

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

AIRPORT BLDG., LOUISVILLE RD., (U.S. 60-WEST)

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 19, 1981

JOHN Y. BROWN, Jr.
GOVERNOR

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #756

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

HUGHES MASONRY COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Timothy T. Green, issued under date of 14 January 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 action was cited for an alleged serious violation of 29 CFR 1926.451(d)(10) (as adopted by 803 KAR 2:030) for failure to provide standard guardrails and toeboards on a tubular scaffold on which three (3) employees were working located approximately twelve (12) feet above ground level. A \$300 penalty was proposed.

On May 21, 1980, a Compliance Officer made a general schedule inspection of a construction site at 1325 Baker Court in Lexington, Kentucky, where the Respondent company was engaged in masonry work at the future location of a Georgia Pacific Corporation Distribution Center.

During that inspection the Compliance Officer observed three men working from the second level of a tubular scaffold which had no guardrails or toeboards as required by 1926.451(d)(10).

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The Respondent has not disputed that the scaffold in question was not guarded. The Respondent defends on the grounds that (1) guarding was impossible because the workers were engaged in erecting the scaffold; (2) that toeboards would have made the work impossible in that they would have prevented the hod carriers from picking up the material lifted up to them by the forklift; and (3) that since the scaffold was equipped with cross-bracing, there was no need to provide standard rails and toeboards.

Hearing Officer Green has found that 1926.451(d)(10) is not applicable to employers who are in the process of constructing, erecting or securing a scaffold. He has therefore vacated the citation and penalty. We reverse.

Consistent with the Federal Review Commission's decision in Dick Corporation, 1979 CCH OSHD Paragraph 24,078 (November 30, 1979), we find that the fact that a scaffold is cross-braced does not relieve an employer from complying with scaffold guardrail requirements specified by 1926.451(d)(10).

We do not find merit in the Respondent's contention that forklift deliveries would be rendered impossible with the installation of standard guardrails and toeboards. While the defense is valid, we note that it is narrow in scope. The guiding principle in the Setterlin Company and Dayton Brothers cases cited in Respondent's Brief at p. 9 is that guardrails will not be required at the exact location of the forklift during loading. Those cases also state that this exemption does not include the entire length of an open scaffold.

Lastly, the Respondent contends that the use of guardrails was impossible at the time the CSHO observed the worksite because the subject employees were erecting the scaffold.

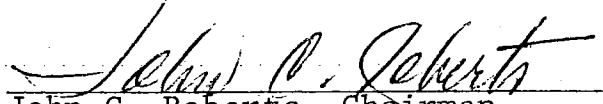
We find that the weight of the evidence indicates that the scaffold was sufficiently completed to support the placement of standard guardrails on the second level where the employees were working. See Complainant's Exhibit No. 1; see also Transcript of Record, p. 73, where the Respondent's Safety Officer testified that mortar had been forklifted to the second level of the scaffold.

Even if the weight of the evidence indicated that erection of the scaffold was in progress, proof of that fact alone would be insufficient to excuse the Respondent from compliance with guardrail requirements. The Respondent would have to further prove that the erection process either caused compliance with guardrail requirements to be impossible or otherwise established a valid defense to 1926.451(d)(10).

While the Respondent's counsel is to be commended for his advocacy on behalf of the Respondent, we find that the Supreme Court decision in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 48 USLW 5022 (1980), has no bearing on the outcome of this case.

We further find that the Complainant introduced proof sufficient to establish a serious violation of the cited standard.

Accordingly, and for the reasons hereinabove stated, 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(d)(10) (as adopted by 803 KAR 2:030) is hereby SUSTAINED. The proposed penalty of \$300 is hereby 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 19, 1981
Frankfort, Kentucky

DECISION NO. 1009

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. P279171717)
Goldberg & Pedley
2800 First National Tower
Louisville, Kentucky 40202

Mr. V. S. Beeler, Safety Officer (First Class Mail)
Hughes Masonry Co., Inc.
P. O. Box 333
Crestwood, Kentucky 40014

This 19th day of May, 1981.


John C. Roberts, Chairman /pr
KOSH Review Commission



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

MERLE H. STANTON
CHAIRMAN

Carl J. Ruh
MEMBER

JOHN C. ROBERTS
MEMBER

January 14, 1981

KOSHRC # 756

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

HUGHES MASONRY COMPANY, 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 #0067027)
Goldberg & Pedley
2800 First National Tower
Louisville, Kentucky 40202

Mr. V. S. Beeler, Safety Officer (First Class Mail)
Hughes Masonry Co., Inc.
P. O. Box 333
Crestwood, Kentucky 40014

This 14th day of January, 1981.



Iris R. Barrett
Executive Director

2. Two citations were issued on June 4, 1980, citation #1 containing one non-serious violation with no proposed penalty therefore, and in citation #2 containing one serious violation with a total proposed penalty therefore in the amount of \$300.00.
3. Notice of Contest received June 17, 1980 contested both the abatement dates and proposed penalty for both the non-serious and serious violation contained in citation #1 and #2.
4. Notice of Receipt of Contest was mailed June 25, 1980.
5. Complaint received July 7, 1980 with the Answer being filed on July 15, 1980 contesting only the serious violation on citation #2.
6. Notice of Assignment to Hearing Officer and Notice of Hearing were mailed July 28, 1980. An Order of Continuance was entered and the hearing was conducted on September 5, 1980 at 1:00 p.m. EDT at the law offices of Meng & Green, 1204 First National Building, Lexington, Kentucky.
7. The Transcript of Testimony of the hearing was received by the Hearing Officer on October 14, 1980, and notice of same was mailed on the same date. The parties hereto waived their right to file briefs.

The above-mentioned hearing was held pursuant to KRS 388.071 (4), which authorizes the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of the Act, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 388.081, the within hearing was authorized by the provisions of said Chapter and same may be conducted by a Hearing Officer appointed by the Review Commission to serve in its stead. The decisions of the Hearing Officer are subject to review

by the Review Commission upon appeal timely filed by either party, or upon its own motion, subsequent to which the Review Commission may sustain, modify or dismiss a citation or penalty.

The Standard alleged to have been violated in Item 1 of citation #2, as adopted by KRS Chapter 338, the description of the alleged violation, and the penalty proposed for same are as follows:

29 CFR 1926.451 (d) (10)
as adopted by 803 KAR 2:020 a tubular scaffold on which 3 employees worked approximately 12 feet above the adjacent ground located on the north side of the structure was not provided with guardrails and toe boards at all open sides and ends of the scaffolds.
(\$300.00)

29 CFR 1926.451 (d) (10), as adopted by 803 KAR 2:020, reads as follows:

(d) tubular welded frame scaffolds. (10) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), and approximately 42 inches high with a mid rail of 1 x 6 inch lumber (or other material providing equivalent protection), and toe boards, shall be installed at all open sides and ends of all scaffolds more than 10 feet above the ground or floor. Toe boards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with Paragraph (a) (6) of this section.

FINDINGS OF FACT

On the day of the inspection, employees of Hughes Masonry Company, Inc. were engaged in the construction of a concrete block building at 1325 Baker Court in Lexington, Kentucky. The Safety Compliance Officer, Forest L. Ramsey, was conducting a general safety inspection. He presented his credentials to Mr. Leopold Landi, superintendent for the

prime contractor on the job site and met subsequently with each of eight subcontractor representatives [transcript of hearing (hereinafter TR), page 7]. The Compliance Officer presented his credentials to Mr. James Evans, Foreman of Hughes Masonry Company, Inc. and then conducted a general safety inspection during the course of which he apparently observed one serious violation of the Act.

The violation concerned platform scaffolding on which the Compliance Officer saw three employees working. The scaffolding was approximately 12 feet above the ground, was open at both ends of the platform, and had no guard rail or toe boards on the side away from the construction. The Commissioner introduced into evidence a photograph, identified as Complainant's Exhibit #1, of the scaffolding showing the open end, the lack of a mid rail and the three employees. The Compliance Officer stated (TR, p. 14) that he did not know who these employees worked for and, in fact, only knew the name of one employee, Olus K. Morgan. Mr. Morgan was apparently identified to the Compliance Officer by Mr. James Evans, the job foreman. On cross-examination by the attorney for the Respondent, (TR, p. 34) the Compliance Officer stated that he did not inquire into the specific trade or designation of the three laborers on the scaffolding. He stated that he only observed the scaffold for approximately 15 minutes. Later, on cross-examination, he acknowledged that he did not feel any need to question any of the employees who were working on the scaffold at the time of his inspection. The point behind Respondent's questioning was to determine

whether the Compliance Officer knew if the employees on the scaffold were either laying block or constructing the scaffold. The Compliance Officer could not say in response which, in fact, was occurring.

James V. Evans, Bricklayer Foreman for Hughes Masonry Company, Inc. then testified on behalf of the Respondent stating (TR, p. 49) that the employees on the scaffold in Exhibit #1 were raising the scaffold and that their job designations were hod carriers or laborers. As mason attendants, these laborers were not authorized by their Union rules to lay block. Mr. Evans stated unequivocally (TR, p. 50-51) that these employees were in the process of erecting the scaffold and raising it to a higher level. Mr. Victor S. Beeler, Safety Officer for Hughes Masonry Company, Inc. since 1975, testified further as to the means of increasing the height of the scaffold and the process taken by the Respondent in erecting the scaffold and securing it. (TR, p. 62-63)

The weight of the testimonies indicates to the Hearing Officer that a scaffold is merely a temporary removable platform for workmen, in this case bricklayers, to stand or sit on when working at a height above the floor or ground. It is modular in construction and, as the proof established, takes a period of time to secure. It is obvious to this Hearing Officer that the Safety Compliance Officer conducted his walk-around inspection at a time when laborers were constructing the scaffolding for the bricklayers to work upon. The Safety Compliance Officer was unable to deny this

based on interviews with the employees on the scaffold at the time of his inspection.


CONCLUSIONS OF LAW

29 CFR 1926.451 (d) (10), as adopted by 803 KAR 2:020 is not applicable to employees or laborers who are in the process of constructing, erecting or securing a scaffold. It is as impractical and lacking in common sense to expect midrails and toe boards to magically appear on a scaffold as it is to assume that those items should be the first components placed in position during the construction of a scaffold.

RECOMMENDED ORDER

NOW THEREFORE, IT IS HEREBY ORDERED:

That the citation for violation of 1926.451 (d) (10) as adopted by KRS 338 and the proposed penalty of \$300.00 are hereby vacated.


Timothy T. Green, Hearing Officer

DATED: January 14, 1981
Frankfort, Kentucky

DECISION NO. 958