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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

July 27, 1977

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

HERBERT L. STOWERS
MEMBER

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision +
Order No. 443*

KOSHRC # 327

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY UTILITIES COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and STOWERS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., dated 25 March 1977, is presently before this Commission for review.

Finding no error in the application of the law to the facts herein, and the evidence appearing to adequately support the findings and conclusions of the Hearing Officer, it is the unanimous ORDER of the Review Commission that the Recommended Order of the Hearing Officer is hereby AFFIRMED, and that the citations involved herein stand AFFIRMED as proposed.

Merle H. Stanton
Merle H. Stanton, Chairman

Charles B. Upton, Commissioner

DATED: July 27, 1977
Frankfort, Ky.

DECISION NO: 443

H. L. Stowers, Commissioner

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 (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
Capital Plaza Tower - 1st Floor
Frankfort, Kentucky 40601


Honorable William D. Lambert (Certified Mail #114305)
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

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

This 27th day of July , 1977.


Iris R. Barrett
Executive Director

Make



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision
Order No. 395*

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 # 327

PUBLIC SERVICE COMMISSION OF
KENTUCKY (For and on Behalf of
Commissioner 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 William D. Lambert (Certified Mail #456861)
ODGEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40202


The Honorable Morris E. Burton (First Class Mail)
Attorney at Law
326 West Main Street
Frankfort, Kentucky 40202

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

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

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

This 25th day of March, 1977.


Iris R. Barrett, Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 327

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

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.

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 23, 1976, Compliance Officers for the
Public Service Commission, for and on behalf of the Department
of Labor made an inspection at a warehouse near Flemingsburg,
Kentucky and also at the site of an alleged construction area
on route 11 near Lewisburg, Kentucky, the inspection being con-
ducted at two (2) separate sites at which employees of the
Respondent company were employed.

As a result of that inspection a citation was issued
September 28, 1976 listing two (2) alleged violations, both of

which are in contest and at issue herein.

The citations alleged that the Respondent Company was in violation of Chapter 338 of the Kentucky revised statutes in the following ways:

Item 1 being an alleged violation of 29 CFR 1910.176 (b)	"Failed to provide that the storage of material shall not create a hazard, in that a reel of wire, located in the Flemingsburg sub-station, is stored on an incline and is not chocked to prevent rolling."
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There was no proposed penalty for this alleged violation.

Item 2 being an alleged violation of 29 CFR 1926.200 (g) (1)	"Failed to provide that construction areas shall be posted with legible traffic signs at points of hazard, in that truck #6573 was observed at construction site sitting approximately eight (8) feet on the black-top, next to a curve, without "Men Working" signs at points of hazard; old Route 11, Lewisburg, Kentucky."
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There was no penalty proposed 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 pertinent procedural information is as follows:

1. Inspection September 23, 1976.
2. Citation issued September 28, 1976 listing two (2) alleged violations, both of which are in contest.
3. Notice of Contest received October 12, 1976 contesting the two (2) above items.
4. Notice of Contest with the copy of citation and proposed penalty transmitted to the Review Commission October 13, 1976.
5. Notice of Receipt of Contest mailed October 14, 1976 and certification of employer form received October 20, 1976.
6. Formal Complaint was received October 29, 1976 and Answer was filed November 10, 1976.
7. The matter was assigned to a Hearing Officer on November 12, 1976 and Hearing was scheduled and held on December 10, 1976 at the Office of the Commission in Frankfort, Kentucky.
8. The Transcript of the Evidence was received on January 3, 1977 and Brief for the Complainant was received on February 8, 1977 and Brief for the Respondent was received March 7, 1977.

Jurisdiction of the subject matter and the parties is admitted and as stated above no proposed penalty was assessed for either of the alleged violations.

STATEMENT OF THE CASE

The first citation involved a reel of wire, which the inspector claimed was not chocked. The reel in question was circular, in accordance with the testimony of the Compliance Officer was sitting on a slight incline (T-7). It was the contention of the Compliance Officer that if a vehicle had struck the reel it could start rolling and that if an employee was in front of the reel he could be hurt from the accident (T-8 & 9).

On cross-examination the Compliance Officer was asked if he tried to roll the reel and he said that he had pushed on it slightly and it didn't roll (T-16). The Compliance Officer further admitted that it, the reel, was sitting in a slight depression. (T-16).

An Exhibit is introduced of a picture of the reel, which according to the testimony does not show the correct slope of the road at the position in which the reel was located and that the angle was very slight. There are no questions about the facts, the question is simply whether or not a hazard existed and whether or not the reel in question at that time and place and in that position should have been chocked in order to prevent injury to any employee or person around it.

The second citation resulted from the failure of a service crew to place warning signs around their vehicle when it was placed in front of a residence to which the Respondent's

crew had gone for the purpose of changing a service drop into a house. The evidence indicated that the residence in question was in a rural location and the truck of the Respondent was sitting on the edge of the highway partly on the blacktop. There was testimony that some four (4) vehicles passed the truck on the road during the inspection (T-10 & 11).

The evidence further revealed that the employees of the Respondent were on the premises near the house inspecting the location where the service drop was to be made when the inspector arrived (T- 1). As a result of the inspection by the employees of the Respondent it was determined that the job could not be done since it did not meet the Respondent's requirements.

The issues involved are as follows:

1. Whether or not the place at which the truck was parked constituted a construction site since the standard for warning of vehicles is a construction standard and not a general standard, as alleged in this case.

2. Whether or not the placement of the reel of wire as shown in the facts of this case required chocking and whether or not a hazard existed to employees in the area by reason of the failure to chock the aforesaid reel.

Complainant in this instance quotes Wes Construction Corporation and misquotes the citation of said decision, but the decision is reported at OSHD 20,996 instead of the citation given in Complainant's Brief.

The Wes Construction Corporation case does give credence to the fact that a vehicle from which employees are working does constitute a construction site and that, as I read it, if the employees are engaged in construction work and working from a vehicle then the vehicle comes a part of the construction site.

The problem that exists in this case is that the workers were dispatched to make a service drop at a residence which would have required a line to be run from the existing transmission pole into the house of the customer. In conformity with the decisions previously rendered by this Commission, I feel that this would have constituted construction work. The problem comes about, because the employees did not actually perform any work. They were sent to the house for the purpose of performing construction work, but found when they arrived there that they could not perform it because of the conditions that existed at the residence of the customer. If the work was not done, then I do not see how construction work could have been performed, or the site considered a construction site.

Complainant states that it is sufficient to show that whether an employee is actually engaged in construction or simply making preparations is wholly irrelevant and that the construction standard supply if the employee is dispatched for the purpose of doing construction work. Complainant further says that the truck from which they operated was clearly a part of the "work

place" as was the house to which they were to attach new equipment.

It seems to me that the Respondent must have been given an opportunity to have complied with the warning provisions of the construction standards, if the construction work were actually undertaken. In other words if the employees had actually begun to make the service drop, then they would have been engaged in construction work and certainly would have been required to have marked the vehicle which in my opinion was a part of the work place in compliance with the construction standards.

However, I do not feel that you can impose upon the Respondent the necessity or the duty of warning motorists about construction work, when such work was not in progress, was never begun, and no opportunity was given the Respondent to have complied with the provisions, assuming that the work was going to be done.

It seems reasonable to say that if the Respondent employees were in fact preparing the residence in any fashion for receptacles of transmission or were preparing the transmission poles so that it might receive the wires from the residence, then that would constitute preparation work and would in fact be construction work. However, the mere examination of a residence for the purpose of beginning construction work, does not seem to me to satisfy the construction definition.

It is my opinion that in order to constitute a construction

site, that construction must actually be done, and that it is not sufficient proof that the employees were dispatched from some office with the purpose in mind of doing construction work. It is the performance of the work itself that creates the construction site, and not the intention of the parties when they leave their office to go to work.

The other question poses more problems to your Hearing Officer actually since the reel was sitting unattended and was admittedly on a slight grade. I would agree with counsel for the Respondent that the Respondent is not a guarantor of the safety of its employees and should not be in a position of guaranteeing that all material will be chocked so as not to come loose. I further agree with the Respondent that the standards were not written with the thought in mind that if a vehicle of some type struck the material and caused it to move that the standards anticipated such chocking and storage as would prevent movement in the event of being struck by a vehicle.

The proof is actually not particularly strong on behalf of the Complainant; however, I feel that the factual situation demanded that the reel placed alongside the road on a slight incline, should have been chocked in some proper fashion so as not to cause it to begin to roll and take knowledge of the fact that if the reel did commence to roll, or from whatever source, that it would constitute a hazard to employees and to persons in the immediate vicinity.

FINDINGS OF FACT

Your Hearing Officer reaches the following findings of fact:

1. That employees of the Respondent had been sent to a residence at the location cited and had inspected premises for the purpose of making a transmission service drop to residents at that location.

2. That in fact the drop was never made because the residence was not in position to accept the service drop and consequently no work was performed at the residence.

3. That there were no traffic signs placed in connection with the parking of the Respondent's vehicle off the road at the site of the residence in question.

4. That a reel of wire, weighing approximately 187 pounds, plus the weight of the reel which was wooden, was standing alongside the road at a warehouse site, not chocked or otherwise blocked to prevent it from rolling, and was on a slight incline.

CONCLUSIONS OF LAW

Your Hearing Officer, based on the above facts, reaches the following conclusions of law:

1. That the work site did not constitute a construction site within the meaning of the standard, since no construction work was ever started in any fashion, and there was no necessity to place a sign under the cited statute unless and until some

actual construction, be it preparation for construction, or construction itself was started.

2. That the standard cited for marking of vehicles did not apply since the site was not, under the standards a construction site, under the facts in this case.

3. That jurisdiction of the subject matter and the parties exists.

4. That all rights of the Respondent were protected including its walk-around right and that a representative of the Respondent was present at the time the memorandum regarding the citation was gathered.

5. That permitting a reel of wire weighing 187 pounds plus the weight of the wooden reel, to sit on a road with a slight incline, not chocked or blocked in any fashion did constitute a violation of the standards in regard to failure to provide proper storage and chocking of material.

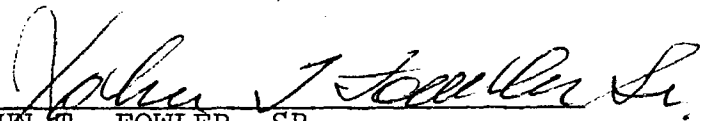
RECOMMENDED ORDER

IT IS ORDERED that the alleged violation of 29 CFR 1910.176 (b), being Item 1 herein, is hereby sustained, together with the no penalty provision provided therein.

IT IS FURTHER ORDERED AND ADJUDGED that abatement of such violation shall be made within thirty (30) days from the effective date of this Order.

IT IS FURTHER ORDERED AND ADJUDGED that the alleged

violation of 29 CFR 1926.200 (g) (1), being Item 2 of the citations, is hereby dismissed and the no penalty provision vacated.


JOHN T. FOWLER, SR.
Hearing Officer

Dated: March 25, 1977
Frankfort, Kentucky

DECISION NO. 395