

Issue



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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 9, 1975

H. L. STOWERS
CHAIRMAN
MERLE H. STANTON
MEMBER
CHARLES B. UPTON
MEMBER

KOSHRC # 84

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

NATIONAL WINDOW CLEANING CO., INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

STANTON, COMMISSIONER:

A Recommended Order of Hearing Officer Roger D. Riggs, dated February 12, 1975, is before the Commission for review upon my direction. The findings of the Hearing Officer in this case shall be and hereby are affirmed in all respects not inconsistent with the following Opinion.

The Review Commission, upon thorough review of the record before it, hereby AFFIRMS both the Hearing Officer's finding of a serious citation against Respondent, and his requirement of IMMEDIATE ABATEMENT. Further, it is the unanimous order of this Commission that the \$500 penalty as proposed by the Department of Labor in consequence of said citation shall be and the same is hereby REINSTATED against Respondent.

Merle H. Stanton
Merle H. Stanton, Commissioner

Concurring:

/s/ H. L. Stowers
H. L. Stowers, Chairman

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

Date: April 9, 1975
Frankfort, Kentucky

DECISION NO. 101

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: Peter J. Glauber
Assistant Counsel

The Honorable Gerry Barker (Certified Mail # 775295)
Attorney for Respondent
220 East Court Avenue
Jeffersonville, Indiana 47130

Mr. Dennis Jackson (Certified Mail # 775296)
Louisville National Window Cleaning, Inc.
2210 Goldsmith Lane
Louisville, Kentucky 40218

This 9th day of April, 1975.



Iris R. Barrett
Executive Director

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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

February 12, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 84

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY

COMPLAINANT

vs.

NATIONAL WINDOW CLEANING CO., INC.

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 Roger D. Riggs, 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 40601
Attention: Peter J. Glauber
Assistant Counsel

The Honorable Gerry Barker (Certified Mail #775218)
Attorney for Respondent
220 East Court Avenue
Jeffersonville, Indiana 47130

Mr. Dennis Jackson (Certified Mail #775219)
Louisville National Window Cleaning, Inc.
2210 Goldsmith Lane
Louisville, Kentucky 40218

This 12th day of February, 1975.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #84

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

NATIONAL WINDOW CLEANING
CO., INC.

RESPONDENT

* * * * *

Hon. Peter J. Glauber, Assistant Counsel,
Department of Labor, Frankfort, Kentucky for Complainant

Hon. E. Gerry Barker, 220 East Court Avenue,
Jeffersonville, Indiana for Respondent

RIGGS, HEARING OFFICER.

An inspection was made on September 4, 1974 by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located at the Heyburn Building, Fourth and Broadway, Louisville, Kentucky described as a location where respondent's employees were washing the outside of windows. On the basis of this inspection, a citation was issued on September 13, 1974, in which it was alleged that Respondent violated one of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972).

The standard, regulation or section of KRS Chapter 338 allegedly violated was 29 CFR 1910.132 (a) (as adopted by OSH-11) and the description of the alleged violation is as follows:

Safety belts were not being used by two (2) employees standing on a fourteen (14) inch ledge while engaged in washing windows on the fourth (4th) floor of the Heydon Building. The employees were exposed to a fall of approximately thirty-six (36) feet to the concrete sidewalk below.

The date by which the alleged violation must be corrected was September 24, 1974. Complainant, by his complaint, designated Respondent to have committed a serious violation of the Act and proposed a penalty of \$500.

On September 24, 1974 the Department of Labor received a letter of contest from the employer. Thereafter, the Review Commission received a Complaint from the Department of Labor alleging the violation as previously stated and proposing said penalty amount. On October 17, the Review Commission received Respondent's Answer.

There are assurances appearing in the file stating that the proper posting of the contest and hearing were duly achieved. The file further contains a certification that the name of the local union representing affected employees is Local 557, Service Employees' International Union.

The file contains a notice of assignment to hearing officer and a notice of hearing. Hearing was held on December 3, 1974 at the District #5, Bureau of Highways Office, Conference Room, 977 Phillips Lane, Louisville, Kentucky, under the authority of KRS 338.071(4), a section of Chapter 338 of the Kentucky Revised

Statutes dealing with the safety and health of employees. This statute authorizes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of said Chapter and to adopt and promulgate rules and regulations concerning the procedural aspects of its hearings. By virtue of the provisions KRS 338.081, hearings authorized by the provisions of this Chapter may be conducted by a Hearing Officer appointed by the Review Commission to represent the Commission in this manner. Following the Hearing of an appeal, or on review of the decision of the Hearing Officer by its own motion, the Review Commission may sustain, modify, or dismiss a citation or penalty.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits, stipulations, and representations of the parties, it is concluded that the substantial evidence, on the record considered as a whole, supports the following:

FINDINGS OF FACT

1. Respondent, Louisville National Window Cleaning Co., Inc., operates a small business of window washing of both residential and commercial buildings in and around the city of Louisville, Kentucky.

2. It is found that on September 4, 1974, the date of inspection by the Compliance Officer, there were two employees of Louisville National Window Cleaning Co., Inc. who while washing windows were not using any type of personal protective equipment

to prevent them from the hazard of falling from a small ledge approximately 36 feet above a concrete sidewalk.

3. It is found that Respondent did provide at least one safety belt for use by these two employees.

4. It is found that Respondent did provide some supervision by occasionally patrolling the various work-cites where window cleaning operations were being performed by the employees.

5. It is found that a substantial probability of death or serious physical harm could result from the condition which existed at this inspection.

6. It is found that Respondent knew or could have known, with the exercise of due diligence, that such condition existed.

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

CONCLUSIONS OF LAW

The conclusion is inescapable that the employees of Respondent, on the occasion of this inspection, were working under conditions which could cause their employer to be in violation of 29 CFR 1910.132 (a)(as adopted by OSH 11-2). Complainant has proven that no "personal protective equipment" was being "used" by the two window washers on the date of inspection. The Complainant has proven that such equipment was here "necessary" due to the "hazards" of the "environment . . . capable of causing injury or impairment in the function of any part of the body through . . . physical contact." Certainly the failure to take precautions to prevent oneself from falling off a small ledge to a slab of concrete more than thirty feet below comes within the confines of the hazardous environment sought to be defined by this regulation.

In concluding that the bare situation fits within the definition of this standard, it next becomes necessary to decide to what extent, if any, the employer has violated the law and to what extent, if any he should be penalized.

A. Extent of the Violation

In considering the extent to which Respondent has violated the law, if at all, this Hearing Officer does not expect an employer to be an insurer of the safety of his employees. An employer must take safety and health measures to provide safe and healthful work conditions. The Act, by directing itself toward the employer, requires him to make reasonably diligent efforts to encourage employees to protect themselves and to provide a means of doing so. The employer must make reasonable supervisory efforts to keep employees within the boundaries of the Act. Thus the employer is a protector not an insurer. Unfortunately the line between the protector and the insurer is often drawn with great difficulty.

There is uncontradicted evidence on the record that this employer provided at least one safety belt for these two employees. This is an effort toward protection of the employees, no doubt. But the employer, by his own testimony, has had frequent difficulties in keeping his workers from ascending to and working at dangerous heights without using the proper protective equipment. With this knowledge, he should have considered that there was a great likelihood that, even if the one man did use the one belt provided, the other man would be inclined to lean out and wash a few windows without protection.

The nature and size of the Respondent's business operation is of the utmost importance in considering the reasonableness with which he supervised the employee activities, and ultimately in considering the extent of the violation. Even with a small number of window washers, it is obviously difficult to provide any kind of extended caretaker supervision where, as here, even as few as 5 or 6 window washers could be working on as many different projects in various locations of the city and county.

Worthy of recognition, while looking at the failings and virtues of the employer, is the failure of Complainant to see that an employer representative was given the opportunity to accompany the Compliance Officer during the inspection as required by KRS 338.111. The circumstances, of course, dictated the action taken, but still the employer's right to be present at the inspection, as provided by statute, was by-passed. Since this was not put into issue at the hearing, and no claim of prejudice was presented it is unnecessary for the Hearing Officer to decide what bearing such would have on the outcome of a case.

B. Penalty

An analysis of all of the legal aspects of the case results in a conclusion that a violation of the cited standard did occur. Viewing what this hearing officer considers the extent of the violation, noted above, a conclusion must be reached as to the assessment of a penalty. In the assessing of civil penalties due consideration must be given to the appropriateness of the penalty according to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

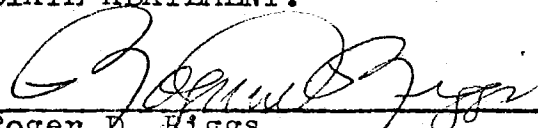
The size of the business is extremely small. In considering the gravity of the violation one must look to the fact that independent employee activity played a big part in the fact that a violation even occurred. As to good faith and history of previous violations, the Compliance Officer himself felt that this employer deserved "maximum" credit in arriving at a proper penalty amount. All of this in mind, the Hearing Officer feels that the appropriate penalty in this case would be \$200.

It is decided that the Commissioner of Labor has met his burden of proof as to the violation of the standard. The evidence, as presented supports a finding that the proposed penalty of \$500 should be reduced to \$200.

RECOMMENDED ORDER

Respondent's Motion to Dismiss is Overruled and:

IT IS ORDERED that the citation shall be and the same is hereby SUSTAINED: that the proposed penalty of \$500 shall be and the same is hereby REDUCED to \$200; and that the abatement date shall be changed to require IMMEDIATE ABATEMENT.



Roger P. Higgs
Hearing Officer, KOSHRC

Dated: February 12 , 1975

Decision No. 91