

*Shapiro*



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*510 (521)*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

January 23, 1978

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC*  
*Decision #4*  
*Order No. 521*

KOSHRC #370

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

STATE CONTRACTING & STONE CO., INC.  
DIVISION OF MEDUSA AGGREGATES CO.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; UPTON, Commissioner.

STANTON, Chairman:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of October 26, 1977, is presently before this Commission for review, pursuant to an Order of Direction for Review.

The Respondent was cited for a serious violation of several standards after an accident which fatally injured one of their employees.

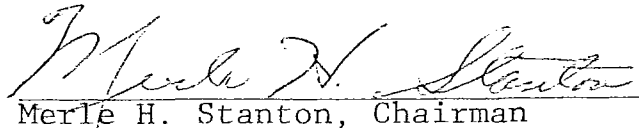
The bulldozer involved in the accident was equipped with seat belts and rollover protection as mandated by the standards. The Hearing Officer correctly found that 29 CFR 1926.28(a) (as adopted by 803 KAR 2:030) places a responsibility upon the employer to require that a seat belt be worn by their bulldozer operator. The evidence introduced was insufficient to sustain a violation of the standard because it was not established whether the employee did not wear the seat belt, or whether he released the belt in an attempt to jump free.

Regarding the alleged violation of 29 CFR 1926.602(a)(3)(i) (as adopted by 803 KAR 2:030) the Hearing Officer states: "The evidence clearly establishes that the accident occurred because a portion of the highway on which the trailer was parked was not 'constructed and maintained to accomodate safely the movement' of the bulldozer." The issue is whether the highway and shoulder constitutes an access roadway or grade as referred to in the standard.

The Hearing Officer finds that since the cited standard applies to the movement of "off highway" or construction equipment the highway and shoulder where the accident occurred is not an access roadway or grade as contemplated by the standard. We disagree with this interpretation.

The employees moved a piece of heavy earthmoving equipment on a highway and shoulder which as the Hearing Officer noted was not "constructed and maintained to accomodate safely the movement." The location is an access roadway or grade and thus the standard applies and was violated.

Therefore it is ORDERED by this Commission that the Hearing Officer's decision insofar as it has vacated the violation of 29 CFR 1926.602(a)(3)(i) and the penalty of \$600.00 is REVERSED, the violation and penalty provision is AFFIRMED. Abatement shall be made immediately. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.

  
Merle H. Stanton, Chairman

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

DATED: January 23, 1978  
Frankfort, Kentucky

DECISION NO. 521

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 and Health

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

Mr. Archie B. Clark, Jr. (Certified Mail #783005)  
Manager of Administration  
State Contracting & Stone Co.  
210 East Fourth Street  
Post Office Box 237  
Beaver Dam, Kentucky 42320

This 23rd day of January, 1978.

  
Iris R. Barrett  
Executive Director

*Wayne*



370 (481)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

October 26, 1977

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

John C. Roberts  
MEMBER

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC*  
*Decision &*  
*Order No. 481*

KOSHRC #370

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

STATE CONTRACTING & STONE CO., INC.  
DIVISION OF MEDUSA AGGREGATES CO.

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.

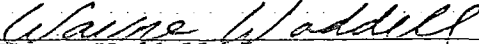
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Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

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

Mr. Archie B. Clark, Jr. (Certified Mail #240834)  
Manager of Administration  
State Contracting & Stone Co.  
210 East Fourth Street  
Post Office Box 347  
Beaver Dam, Kentucky 42320

This 26th day of October, 1977.

  
Wayne Waddell  
Counsel  
KOSH REVIEW COMMISSION

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
KOSHR #370

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT  
CONCLUSIONS OF LAW AND  
RECOMMENDED DECISION

STATE CONTRACTING & STONE CO., INC.  
DIVISION OF MEDUSA AGGREGATES CO.

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of a citation issued against State Contracting and Stone Co., Inc., Division of Medusa Aggregates Co., hereinafter referred to as "State Contracting", 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 April 4, 5, 7, 8 and 11, 1977, a Compliance Officer for the Commissioner made an inspection at the site of an accident on Highway 185, nine miles north of Bowling Green. As a result of that inspection, the Commissioner issued a citation on April 26, 1977, charging State Contracting with one serious violation of the Act, and proposing a penalty therefor of \$600.00.

State Contracting on May 2, 1977, and within 15 working days from receipt of the citation, filed a notice with the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on May 4, 1977, and notice of receipt of the contest was sent by this Review Commission to State Contracting on May 5, 1977. Thereafter the Commissioner filed its Complaint and on June 13, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Owensboro on June 29, 1977, pursuant to KRS 338.070(4). That section of the statute authorizes this Review Commission to rule on appeals from citations, notations and variances to the provisions of the Act, and to adopt and promulgate rules and regulations concerning the conduct of those hearings. KRS 338.081 further authorizes the 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 standards (as adopted by 803 KAR 2:020) allegedly violated and in contest here, the description of the alleged violation, and the penalty proposed for same, are as follows:

29 CFR 1926.28(a)	Appropriate personal protective	\$600.00
29 CFR 1926.602	equipment (i.e. seat belt) was	
(a)(2)	not used by an employee while	
	operating a 1960 model D8 H	
	dozer that was equipped with	
	rollover protective structure.	
29 CFR 1926.602	Constructive equipment and	
(a)(3)(i)	vehicles were moved upon an	
	access roadway and grade which	
	was not constructed and main-	
	tained to accomodate safely	
	the movement of the equipment	
	and vehicles involved (bulldozer	
	being unloaded from lowboy on	
	unstable ground).	

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

On April 4, 1977, State Contracting had a contract to construct a road on private property being used for strip mining. To construct the road, State Contracting intended to use a D8H bulldozer which it carried to the construction site on a triaxle lowboy trailer. The trailer was

parked at the entrance to the property on Kentucky Highway 185, in such a way that the wheels on one side of the lowboy were on the paved blacktop portion of the highway, while the wheels on the other side were on the unpaved shoulder of the highway. The highway itself is a Class AAA road designed for a weight limit of 78,220 pounds. Apparently the trailer and bulldozer did not exceed this weight limit.

After parking the lowboy trailer, an employee of State Contracting began to unload the bulldozer. Before he was able to do so, however, the shoulder on the side of the highway beneath the trailer began to cave in. The employee stopped what he was doing and, after attempts to move the trailer completely onto the paved portion of the highway failed, called his supervisor.

The supervisor arrived at the scene about 30 minutes after he was called. After examining the situation, the supervisor decided to unload the bulldozer himself. By this time, the shoulder had caved in even more and the employee who at first tried to remove the bulldozer warned the supervisor not to do it, but to "winch it off" instead. In the words of the employee, however, the supervisor "stuck his cigar in his mouth and gave me a big grin like he was really going to show me how to do it".

The supervisor climbed onto the bulldozer and began to drive it off the trailer. As he lifted the blade and started to move the bulldozer, the soft ground on the one side of the trailer caved in further causing the bulldozer to slide sideways off the trailer and then roll over an embankment on the side of the road. The supervisor either jumped or was thrown from the bulldozer which then landed on top of him, causing his death.

The bulldozer involved had a rollover protection structure (ROPS) and was equipped with a seat belt. It was not established, however, if



the supervisor was thrown from the bulldozer because he was not wearing the seat belt when the accident occurred, or whether he had been wearing the seat belt and had removed it in an attempt to jump from the bulldozer.

The citation proposed a penalty of \$600.00 for the alleged violation. This penalty was proposed in accordance with guidelines established by the Commission to obtain uniformity in the application of penalties throughout the state. It was determined that this was a serious violation because it could, and in fact did, result in death. Under the Commissioner's guidelines, such violations carry a minimum unadjusted penalty of \$1,000.00.

The guidelines also permit up to 20% for good faith on the part of the employer in complying with the Act, up to 20% for history of the employer in complying with the Act, and up to 10% for size of the employer in terms of the number employed. The company was too large to qualify for any size adjustment, but did receive the maximum credit for good faith and history. The 40% adjustment reduced the proposed penalty to \$600.00.

#### CONCLUSIONS OF LAW

29 CFR 1926.28(a) provides:

Personal protective equipment . . . . The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employee.

Subparagraph (b) of 29 CFR 1926.28, further provides:

Regulations governing the use, selection and maintenance of personal protective and lifesaving equipment are described under Subpart E, of this part.

29 CFR 1926.602(a)(2) provides in part:

Material handling equipment . . . . Earth moving equipment, General . . . . (i) seat belts shall be provided on all equipment covered by this section . . . .

Taking these standards in reverse order, State Contracting, in effect, concedes that 1926.602(a) required the bulldozer involved here to be equipped with seat belts. The company contends, though, that the standard does not require the employer to use the seat belts. State Contracting also contends that the scope of 1926.28(a) is limited by 1926.28(b) to the personal protective equipment listed under Subpart E. Since Subpart E which is entitled "Personal Protective and Lifesaving Equipment" contains no provision pertaining to seat belts. State Contracting contends the failure to use seat belts is not a violation of that standard.

The same issues were raised before the Federal Review Commission in Sweetman Construction Co., CCH-OSHD ¶ 20,466 (1976). There that Review Commission rejected the employees contention that 1910.28(a) did not apply to seat belts, stating as follows:

Respondent's argument lacks merit. On its face, personal protective equipment must be used where "there is an exposure to hazardous condition, or where this part (Part 1926) indicates the need for such equipment . . ." Respondent's scrapers are earth-moving equipment that is plainly subject to 29 CFR 1926.602(a). The installation of seat belts on the scrapers required by 29 CFR 1926.602(a)(2)(i). This standard clearly "indicate(s) the need for such equipment within the terms of section 1926.28(a). Paragraph (b) (29 CFR 1926.28) is useful in that it draws attention to several typical forms of personal protective equipment, but it does not confine the scope of subsection (a) of (29 CFR 1926.28)

Both standards must be read in conjunction with one another. The first, 1926.28(a), requires the use of personal protective equipment where the need for such equipment is established by other standards in Part 1926. The second, 1926.602(a)(2)(i), then goes on to establish that need. Thus, employers are responsible for not only equipping machinery, such as bulldozers, with seat belts, but also requiring their employees to wear them while operating such machinery.

In the Sweetman case, however, the Review Commission vacated that part of the citation relating to an employee who was killed when thrown

from a machine, because it was not established whether the employee did not wear the seat belt while operating the machine, or whether he had unhooked it when the machine went out of control in an attempt to jump free. Here too, it was not established whether the Supervisor was thrown from the bulldozer because he was not wearing the seat belt, or whether he had unhooked the seat belt and was trying to jump free. Therefore, that part of the citation alleging a violation of 29 CFR 1926.28(a) and 29 CFR 1926.602(a)(2) should be vacated.

29 CFR 1926.602(a)(3)(i) provides:

Material handling equipment . . . . Earthmoving equipment; General . . . . No employer shall move or cause to be moved construction equipment or vehicles upon any access roadway or grade unless the access roadway or grade is constructed and maintained to accomodate safely the movement of the equipment and vehicles involved.

The evidence clearly establishes that the accident occurred because a portion of the highway on which the trailer was parked was not "constructed and maintained to accomodate safely the movement" of the bulldozer. The question remains, though, was the highway an "access roadway" within the meaning of the standard.

29 CFR 1926.602(a)(1) defines the coverage of the standard to include "scrapers, loaders, crawlers or wheel tractors, bulldozers, off-highway trucks, graders, agricultural and industrial tractors and similar equipment". In construing the standard in terms of what is intended to be covered, it would appear that the intent was to limit its application to equipment normally operated on private property, such as a construction site. Otherwise, there would be no reason to make a distinction between off-highway trucks, which are specifically included, and trucks used on highways, which are not included. Therefore, a highway would not be an "access highway" within the meaning of 29 CFR 1926.602(a)(1), and the citation for violation of the standard should be vacated.

RECOMMENDED DECISION

Upon the basis of the foregoing Findings of Fact, Conclusions of Law, and upon the entire record,

IT IS HEREBY ORDERED,

That the citation issued April 26, 1977, charging a violation of 29 CFR 1926.28(a), 29 CFR 1926.602(a)(1) and 29 CFR 1926.602(a)(3)(i), and proposing a penalty therefor of \$600.00, be and is hereby vacated.



PAUL SHAPIRO  
HEARING OFFICER  
KOSHR

Dated: October 26, 1977  
Frankfort, Kentucky

DECISION NO. 481