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345 (499)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

CHARLES B. UPTON
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

HERBERT L. STOWERS
MEMBER

August 1, 1977

KOSHRC #345

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY UNDERGROUND CONTRACTORS

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and STOWERS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of 27 April 1977, is presently before this Commission for review.

It is the finding of this Commission that the Hearing Officer's conclusion that the cavity in question was not a trench as defined by 29 CFR 1926.653(n) (as adopted by 803 KAR 2:030) and that therefore the specific trenching requirements under 29 CFR 1926.652(c) (as adopted by 803 KAR 2:030) are inapplicable, is erroneous.

29 CFR 1926.653(n) defines a trench as

A narrow excavation made below the surface of the ground. In general the depth is greater than the width, but the width of a trench is not greater than fifteen (15) feet.

The Hearing Officer concluded that notwithstanding the fact that the width of the cavity herein was not greater than fifteen feet, the six and two-thirds (6-2/3) foot depth was not greater than the eight (8) foot width; and that the cavity was therefore not a trench as defined by the standard. This Commission declines to adopt the aforesaid conclusion in this case. While there clearly may be instances where the fact that the depth of a cavity is not greater than its width would definitively prevent it from being

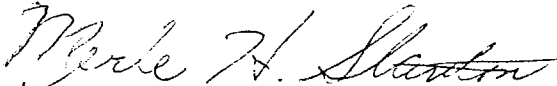
classified as a trench, we are of the opinion that the word generally as it is used in the standard does not foreclose the possibility of a trench being wider than it is deep. See D. Federico Co., Inc., v. Occupational Safety and Health Review Commission and W. J. Usery, Jr., Secretary of Labor, United States Court of Appeals for the First Circuit, Docket No. 76-1084, (June 16, 1977), CCH ESHG Para. 21,904. Other factors must also be considered, such as the actual dimensions involved, as well as whether, according to the practical knowledge and experience of the Commission, the cavity is in fact being used as a trench.

We hold that in this instance, where the width of the cavity is considerably less than the fifteen (15) foot limit, and the depth is one and one-third (1-1/3) feet less than the eight (8) foot width, that the cavity comes within the 29 CFR 1926.653(n) definition of a trench. In this case the cavity was being used as a work area for a road boring crew engaged in constructing a waterline underneath a highway. This Commission is of the opinion that under the circumstances herein that the cavity was in fact being used as a trench. Therefore, it is found that under the circumstances of this case the Hearing Officer's conclusion that the cavity in question was without the scope of 29 CFR 1926.653(n) (as adopted by 803 KAR 2:030) is in error, and that the cavity in question was in fact a trench.

We further find that the record supports a violation of the specific trenching requirements under 29 CFR 1926.652(c) (as adopted by 803 KAR 2:030) for failure to shore, slope or otherwise support the sides of a trench which was dug in hard or compact soil.

Because of the size of the particular job involved, the Commission is of the opinion that in the interests of fairness to small employers, a penalty reduction is justified under the circumstances of this case.

Accordingly, it is the unanimous order of this Commission that the finding of the Hearing Officer that the cavity in question was not a trench as defined by 29 CFR 1926.653(n) (as adopted by 803 KAR 2:030) should be and is hereby OVERRULED, and that the vacation of Citation 2, Item #1 and the proposed penalty by the Hearing Officer is therefore REVERSED. It is further ORDERED that the violation of 29 CFR 1926.652(c) (as adopted by 803 KAR 2:030) herein should be and is hereby SUSTAINED, and that the proposed penalty is hereby REDUCED to \$250. All conclusions and findings of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.


Merle H. Stanton, Chairman

KOSHRC #345
(Decision and Order of Review Commission)

Charles B. Upton
Charles B. Upton, Commissioner

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

DATED: August 1, 1977
Frankfort, Kentucky

DECISION NO. 449

KOSHRC #345
(Decision and Order of Review Commission)

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

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Frederick G. Huggins
Assistant Counsel

Mr. John Newcom, Owner (Certified Mail #114314)
Kentucky Underground Contractors
P. O. Box 137
Marion, Kentucky 42064

This 1st day of August, 1977.



Iris R. Barrett
Executive Director

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345 (9/11)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

HERBERT L. STOWERS
MEMBER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

CHARLES B. UPTON
MEMBER

April 27, 1977

KOSHRC
Decision +
Order No. 411

KOSHRC # 345

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY UNDERGROUND CONTRACTORS

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

Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Frederick G. Huggins
Assistant Counsel

Mr. John Newcom, Owner (Certified Mail #456892)
Kentucky Underground Contractors
P. O. Box 137
Marion, Kentucky 42064

This 27th day of April, 1977.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #345

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

KENTUCKY UNDERGROUND CONTRACTORS

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of a citation issued against Kentucky Underground Contractors, hereinafter referred to as "Underground Contractors", by the Commissioner of Labor, hereinafter referred to as the "Commissioner", for violation of the Kentucky Occupational Safety and Health Act, hereinafter referred to as the "Act".

On December 7, 1976, a Compliance Officer for the Commissioner made an inspection of a construction site located on U. S. 68, five miles west of Hopkinsville. As a result of that inspection, the Commissioner on December 14, 1976, issued two citations against Underground Contractors charging it with six (6) nonserious violations of the Act and one (1) serious violation of the Act. The Commissioner proposed a penalty of \$500.00 for the serious violation.

On January 5, 1977, and within 15 working days from receipt of the citation, Underground Contractors filed a notice with the Commissioner contesting the second citation. Notice of the contest was transmitted to this Review Commission on January 12, 1977 and notice of receipt of the contest was sent to Underground Contractors that same day. The

Commissioner then filed its complaint on January 20, 1977 and Underground Contractors filed their answer on February 2, 1977. By separate notices dated February 9, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held pursuant to KRS 338.070(4) on March 10, 1977, in Hopkinsville. That section of the statute authorizes this Review Commission to rule on appeals from citations, notations, and variances to provisions of the Act, and to adopt and promulgate rules and regulations concerning the conduct of those hearings. KRS 338.081 further authorizes this Review Commission to appoint Hearing Officers to conduct its hearings and represent it in this manner. The decisions of Hearing Officers are subject to review by the Review Commission on appeal timely filed by either party, or upon its own motion. The standard alleged to be violated as adopted by KRS Chapter 338, the description of the alleged violation and the penalty proposed for same are as follows:

29 CFR 1926.652(c) (as adopted by 803 KAR 2:030)	A trench more than five (5) feet in depth and more than eight (8) feet in length did not have the sides of the trench shored or otherwise supported or in lieu of shoring, the sides of the trench above the five (5) foot level were not sloped to preclude collapse, or portable trench boxes or sliding trench shields were not used. (two (2) employees working in trench located on Highway 68 + 80, five (5) miles west of Hopkinsville, Kentucky, at time of inspection)	\$500.00
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Upon a review of the pleadings, testimony and evidence herein, the following Findings of Fact, Conclusions of Law and Recommended Decision are hereby made.

FINDINGS OF FACT

Underground Contractors is a construction company engaged in road boring. At the time of inspection, Underground Contractors was boring a hole under U. S. Highway 68 for a water line to be constructed beneath the highway. The drill which was being used to bore the hole was in a trench that was eight feet wide, 20 feet long and 71 to 80 inches deep in the middle. The soil in which the trench was dug was a hard, clay like substance and the sides of the trench were vertical. The soil excavated from the trench was piled in a spoil bank on one side of the trench. The spoil bank was approximately five feet in height, and the side adjacent to the trench sloped away from the edge of the trench. There was no shoring on the sides of the trench.

The long sides of the trench ran perpendicular to the highway. The end of the trench, closest to the highway was approximately ten feet from the edge of the road. The highway was open for traffic.

At the time of the inspection, two men were observed in the trench. They were engaged in operating the drill that was used to bore the hole under the highway.

The Compliance Officer determined that the violation was a serious violation of the Act, and he proposed an unadjusted penalty of \$1,000.00, the minimum unadjusted penalty which the Commissioner will propose for such a violation. The unadjusted penalty was reduced 50% by the Compliance Officer on the basis of the good faith, history and size of the company according to guidelines adopted by the Commissioner. This again was the maximum adjustment the Commissioner allows under these guidelines.

CONCLUSIONS OF LAW

29 CFR 1926.652(c) (as adopted by 803 KAR 2:030) provides as follows:

Specific trenching requirements Sides of trenches in hard or compact soil, including embankments shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5 foot level may be sloped to preclude a collapse, but shall not be steeper than a 1 foot rise to each 1/2 foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4 foot minimum shall be provided at the toe of the sloped portion.

Underground Contractors contends that since the excavation was eight (8) feet wide it was not a trench and, therefore, not governed by the above standard. 29 CFR 1926.653(n) (as adopted by 803 KAR 2:030) defines a trench as follows:

A narrow excavation made below the surface of the ground. In general the depth is greater than the width, but the width of a trench is not greater than 15 feet.

Although, the width of the excavation was only 8 feet, it was less than the depth which, at its deepest point, was only 80 inches below the surface. Therefore, although the excavation was not shored, sheeted, braced or sloped in accordance with the standard, it was not a trench and did not fall within provisions of the standard. Therefore, the citation was improper.


RECOMMENDED DECISION

NOW, THEREFORE, IT IS HEREBY ORDERED

That the Citation charging a serious violation of 29 CFR 1926.652 (c) and fixing a penalty therefor of \$500.00, be and the same is, hereby dismissed.

Dated: April 27, 1977
Frankfort, Kentucky

DECISION NO. 411



PAUL SHAPIRO
HEARING OFFICER
KOSHR