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JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

July 29, 1977

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

KOSHRC # 326

PUBLIC SERVICE COMMISSION
OF KENTUCKY (For and on Behalf
of Commissioner of Labor)

COMPLAINANT

VS.

KENTUCKY UTILITIES CO.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; STOWERS and UPTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, issued under date of March 25, 1977, is presently before this Commission for review, pursuant to a petition for discretionary review filed by the Complainant.

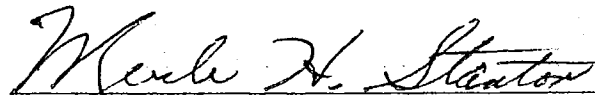
The fundamental issue raised in this case is the applicability of the construction standards to the work being done by the employees of the Respondent at the time of inspection.

In his Recommended Order the Hearing Officer has dismissed the citation and vacated the proposed penalties. The decision is based on a finding that the construction standards do not apply to the factual situation in the case.

Without deciding the issue of applicability of the construction standards this Commission finds that the Hearing Officer has made the proper disposition of the citations and penalties. The Respondent's activities may be governed by the construction standards but assuming their applicability, the proof submitted does not establish a violation of 1926.955(a)(3) or 1926.200 (g)(2). The visual inspection and estimate of the signs used by the Respondent is not sufficient and proper proof to sustain a violation of

1926.200 (g)(2). The record further indicates that the Compliance Officer's concern was with the method of inspection of the pole by employees of the Respondent. The evidence establishes that 1926.955 (a)(2) would be the proper citation for the factual situation presented.

IT IS THE ORDER of this Commission that the Hearing Officer's dismissal of the citations and vacation of the penalties be AFFIRMED. The Commission reserves judgment upon applicability of properly cited construction standards to the activity of the Respondent here and similar work in future cases.


Merle H. Stanton, Chairman

s/H. L. Stowers
H. L. Stowers, Commissioner

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

DATED: July 29, 1977
Frankfort, Kentucky

DECISION NO. 444

KOSHRC #326

(Decision and Order of Review Commission)

This is to certify that a copy of this Order has been served by mailing or personal delivery on the following:

Public Service Commission of Kentucky (Messenger Service)
Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: Richard D. Heman, Jr., Secretary

Public Service Commission of Kentucky (Messenger Service)
Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: A. F. Humphries
Director of Engineering

Honorable Morris E. Burton (First Class Mail)
Attorney at Law
302 McClure Building
Frankfort, Kentucky 40601

Hon. William M. Sawyer (Messenger Service)
Counsel for Public Service Commission
Capital Plaza Tower - 24th Floor
Frankfort, Kentucky 40601

Honorable William D. Lambert (Certified Mail #114308)
OGDEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40202


Mr. A. B. Vimont, System Safety Dir. (First Class Mail)
Kentucky Utilities Company
120 South Limestone Street
Lexington, Kentucky 40507

Mr. Glenn R. Punsiful (First Class Mail)
District Manager
Kentucky Utilities Company
Post Office Box 899
Harlan, Kentucky 40831

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Mr. M. H. Lewis, Vice President (First Class Mail)
Kentucky Utilities Company
Post Office Box 7
Flemingsburg, Kentucky 41041

This 29th day of July, 1977.


Iris R. Barrett
Executive Director



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision &
Order No. 394*

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 25, 1977

MERLE H. STANTON
CHAIRMAN

HERBERT L. STOWERS
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC #326

PUBLIC SERVICE COMMISSION OF
KENTUCKY (For and on behalf of
DEPARTMENT OF LABOR)

COMPLAINANT

VS.

KENTUCKY UTILITIES COMPANY

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

Public Service Commission of Kentucky (Messenger Service)
24th Floor - Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: Richard D. Heman, Jr., Secretary

Public Service Commission of Kentucky (Messenger Service)
24th Floor - Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: A. F. Humphries
Director of Engineering

The Honorable Morris E. Burton (First Class Mail)
Attorney at Law
326 West Main Street
Frankfort, Kentucky 40601

Mr. A. B. Vimont, System Safety Director (First Class Mail)
Kentucky Utilities Company
120 South Limestone Street
Lexington, Kentucky 40507

The Honorable William D. Lambert (Certified Mail #456860)
ODGEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40202

Mr. Glenn R. Punsiful, District Mgr. (First Class Mail)
Kentucky Utilities Company
Post Office Box 899
Harlan, Kentucky 40831

The Honorable William M. Sawyer (Messenger Service)
Counsel for Public Service Commission of Ky.
Capital Plaza Tower - 24th Floor
Frankfort, Kentucky 40601

Mr. M. H. Lewis, Vice President (First Class Mail)
Kentucky Utilities Company
Post Office Box 7
Flemingsburg, Kentucky 41041

KSOHRC #326

This 25th day of March, 1977.

A handwritten signature in cursive script, reading "Iris R. Barrett", written over a horizontal line.

Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 326

PUBLIC SERVICE COMMISSION OF
KENTUCKY (For and on behalf of
DEPARTMENT OF LABOR)

COMPLAINANT

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

KENTUCKY UTILITIES COMPANY

RESPONDENT

* * * * *

Hon. William D. Lambert, Attorney at Law, Ogden, Robertson & Marshall, 1200 One Riverfront Plaza, Louisville, Kentucky 40270, Attorney for Respondent.

Hon. Morris E. Burton and Hon. William Sawyer, Attorneys at Law,
326 West Main Street, Frankfort, Kentucky 40601, Attorneys for
Complainant.

Mr. A. B. Vimont, System Safety Director, Kentucky Utilities Company, 120 South Limestone Street, Lexington, Kentucky 40507.

FOWLER, Hearing Officer.

On September 15, 1976 the Public Service Commission, by and through its duly authorized Compliance Officers, made an inspection for and on behalf of the Department of Labor of the Commonwealth of Kentucky of premises in Harlan, Kentucky at which employees of the Respondent Company were working.

On the basis of that inspection, it was alleged in a citation issued on September 21, 1976 that the Respondent Company was in violation of the provisions of KRS Chapter 338 in the following respects, which were alleged to be other than serious violations.

There were six (6) items alleged to be in violation in the citation and two (2) of those items are in contest and at issue herein. Those citations being in issue being as follows:

Item 5 alleging a violation of 29 CFR 1926.955 (a) (3)	"Failed to provide that where poles or structures may be unsafe for climbing, they shall not be climbed until made safe by guying, bracing, or other adequate means, in that a electric pole that had been hit by a vehicle, was not previously guyed and was leaning out of alignment was not made safe by guying, bracing, or other adequate means prior to an employee climbing the pole. Pole is located at Holme Mill Community, Route 38."
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The proposed penalty for such alleged violation was \$43.00.

Item 6 was also an item of contest and is as follows:

Being an alleged violation of 29 CFR 1926.200 (g) (2)	"Failed to provide that traffic control (men working) signs or devices shall conform to ANSI D6.1-1971, in that "Men Working" signs at construction site on Route 38, Holmes Mill Community do not meet these requirements."
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There was no proposed penalty for this alleged violation.

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 authorizes the Review Commission to hear and rule on appeals from citations, notifications and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the Hearings. Under the provisions of KRS 338.081, 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 a citation or penalty.

The procedural pertinent information and dates are as follows:

1. Inspection of the premises described September 15, 1976.
2. Citation issued September 1, 1976 listing six (6) alleged violations, of which two (2) as set forth above are contested and in question.
3. Notice of Contest was received October 8, 1976 contesting the above named items.
4. Receipt of Contest was mailed to the Review Commission on October 14, 1976 and certification of employer form was mailed October 19, 1976.
5. Formal Complaint was received October 29, 1976 and Answer was filed November 10, 1976.

The matter was assigned to a Hearing Officer on November 12, 1976 and Hearing was scheduled as held on December 10, 1976 at 9:00 A.M. at the office of the Commission in Frankfort, Kentucky.

Jurisdiction of the parties and subject matter is admitted in the record.

STATEMENT OF THE CASE

The relevant facts are not in dispute and very briefly

they are as follows:

On September 15, 1976 Compliance Officers conducted an inspection and on the inspection of an outdoor work crew at Holmes Hill along Route 38 in Harlan, Kentucky Compliance Officer testified that he observed a crew of Respondent's employees engaged in repairing a roadside utility pole, which had apparently been struck and damaged by an automobile. The pole is described as "knocked out of line" and leaning at a ten (10°) degree angle, with the conductor wires drooping to about five (5) feet above ground level.

The Compliance Officer was present when the Respondent's employees climbed the pole in question to a height of about fourteen (14) feet and attached a steel cable to realign the pole (T-9). The Compliance Officer concluded that the safety measures required by the statutes were not met in this situation and that such activity as above described created an unreasonable hazard for Respondent's employees.

The second citation involves the allegation that the Respondent failed to provide traffic control signs in conformity to the standards at the above described site in violation of the standard cited for such traffic control signs.

The basis of the second violation was that the truck which had been dispatched with Respondent's employees as passengers, and presumably as workers to be, had been left on the side

of the road and that adequate warning had not been given for the safety of the employees who were to be working around the truck in question.

The Respondent offered no testimony and the entire record is supplied by Complainant herein, and it reveals that the employees of the Respondent climbed the pole and made a check for soundness (T-9). The employee went up approximately fourteen (14) feet and hooked a cable from the ground truck and the truck then pulled the pole to an upright position and then the Respondent employees tamped in dirt around the pole and secured it in an upright position.

There is an exhibit filed as a part of the record in the form of a photograph showing the pole after it had been straightened, but it is not particularly helpful and reveals no damage except for a scarring which the witnesses say was made by an automobile collision the evening before.

On cross-examination the Compliance Officer states that the reason for the citation was that the pole should have been inspected before the employee climbed it. The Compliance Officer further states that after examination it was determined that the pole was safe for climbing, but the Compliance Officer contends that the employee did not know that when he climbed the pole and there could have been damage underground which was not visible by the inspection which was made.

The truck in question was parked off of the side of the road and the pole in question was some ten (10) feet from the highway.

In view of the fact that the Respondent is charged with violations under the construction standards, it becomes essential that a determination be made in deciding this matter, whether the construction standards apply and whether or not the work site constituted a construction site. If in fact it was not a construction site then neither of the citations issued were applicable in view of the fact that they were and are construction standards and meant to apply to construction sites.

The pole in question in this case was a pole used for the purpose of transmitting electric current and not a telecommunications pole for transmission of telephone or wire service.

The question thus becomes whether the constructions standards apply or the general standards apply to the factual situation in this case.

The question of application of telecommunications standards as opposed to construction standards has been before this Review Commission on several occasions, most recently, to my knowledge in KOSHRC NO. 254, Public Service Commission of Kentucky for and on behalf of Commissioner of Labor v. Cincinnati Bell, Inc., and cases previously decided at KOSHRC NO. 185 and 224 involving the same parties. The position of the Commission

seems clear in regard to the application of telecommunications standards as opposed to construction standards. In this instance we have the question of the application of construction standards as opposed to the application of the general standards.

FINDINGS OF FACT

Your Hearing Officer reaches the following findings of fact:

1. That on the day in question work was being performed by Respondent's employees on an electric transmission line and a cable was attached to the pole which was leaning approximately ten (10°) degrees from vertical and that the pole was then pulled to an upright position and secured in that position by tamping dirt around the pole.
2. That an automobile or some vehicle had struck the pole the evening before and knocked it some ten (10°) degrees off of its vertical position.
3. That an employee of the Respondent made a visual inspection, climbed the pole and took a line and hooked it to the pole, and then proceeded to tie it to a truck which in turn pulled the pole to a vertical position.
4. That warning devices for traffic were not measured by the Compliance Officer and no definite measurement was given in the record, except to say that they did not comply with the size required in construction sites.
5. That jurisdiction exists and that all necessary

requirements of the act were met by the Department of Labor and that the Respondent was given ample opportunity for walk-around inspection and was in fact at the job site when the citation material was gathered.

CONCLUSIONS OF LAW

It is concluded as a matter of law by your Hearing Officer as follows:

1. That the work being performed by the Respondent at the work site was not construction work within the meaning of the standards, but was maintenance work and that 1926 was not applicable to the given factual situation.

The question of what constitutes construction under the general industry standard is contained for the power transmission and distribution industry at 29 CFR 1926.950 et al, and also the scope of construction work is contained at 1910.12 and its subsections, which set forth the criteria under which work shall be considered to be construction work. The Complainant bases his case primarily on 1910.12(d) which clarifies the scope of the construction work definition by expressly stating certain terms which are included in construction work. Complainant cites Pacific Gas & Electric Company, OSHD 19,431 as authority for the proposition that the work involved was construction work as opposed to maintenance work.

An examination of Pacific Gas and Electric Company, above quoted, shows a substantial difference in the facts between

that case and the one at hand. In Pacific Gas and Electric Company a new pole was being installed and the employees of the Respondent had climbed an old pole which was tied and braced to the new pole. There was no question but what an actual installation of a new pole was being performed and that there was alteration or conversion and an improvement of the existing transmission and distribution lines and equipment. The employees fell when the old pole collapsed because it was not properly anchored to the new pole.

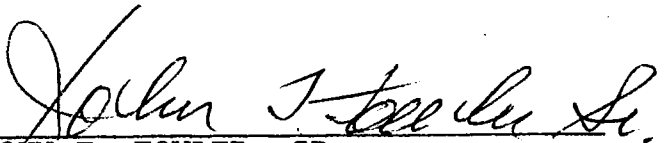
The Court in the Pacific Gas and Electric Company case points out in its decision that there is merit to the argument that maintenance work is not within the purview of construction work and that construction standards should not apply to maintenance work. The Court points out however that in the Pacific Gas case there was an improvement being performed and that it was the replacement of existing lines and that that is what constituted the construction work within the meaning of the standard.

In this case, your Hearing Officer can see no construction work being done whatsoever. It appears that the pole had been struck by an automobile and that the only thing that was done was maintenance work in straightening the pole back up to its normal position and that nothing was added, no improvement was made, and the pole was simply restored to its original position. This, I feel, is entirely maintenance work within the meaning of the act, and with the meaning of common sense.

It is therefore concluded as a matter of law that the present factual situation presented here does not present a construction activity and that the construction standards do not apply to the factual situation in this case.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citations against the Respondent herein be dismissed and that the penalties provided be vacated.


JOHN T. FOWLER, SR.
Hearing Officer

Dated: March 25, 1977
Frankfort, Kentucky

DECISION NO. 394