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JULIAN M. CARROLL

WENDY T. HARRIS

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 241*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge Street
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 5, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 170

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

RUBY CONSTRUCTION COMPANY, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman, UPTON and STANTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Herbert B. Sparks, dated Dec. 23, 1975, is before the Commission for review.

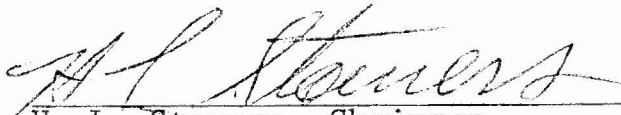
Having reviewed all elements of the record in this case, it appears to the Review Commission that the evidence as presented herein is not sufficient to sustain a change of the subject serious violation to a nonserious. It is reversible error on the part of the Hearing Officer to apply penalty adjustment factors "in extenuation and mitigation . . . in assessing . . . the type of violation." Transcript, p. 7. In his Findings of Fact, the Hearing Officer holds the Respondent to be in "technical violation" of the cited standard and later reduces the charge to nonserious on the basis of two supposedly similar precedential cases: Jackson Construction, OSHRC 18,883, in which certain extenuating factors went to reducing the penalty, not the citation itself, and Ward Engineering, KOSHRC #151, in which the subject trench was only 6 feet, 10 inches deep, compared to Respondent's 11 foot deep trench involved herein. It is found by the Commission therefore, that the evidence on the record does not factually support a change in the citation to nonserious, and the Hearing Officer erred in that he so found.

Nor does there appear to be good and sufficient reason to reduce the proposed penalty of \$800 to \$175. It is found that

the penalty assessment criteria were properly applied by the Department of Labor, and we can find no cause to disturb that result.

Therefore, it is the unanimous decision of the Commission that the Recommended Order of the Hearing Officer be and it hereby is REVERSED. It is further ordered that the citation charging a serious violation of 29 CFR 1926.652(b) and the proposed penalty of \$800 be REINSTATED as initially charged and proposed by the Department of Labor.

All other findings of the Hearing Officer not inconsistent with this decision are hereby affirmed.


H. L. Stowers, Chairman

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

/s/ Merle H. Stanton
Merle H. Stanton, Commissioner

Dated: March 5, 1976
Frankfort, Kentucky

DECISION NO. 241

KOSHRC # 170
(Decision and Order of Review Commission)

This is to certify that 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
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

Mr. J. M. Field, President (Certified Mail #456136)
Ruby Construction Co., Inc.
3837 Fitzgerald Road
Louisville, Kentucky 40216

This 5th day of March, 1976.


Iris R. Barrett
Executive Director

None



Final Jan 22

JULIAN M. CARROLL

~~WENDELL H. FORD~~
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 208*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

December 23, 1975

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 170

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

~~RUBY CONSTRUCTION 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.

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 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
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Honorable Earl M. Cornett
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Thomas M. Rhoads
Assistant Counsel

Mr. J. M. Field, President (Certified Mail #456061)
Ruby Construction Co., Inc.
3837 Fitzgerald Road
Louisville, Kentucky 40216

This 23rd day of December, 1975.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC # 170

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

RUBY CONSTRUCTION COMPANY,
INCORPORATED

RESPONDENT

* * *

Hon. Thomas Rhoads, Assistant Counsel, Department of Labor,
Frankfort, Kentucky, for Complainant

Mr. J.M. Fields, President, Ruby Construction Company, for
the Respondent

An inspection was made on June 6, 1975, by the Kentucky Department of Labor, Division of Occupational Safety and Health at a place of employment located in Jefferson County, Kentucky, at or near Wathen Lane and Seventh Street Road, Shively, Kentucky, and on the basis of the inspection it was alleged in a citation dated June 25, 1975 that the Respondent violated the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972) in the following respects, which was alleged to be a serious violation.

There was a citation issued against Respondent and that citation was protested, that being citation which alleged a violation of 29 CFR 1926.652 (b) (as adopted by 803 KR52-030), a description of the alleged violation being as follows:

~~"Violation of the sides of the trench on Wathan Lane were inadequately shored in that the plywood sheeting provided covered only a four (4) foot long eight (8) foot high section of the 20 foot long eleven (11) foot deep trench, only one (1) cross brace three (3) inches by ten (10) inches approximately two and one half (2½) feet long was provided, approximately three (3) feet from the bottom of the trench. This trench was in clay and sand from the bottom to an approximate five (5) foot height. From the five (5) foot level to the top of the trench was clay soil. An employee working in the trench was not protected from the hazard of moving ground or cave-ins."~~

~~The date by which the alleged violation was to be corrected was July 7, 1975.~~

The procedural pertinent information and dates are as follows:

1. Inspection of the premises mentioned above - June 6, 1975.
2. Citation issued June 25, 1975 listing one (1) serious violation of the Acts and Standards.
3. Proposed penalty for the contested standard herein in question was \$800.00 and the abatement date was July 7, 1975.
4. ~~Notice of Contest was received July 3, 1975, contesting the above named item.~~
5. Notice of Receipt of Contest was mailed July 8, 1975.
6. ~~Certification of Employer Form was received July 17, 1975.~~

7. Complaint was received July 9, 1975. No formal answer was filed herein, but no complaint was made of same by the Department, either prior to the proceedings or during the hearing.
8. Case was assigned to a Hearing Officer on August 19, 1975; the hearing was scheduled and held on September 29, 1975 at 10:00 a.m. at the Conference Room in the Department of Labor, Third Floor, Legal Arts Building, Louisville, Kentucky.
9. A deposition of the Compliance Officer was held at the same location on August 14, 1975 at or about the hour of 1:00 pursuant to an order by the Review Commission dated August 13, 1975 granting Complainants request for taking of said deposition.

~~The aforesaid hearing was held under the provisions of KRS 338.071 (4), one of the provisions dealing with the safety and health of employees which authorized the Review Commission to hear and rule on appeals from citations, notification and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearing. Under the provisions of KRS 338.081, the hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss the citation or penalty.~~

~~After hearing the testimony of the witnesses, having considered same, together with the exhibits filed and the 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.~~

FINDINGS OF FACT

Jurisdiction of the parties in the subject matter and due and timely notice of the hearing is found by the Hearing Officer.

Respondent was in technical violation of the citation herein in question, and the record adequately reflects this by preponderance of the evidence.

The Respondent was engaged in the activity of laying joints of pipe which were twenty (20) feet long in a trench which was two (2) feet wide at the bottom, eleven (11) feet deep, and approximately eight (8) feet in width at the top. Plywood sheeting was being used to shore the trench herein in question. The sheeting, as is evidenced by the photographs that were entered as evidence, consisted of three-quarter inch thick plywood, four (4) feet wide, eight (8) feet long on each side. At the time the Compliance Officer was present there was one crossbrace, approximately three (3) by ten (10), and approximately two and one-half (2½) feet long being placed approximately three (3) feet above the bottom of the trench.

It seems to be the general consensus of both the Compliance Officer and the employees on the scene that the soil in the trench was sand and clay to within approximately five (5) feet from the bottom of the trench, the remaining six (6) feet was approximately all of a clay composition. One employee was in the trench placing a crossbrace in at the time the Compliance Officer's observations.

It was determined that the intent was that the employees would always remain between the plywood sheets when in the trench.

In utilizing Table P-2, which is to be used as a guide in applying this standard, and based on a finding that the soil should be considered in the soft, sandy or filed category, the minimum requirements for trench shoring in a trench of this nature would be uprights either three (3) by four (4) inches or two (2) by six (6) inches. It is further found that close sheeting is required in this type of situation. Close sheeting means that there would be no spaces in between the sheets and would be continuous throughout each side of a trench of this nature.

The uprights utilized in this situation were eight (8) feet long. These eight (8) feet peices of plywood fell three (3) feet short of the top of the trench. There was only one pair of uprights used in this trench.

It is also noted that in soil of this nature and in a trench of this width, crossbracing required would be at a minimum six (6) by eight (8) inches. Crossbracing in this instance was one board which was a three (3) by ten (10) approximately two and one-half (2½) feet long. Crossbracings are required to be a maximum four (4) feet apart vertically and at six foot intervals. In this situation there was only the one crossbrace being utilized.

As to the sloping requirements for a trench of this nature, one must utilize the Table P-1 which is found immediately after 1926.652 (g). The angle of the slope, using the dimensions hereto-

fore set forth, two (2) feet at the bottom, eight (8) feet width at the top, and an eleven (11) foot deep trench would figure out to be approximately a 75° angle. Even in compacted angular gravels there is a sloping requirement of at least a trench being laid back 63° and 26'. The recommended slope for average soil is 45° . For compacted sharp sand soil the slope should be 33° 41'. In well rounded loose sand the slope should be 26° 34'.

It is the finding of this Commission that at best this soil could be considered average soil. Unfortunately, there was no soil analysis performed. As to the general overall nature of the soil, it was noted that there had been no cave-ins and there had been no slippage. In response to questions by Respondent, it was determined that there had been no sloughing or sliding of soil in this area.

It was also determined that there was asphalt on either side of this trench. From the testimony of the Compliance Officer, his best guess was that the asphalt was approximately six (6) inches deep. It is also noted that there was no stacked excavated material on either side of the trench to complicate the situation.

CONCLUSIONS OF LAW

The Complainant has furnished the Hearing Officer with proof of the violation of the section reflecting the protested charge and the charge is found to be other than a serious violation. The definition of a serious violation under the Act is "where there is

a substantial probability that death or serious physical harm could result from the condition which exists from one or more practices, means, methods, operations, or processes in a place of employment (unless the employer could not with the exercise of reasonable diligence know the violation)."

The record is devoid of evidence which would indicate that there was a substantial probability that death or serious physical harm could result from the violation. While this could be considered a "technically serious" violation, there are various factors in extenuation and mitigation that must be taken into account in assessing the penalty and the type of violation. In Jackson Construction, Inc. (18,883), an employer was found in "technically serious" violation of the trench shoring requirements of 1926.652 (c) because the trench walls at the time of inspection within all probability stood safely at 90° since they were dry. Although it was agreed that the materials in which the trench was dug would lose their cemented properties when wet, the remoteness of possibility of collapse of the trench warranted a reduction of the proposed penalty from \$600.00 to \$50.00.

It is also noted that this Commission, in previous cases, specifically #151, Commissioner of Labor, Commonwealth of Kentucky v. Ward Engineering, a citation was sustained under this same standard, 29 CFR 1926.652 (b) where the sides of a trench were more than five (5) feet in depth and more than eight feet in length and they were not shored, sheeted, braced, sloped, or otherwise supported.

by means of sufficient strength to preclude collapse. In the Ward case there were two employees working in a trench one hundred ten (110) feet long, six (6) feet, ten (10) inches deep, nine (9) feet, seven (7) inches wide, and a penalty of \$175.00 was proposed and was approved by this Commission by its final order. It is also noted that the violation was deemed to be other than serious.

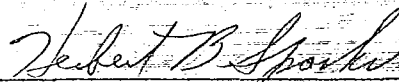
Because of the attempts, not only at shoring, but at sheeting, the trench herein in question, and also because of the nature of the soil being clay and clay and sand at the depths heretofore indicated, and because of the nature of the material on either side of the trench, it is believed that a penalty reduction to the amount of \$175.00 is well founded in this case. The record indicates that there were no cave-ins, sloughing, sliding, ground movement, or ruptures of the soil. These factors should be taken into consideration in addition to the good faith efforts on behalf of the Respondent, Ruby Construction, in this instance.

It is also noted that while the Compliance Officer deemed it to be a serious violation, he gave thirty (30) days to correct this violation, the inspection being held on June 6, 1975, and the abatement date of this violation being July 7, 1975.

Under the circumstances set out hereinabove, it does not appear that purposes of the Act would be fulfilled, nor that justice would be served by assessing the penalty in the proposed amount, thus the penalty for this violation should be reduced to \$175.00.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein in question charging a serious violation shall be and the same is hereby reduced to an other than serious violation and the citation is hereby sustained. The proposed penalty of \$800.00 shall be and the same is hereby reduced to \$175.00. This violation must be corrected without delay, but no later than fifteen (15) days from the date of this Recommended Order.



HERBERT B. SPARKS

HEARING OFFICER - KOSHRC

Dated December 23, 1975

Decision No. 208