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

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

May 13, 1981

KOSHRC #795

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

SOFCO ERECTORS, INC. — 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 February 25, 1981, is presently before this Commission for review, pursuant to an Order of Direction for Review issued by former Commission Chairman Merle H. Stanton.

At issue in this case is an alleged serious violation of 29 CFR 1926.28(a) or, in the alternative, 29 CFR 1926.105(a), (both as adopted by 803 KAR 2:030) and a proposed penalty of $480.

Finding that Sofco Erectors was not the employer of the allegedly exposed employees, Hearing Officer Green has recommended dismissal of the alleged citation and penalty. Hearing Officer Green made no findings of fact or conclusions of law concerning the substantive issue in the case; that is, whether a violation of 1926.28(a) or 1926.105(a) was established.

We find that Hearing Officer Green erred in failing to rule on the substantive issues in this matter.

We further find that the Complainant failed to sustain the necessary burden of persuasion herein, and therefore we do not reach the issue of whether the Respondent herein was appropriately cited.

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The Respondent was cited by Kentucky Department of Labor Compliance Safety and Health Officers when four employees were observed in the process of installing roof decking and ventilator openings in the roof of the scrubber area during the construction of the Spurlock Power Plant at or near Maysville, Kentucky.

The Compliance Officers testified that at the time of the inspection of the roof area, the decking covered about two-thirds (2/3) of the roof. The remainder was open with steel structure exposed. There were also square openings in the decking itself which would later be used for exhaust fan ventilators, but which were merely unfinished, unguarded floor openings at the time of the inspection.

Both the ventilator openings and the open-side decking allegedly exposed the four employees to the hazard of falling at least thirty-five (35) feet to a floor below, or at most 250 feet to the ground. Death or serious bodily harm was adjudged by the inspectors to be the likely result if such an accident were to occur.

The Respondent contends that the Labor Department failed to prove a violation for two reasons: The Respondent contends (a) that 1926.28(a) and 1926.105(a) do not apply to flat roofs, and (b) that the Labor Department failed to establish the feasibility of attaching lifelines to which safety belts and lanyards could be attached, and that in fact the installation of nets was impossible and the use of lifelines, if feasible, would create a greater hazard than it would alleviate.

It has been established by this Commission that proof that the employees were working from a flat roof surface does not automatically establish a defense of greater hazard or that use of safety belts, lifelines and lanyards is infeasible. Pelco Structures, KOSHRC #490; D-E Erectors, Inc., KOSHRC #266.

The critical issue of proof in all cases involving an alleged violation of 1926.28(a) as it applies to safety nets, lifelines and lanyards, and the 1926.105(a) requirement of safety nets as an alternative protection was established by this Commission in Bob Graham Construction Company, KOSHRC #547, in which the Commission held that the Labor Department must initially prove that lifelines, safety belts and/or safety nets are feasible under the circumstances of each particular case.

In that case we stated that

> In making an initial showing of feasibility, it is not necessary for the Department of Labor to anticipate and negate a Respondent's affirmative defenses. It is necessary, however, for the Department to make a credible showing that the means for attaching and using lifelines, safety belts and/or lanyards are, or circumstantially appear to be available.
>
> Once such a credible showing is made, the Complainant has made out a prima facie case. The Respondent may, of course, defend by rebutting the initial showing of feasibility. Once a Respondent rebuts the Complainant's initial showing of feasibility, a balancing approach must then be used to determine whether the Respondent's rebuttal evidence in fact outweighs, or disproves, the Complainant's initial showing of feasibility. (Emphasis added.)

In the Bob Graham case this Commission also noted that

> The difficulties in the application of the requirements of 1926.28(a) have resulted . . . not from any difficult or mysterious legal labyrinth, but because almost every case can be distinguished from preceding cases both factually and in the quality of proof presented by both the Complainant and Respondents.
>
> A party makes or breaks his case depending upon whether he has and develops the necessary factual detail for the record . . . testimony by both the Compliance Officers' and Respondents' witnesses . . . has generally tended to be less than a clear statement for the record of the specific factual details which are necessary to establish the elements of either a prima facie case or a defense. (Emphasis added.)

While we find that an initial showing of feasibility was made by the Complainant herein, we find that, on rebuttal, the Complainant did not develop the factual detail necessary to satisfy the burden of persuasion that either personal protective equipment or nets were possible, feasible, or would not create a greater hazard under the circumstances.

In the case of J. F. Wagners Sons Company, Inc., this Commission upheld a Hearing Officer's Recommended Order which held that the Commissioner of Labor failed to rebut the testimony provided by the Respondent concerning the defenses of greater hazard and impossibility of compliance, where the facts indicated that the exposed employees were laying flat roof decking.

It was held in that case that "other than testimony by the Compliance Officer as to his opinion concerning the feasibility of utilizing protective devices, the Commissioner offered no proof to rebut the testimony of Wagner in support of its . . . affirmative defenses." We find a similar dearth of evidence herein.

Because we find that the citation cannot be sustained on its merits, we do not reach the issue of whether the Respondent could have been held liable under rules of multi-employer liability. We thus find the Hearing Officer's Conclusions of Law concerning this issue to be without legal effect.

Accordingly, and for the reasons set forth herein, IT IS ORDERED that the Hearing Officer's Recommended Order dismissing the citations and vacating the penalty herein be and it is hereby SUSTAINED. It is further ORDERED that all Conclusions of Law set forth in the Recommended Order inconsistent with this Decision and Order are hereby rendered null and void.

John C. Roberts, Chairman

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

s/Charles E. Braden
Charles E. Braden

DATED: May 13, 1981
Frankfort, Kentucky

DECISION NO. 1004

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
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Hon. Hugh M. Richards (Messenger Service)
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Mr. J. A. Nickerson, V. P. (First Class Mail)
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10333 Wayne Avenue
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This 13th day of May, 1981.

John C. Roberts /pr
John C. Roberts, Chairman
KOSH Review Commission