

ww

737



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

CHARLES B. UPTON
MEMBER

FRANKFORT, KENTUCKY 40601

JOHN C. ROBERTS
MEMBER

PHONE (502) 564-6892

November 25, 1980

KOSHRC #737

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CRAWFORD CONSTRUCTION CO.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of October 2, 1980, is presently before this Commission for review, pursuant to an Order by this Commission granting Respondent's Petition for Discretionary Review.

Finding no error in the application of the law to the facts herein, and finding that the evidence herein adequately supports the findings and conclusions of the Hearing Officer, it is therefore the ORDER of this Commission that the Recommended Order in this case be and it is hereby AFFIRMED. The violations and proposed penalties are hereby SUSTAINED. Abatement shall be immediate.

Merle H. Stanton
Merle H. Stanton, Chairman

DATED: November 25, 1980
Frankfort, Kentucky

DECISION NO. 938

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

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


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
U. S. 127 South
Frankfort, Kentucky
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. J. G. Crawford, President (Cert. Mail #P14 8475668)
P. O. Drawer 240
1844 North 8th Street
Paducah, Kentucky 42001

This 25th day of November, 1980.


Iris R. Barrett
Executive Director

ww

737



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 2, 1980

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC # 737

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CRAWFORD CONSTRUCTION CO.

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

Mr. J. G. Crawford, President (Cert. Mail #P14 8475616)
P. O. Drawer 240
1844 North 8th Street
Paducah, Kentucky 42001

This 2nd day of October, 1980.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #737

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

CRAWFORD CONSTRUCTION CO.

RESPONDENT

This matter arises out of two citations issued against Crawford Construction Company, hereinafter referred to as "Crawford", 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 28, 1980, a Compliance Safety and Health Officer, hereinafter referred to as the "CSHO", made a inspection of a worksite where Crawford was performing as a construction contractor. As a result of that inspection, the Commissioner issued a citation on May 1, 1980, charging Crawford with one nonserious violation of the Act, and one serious violation of the Act, and proposing a total penalty therefor of \$420.00.

On May 20, 1980, and within 15 working days from receipt of the citation, Crawford filed a notice with the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on May 21, 1980, and notice of receipt of the contest was sent by the Review Commission to the parties on May 22, 1980. Thereafter, on May 30, 1980, the Commissioner filed its Complaint and on June 9, 1980, Crawford filed its Answer. By Notice dated June 17, 1980, this matter was assigned to a Hearing Officer and scheduled for hearing to be held on July 23, 1980.

The hearing was held in Paducah on July 23, 1980, pursuant to KRS 378.070(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 decisions of Hearing Officers are subject to discretionary review on appeal timely filed by either party, or upon the Review Commission's own motion.

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

29 CFR 1926.28(a)	Employees were not required to wear appropriate personal protective equipment (i.e. safety belts and lanyards) to prevent falling where scaffolding safety nets, or other protection was not feasible while performing work involving the removal of the steel super structure on the Paducah Clarks River bridge on Highway 60-62. Employees while performing their duties were subjected to the hazard of falling from heights ranging from approximately twenty-five (25) feet to fifty-four (54) feet above ground and water level.	\$420.00
-------------------	---	----------

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

Crawford contracted with the Kentucky Department of Transportation to remove a four span bridge crossing Clark's River on U.S. 68 near Paducah. The frame of each span consisted of two steel trusses running lengthwise along each side of the bridge and connected by steel cross pieces at each end of the trusses. The frame of each span was bolted to concrete piers constructed in the river, and, to provide stability, the trusses were heavily braced from truss to truss above and below the floor level of the bridge. When the inspection was made, all of the trusses, except one, had been removed. The remaining truss was supported by anchor bolts securing each end of the truss to a concrete pier and by a cable attached to the top of the bridge from an overhead crane.

A second bridge, running parallel to the bridge being removed was being used to maintain traffic on U.S. 68. The two bridges were connected by temporary

narrow walkways from the second bridge to the piers of the bridge being removed. These walkways were guarded with standard guardrails. The guardrails, which were made of light aluminum tubing, were connected to the walkways by C-clamps bolted to the side.

To complete the removal of the truss, the anchor bolts securing it to the piers were first removed. Then the overhead crane lifted the truss from the piers and lowered it to the ground. That entire operation took approximately 20 to 40 minutes.

While the CSHO was at the worksite, he observed an employee climb to the top of the truss, approximately 54 feet above the ground, and cut and remove a piece of steel attached to the truss. While cutting the steel, the employee did not wear a lanyard or other protective device to prevent him from falling to the ground. Although, the installation of a safety line was not feasible under the circumstances, the employee could have worn a lanyard and attached it to the cable from the overhead crane, or to the truss itself. The failure to wear such a protective device exposed the employee to the hazard of a fall of approximately 54 feet.

The CSHO also observed two employees on the concrete piers removing the bolts anchoring the truss. These employees were about 40 feet above the water, which was approximately 5 feet deep at that point. They, too, were not wearing any protective devices, and they were exposed to the hazard of a fall from that height. Although a safety line was not feasible here either, the employees could have worn a lanyard attached to the handrails on the walkway connecting the pier to the other bridge.

In proposing the penalty for the violation, the CSHO followed elaborate guidelines established by the Commissioner for all CSHO's to use. Under these 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

CHSO 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 "Severity Quotient", is averaged with the "Probability Quotient" and the result is 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 two for the "number of employees exposed". This was the number of employees he observed working without protective equipment. For "duration of exposure" he also assigned a value of two because the employees were not exposed to the hazard for a lengthy period of time. For "proximity to danger" he assigned the value of six, because the men were working within 2-1/2 feet of the edge while working on the pier and although directly at the point of danger while working on the truss, the employees had something to hold onto. For speed and stress the CSHO assigned a value of eight, because he felt that the employees were completely unprotected from the hazard. 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 those heights 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 40%. The CSHO allowed 10% for good faith, which was the maximum he could allow based on the size of the Probability Severity Quotient. He also allowed 10% for history, the maximum permitted by the Commissioner, and 20% for size, because the company had between 26 and 60 men. This reduced the penalty to \$420.00, the amount proposed in the citation.

CONCLUSIONS OF LAW

29 CFR 1926.28(a) provides:

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.

To establish a violation of this standard, the Commissioner must not only show that the employees were exposed to a hazard, but must also show the means by which the employer may comply with the standard. The burden then shifts to the employer to show the "infeasibility or impossibility of compliance", Steel Builders of Kentucky, DN KOSHRC #378 (1978).

The Commissioner's evidence satisfies the burden of proof required to support the citation. It is clear from the evidence that employees were working at heights of 54 feet and 40 feet above the ground with no equipment to protect them from a fall. The evidence also establishes that lanyards could have been attached to the overhead crane or the truss, in the case of the one employee working on top of the truss, and to the handrails on the adjacent walkway, in the case of the two employees working on the pier.

Crawford contends that neither means of protection proposed by the Commissioner was suitable. With respect to the man working on the truss, Crawford maintains that the cable from the crane on the headache ball attached to it, was not a safe anchorage for a lifeline, and that the beam of the truss was also an unsafe anchorage. Concerning the men on the pier, Crawford maintains that the

handrail which the CSHO suggested as the anchor for the lanyards was not strong enough to hold the employee if he were to fall.

The fallacy of Crawford's position is that it assumes unless the protective equipment afforded absolute protection from the hazard, it need not be used. The purpose of the Act, is not to provide absolute safety, but only to improve safety conditions to the extent that it is possible to do so. The use of safety equipment and safe practices are not excused by the Act, where, as in this case, absolute safety cannot be achieved because of the nature of the working conditions. Admittedly, a lanyard tied to the headache ball or the cable from the overhead crane, and one tied to the handrails of the walkway, would not completely protect the employees working on the truss or the concrete pier. But it would provide some protection, and considerably more protection than no lanyard at all. For these reasons the citation should be sustained.

Furthermore, the penalty proposed was appropriate under the circumstances, and should also be sustained.

RECOMMENDED DECISION

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


IT IS HEREBY ORDERED

That the citation issued May 20, 1980, charging a serious violation of 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030), and proposing a penalty therefor of \$420.00 be and is hereby affirmed.

IT IS FURTHER ORDERED that the violation must be abated immediately upon receipt of this Decision, and the penalty must be paid without delay, but no later than 30 days from the date hereof.

DATED: October 2, 1980
Frankfort, Kentucky

DECISION NO. 916


PAUL SHAPIRO
HEARING OFFICER
KOSHRC