M. Richards (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Hon. David B. Ratterman (Cert. Mail #P279171715)
Goldberg & Pedley
2800 First National Tower
Louisville, Kentucky 40202

Hughes Masonry Co., Inc. (First Class Mail)
1400 Willow Avenue
Louisville, Kentucky 40204

This 18th day of May, 1981.

John C. Roberts, Chairman
KOSH Review Commission

www

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John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

Carl J. Ruh
MEMBER

JOHN C. ROBERTS
MEMBER

February 19, 1981

KOSHRC # 731

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

HUGHES MASONRY CO., 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

Hon. Hugh M. Richards (Messenger Service)
Assistant Counsel
Department of Labor
U. S. 127 South
Frankfort, Kentucky 40601

Hon. David B. Ratterman (Cert. Mail #0067063)
Goldberg & Pedley
2800 First National Tower
Louisville, Kentucky 40202

Hughes Masonry Co., Inc. (First Class Mail)
1400 Willow Avenue
Louisville, Kentucky 40204

This 19th day of February, 1981.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #731

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

HUGHES MASONRY CO., INC. — RESPONDENT

This matter arises out of one citation issued against Hughes Masonry Co, Inc., hereinafter referred to as "Hughes Masonry", by the Commissioner of Labor hereinafter referred to as the "Commissioner" for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On April 9, and 10, 1980, a Compliance Safety and Health Officer, hereinafter referred to as the "CSHO", made an inspection of a construction site in Louisville where Hughes was working as a subcontractor. As a result of that inspection, the Commissioner issued a citation on April 22, 1980, charging Hughes Masonry with one serious violation and proposing a total penalty therefor of $490.00.

On May 13, 1980, and within 15 working days from receipt of the citation, Hughes Masonry served notice on the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on May 19, 1980, and notice of receipt of the contest was sent by the Review Commission to the parties on May 20, 1980. Thereafter on June 4, 1980, the Commissioner filed its Complaint and on August 5, 1980, Hughes Masonry filed its Answer. On June 17, 1980, this matter was assigned to a Hearing Officer and scheduled for hearing to be held July 11, 1980. By subsequent orders, the hearing was continued to August 21, 1980.

The hearing was held in Louisville on August 21, 1980, pursuant to KRS 378.080(4). That section of the statute authorizes this Review Commission to

rule on appeals from citations, notifications, and variances to the Act, and to adopt and promulgate rules and regulations concerning the conduct of those hearings. KRS 378.081 further authorizes this Review Commission to appoint Hearing Officers to conduct its hearings and represent it in this manner. The decision of hearing officers are subject to discretionary review by the Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

The standards allegedly violated (as adopted by 803 KAR 2:030) the description of the alleged violation, and the penalty proposed for same are as follows:

1926.451(h(15)	The masons' multiple-point suspension scaffold more than ten (10) feet above the ground on the west side of the building, did not have a midrail and/or toeboards installed at all open sides and ends, exposing employees to a fall from the twenty-first level of the apartment complex and materials falling on the employees working or passing beneath the scaffold.	$490.00

Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law and Recommended Decision are hereby made:

FINDINGS OF FACT

Hughes Masonry is a masonry contractor who, at the time of the inspection, was installing the bricks and blocks forming the exterior wall of a 21 story building under construction in Louisville. The work was performed from a multipoint suspension scaffold. The scaffold was suspended by cables running from I-beams attached to the roof and extending away from the building. As the work progressed, the cables were shortened drawing the scaffold closer to the roof.

When the inspection was made all of the masonry work had been completed except for the installation of some blocks forming the parapet on the roof. This was referred to as "topping out" the wall. In order to top out the wall the scaffold had been pulled up to the top of the building.

At the lower levels, the scaffold had been equipped with a protective cage constructed of wire mesh sides and overhead boards. This cage completely enclosed

the open sides of the scaffold. The protective cage was removed when the scaffold was pulled to the top of the building because at that height there was not sufficient clearance between the scaffold and the beams from which it was suspended to accommodate the cage. After the cage was removed, the open sides of the scaffold were guarded by a rail, but the rail did not conform to the standard because it lacked both a midrail and a toeboard.

The CSHO observed three employees working on the scaffold when he arrived at the work site. This observation was made from the ground. He later went to the roof of the building and observed one employee just as he came off the scaffold. The three employees had apparently just finished replacing the floor boards on the scaffold. Because there were heavy winds that day, the scaffold was not being used to perform masonry work.

The scaffold was equipped with safety lanyards which the employees were instructed to use when working without the protection of the cage. It was not established, however, whether the lanyards were being used by the employees while they were replacing the boards on the scaffold at the time of the inspection.

After the cage was removed, the building materials used in the work were stored on the roof of the building. Therefore, when the inspection was made there were no building materials on the scaffold. There was, however, an electrical drill on the floor of the scaffold. This drill was tied to the scaffold to prevent it from accidently falling to the ground below.

The area beneath the scaffold was posted with signs warning that men were working overhead. In addition, an employee of Hughes Masonry was assigned to work in the area, and one of his duties was to warn people passing through the area that men were working above.

Because of the absence of the toprail and midrail on its opensides, the scaffold was cited as being in violation of the act. The violation was cited as serious due to the height at which the scaffold was being used and a penalty of $490.00 was proposed for the violation.

In proposing the penalty for the violation, the CSHO followed elaborate guidelines established by the Commissioner for all CSHO's to use. Under the guidelines, the CSHO first determines the gravity of the violation in terms of the probability of injury or illness which may result from it. Factors taken into consideration are the number of employees exposed, the frequency and duration of exposure, the proximity of employees to the point of danger, the speed of an operation and the resulting stress upon the employees, and any other factor which the CSHO believes may significantly affect the probability of an accident. Each factor is measured on a scale of one to eight and the average of all these factors is taken. This average is referred to as the "Probability Quotient".

For serious violations, the severity of the injury or illness is also taken into consideration. A value of one to eight is also assigned for severity. The value assigned is based upon the type of treatment which would be required if an employee was injured as a result of the violation. Where the injury would only require a doctor's treatment, a value of one to two is assigned. Where hospitalization could result, a value of three to six is assigned. Where chronic illness or injury, permanent disability or death could result, a value of seven or eight is assigned. This value known as the "Probability-Severity Quotient". The Probability-Severity Quotient is then converted into a "Gravity Based Penalty" according to a table adopted by the Commissioner.

The Gravity Based Penalty can then be adjusted downward as much as 80% depending on the employers "good faith", "size of business" and "history". Up to 40% reduction may be permitted for size, up to 30% for good faith, and up to 10% for history.

In calculating the "Probability Quotient", the CSHO assigned a value of three for the "number of employees exposed". This was the number of employees he observed working on the scaffold. For "duration of exposure" he assigned a value of six because due to the high wind conditions, the employees were not working a full day when the inspection was made. For "proximity to danger" he assigned the value of

eight because the men were working on the scaffold. For speed and stress, the CSHO assigned a value of two because he felt that the employees were under little stress. This resulted in a Probability Quotient of four.

For the "Severity Quotient" the CSHO assigned a value of seven, because he believed a fall from the scaffold at the height that it was being used would result in serious physical injury or death. The two quotients averaged out to a Probability-Severity Quotient of five, which was converted by the appropriate table into a Gravity Based Penalty of $700.00.

The Gravity Based Penalty was then reduced by 30%. The CSHO allowed 20% for good faith, based on the company's safety program, accident record and the nature of the violation. He also allowed 10% for history, the maximum permitted by the Commissioner, because the company had been inspected previously and had complied with the Commissioner's orders to abate the conditions cited. He made no adjustment for size because he understood the company employed more than 100 men (the actual number employed at the time of the inspection was between 50 and 60 which would call for an additional 20% reduction). This adjustment reduced the penalty to $490.00, the amount proposed in the citation.

CONCLUSIONS OF LAW

29 CFR 1926.451(h)(15) provides in part:

> Masons adjustment multiple-point suspension scaffolds
> . . . . Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), approximately 42 inches high, with a midrail and toeboards shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

The parties both agree that the scaffold in question was a multiple point suspension scaffold used more than 10 feet above the ground and that it did not have a guardrail as specified in the standard because it lacked a midrail and a toeboard. The Commissioner contends the absence of a midrail exposed the employees using the scaffold to the hazard of falling 21 stories to the ground below and the absence of a toeboard created a hazard of objects falling from the scaffold and striking persons on the ground below.

that the language of the standard is unequivocal, and that any use of a scaffold without a guardrail conforming to the specifications of the standard is a violation of the standard.

In response, Hughes Masonry contends the absence of a midrail did not create a hazard because the employees were furnished and instructed to use safety lanyards and the scaffold did not require a toeboard because no loose objects were kept on it.

Although, there do not appear to be any decisions interpreting the above standard, there are numerous decisions interpreting other similar standards requiring the installation of guardrails. These other standards are fairly identical to the standard relied upon here by the Commissioner. In interpreting these other standards, the Review Commission has generally held that guardrails are not required where equivalent protection is provided. Thus, in Miller Druck Co., OSHD 24,582, a citation for failing to equip the open ends of a scaffold in violation of 1910.451(e)(11) was vacated where other equipment providing equivalent protection was used.

Also , in Lane Construction Corp. 1976-1977 OSHD, 20,919, a citation for permitting employees to use unguarded scaffolds in violation of 1910.451(c)(10) was vacated because the employees used safety lines.

Both decisions are consistent with the basic principle that there is no violation of the Act where employees are not exposed to a hazardous condition, Triangle Refineries, Inc., 1971-1973 OSHD 15,454.

Although it was not established whether the employees observed by the CSHO were using safety lines when he observed them, the unrebutted testimony of company officials was that employees were instructed to use them under the circumstances, and did in fact use them generally. Thus, the lack of a midrail was not a violation of the Act.

The failure to install a toeboard was also not a violation the Act. Materials used in the construction were not kept on the scaffold and, although there were tools kept on the scaffold, they were tied down. Thus, there was little likelihood

of anything being kicked or pushed off the scaffold to the ground below. For these reasons, the citation should be vacated.

RECOMMENDED DECISION

NOW, THEREFORE, upon the basis of the foregoing Findings of Fact, Conclusions of Law and upon the entire record,

IT IS HEREBY ORDERED

That the citation charging Hughes Masonry Co., Inc. with the serious violation of 1926.451(h)(15) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of $490.00, is hereby vacated.

Paul Shapiro

PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: February 19, 1981
Frankfort, Kentucky

DECISION NO. 973