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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*KOSHRC
Decision +
Order No 540*

REVIEW COMMISSION

104 BRIDGE ST.
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

March 13, 1978

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #379

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROUCK PLUMBING COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman, UPTON and ROBERTS, Commissioners.

UPTON, Commissioner, FOR THE MAJORITY:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of December 27, 1977, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Respondent.

The Hearing Officer has dismissed the citation alleging a violation of 29 CFR 1926.651(c) (as adopted by 803 KAR 2:030). He has correctly found that to sustain a violation of this standard it must be shown that the excavation presents a danger of moving ground to employees working within it. There is not sufficient evidence in the record to show that the "pit" exposed employees to a danger from moving ground and we therefore SUSTAIN the Hearing Officer's decision regarding the alleged violation of this standard.

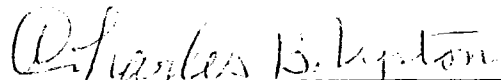
A citation was issued to the Respondent charging a violation of 29 CFR 1926.652(c) (as adopted by 803 KAR 2:030) because a trench, 75 inches deep, 45 inches wide, and 28 feet long, was not sloped, shored or otherwise supported. The trench involved was more than five feet deep and more than eight feet in length in hard or compact soil. This trench falls within the scope of the cited standard and the failure to comply with the requirements is a violation of the Act. The Hearing Officer has

incorrectly dismissed the citation based on his finding that the nature of the ground in which the trench was dug presented no hazard. A violation of this trench standard, unlike the excavation, can be sustained without proof of danger from moving ground.

The standard contemplates a hazard to employees whenever they are in an unshored or unsloped trench which is in hard or compact soil and more than 5 feet in depth and 8 feet in length. Although the lower half of the trench in this case was rock, the overall depth exceeded five feet therefore the provisions of the standard must be met. The decision of the Hearing Officer to dismiss the citation for violation of this standard is therefore REVERSED.

The record indicates that 1-1/2 to 2 feet of "spoil" material was on the edge of the trench and pit at the time of inspection. The Hearing Officer has found that although this excavated material was periodically removed, at the time of inspection it was "stored", within the meaning of the standard, less than two feet from the edge. A violation of 29 CFR 1926.651(i)(1) (as adopted by 803 KAR 2:030) has been sustained by Mr. Shapiro. We agree with his finding on this matter however his statement that the pit and trench were one continuous excavation is in error. Two types of excavations were involved and subject to different requirements.

Accordingly it is ORDERED by a majority of this Commission that the Hearing Officer's decision dismissing an alleged serious violation of 29 CFR 1926.651(c) (as adopted by 803 KAR 2:030) is AFFIRMED. The decision sustaining a serious violation of 29 CFR 1926.651(i)(1) (as adopted by 803 KAR 2:030) is likewise AFFIRMED. The dismissal of the citation alleging a serious violation of 29 CFR 1926.652(c) (as adopted by 803 KAR 2:030) is REVERSED and the citation is hereby AFFIRMED. A total penalty of \$650.00 is imposed.



Charles B. Upton, Commissioner

/s/ Merle H. Stanton

Merle H. Stanton, Chairman

ROBERTS, Commissioner, CONCURRING in part and DISSENTING in part:

I agree with the majority's decision to sustain the two violations in this case, but I believe that under the circumstances the violations are nonserious in nature and a greatly reduced penalty is appropriate.



John C. Roberts, Commissioner

DATED: March 13, 1978
Frankfort, Kentucky

DECISION NO. 540

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: Hon. Frederick G. Huggins
Assistant Counsel

Mr. Donald E. McManus, Pres. (First Class Mail)
Rouck Plumbing Company, Inc.
930 West Main Street
Louisville, Kentucky 40202

Honorable Jerome D. Berman (Certified Mail #783036)
TAUSTINE, POST, BERMAN, FINEMAN & KOHN
812 Marion E. Taylor Building
Louisville, Kentucky 40202

This 13th day of March, 1978.



Iris R. Barrett
Executive Director

Adams

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to R*



379 (506)

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

JOHN C. ROBERTS
MEMBER

PHONE (502) 564-6892

December 27, 1977

*KOSHRC
Decision &
Order No 506*

KOSHRC # 379

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ROUCK PLUMBING 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:

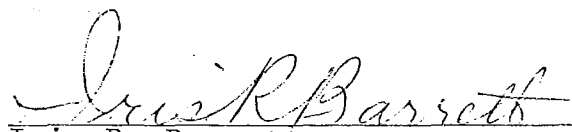
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

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

Mr. Donald E. McManus, Pres. (First Class Mail)
Rouck Plumbing Company, Inc.
930 West Main Street
Louisville, Kentucky 40202

Honorable Jerome D. Berman (Certified Mail #240816)
Taustine, Post, Berman, Fineman & Kohn
812 Marion E. Taylor Building
Louisville, Kentucky 40202

This 27th day of December, 1977.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #379

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

ROUCK PLUMBING COMPANY

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of two citations issued against Rouck Plumbing Company, Inc., hereinafter referred to as "Rouck", 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 May 29, 1977, a Compliance Officer for the Commissioner made an inspection of a construction site at 2850 Grinstead Drive in Louisville. As a result of that inspection, the Commissioner issued two citations on June 2, 1977, charging Rouck with two serious violations of the Act, and proposing a penalty therefor of \$1300.00.

On June 9, 1977, and within 15 working days from receipt of the citations, Rouck filed a notice with the Commissioner contesting the citations. Notice of the contest was transmitted to this Review Commission on June 10, 1977, and notice of receipt of the contest was sent by this Review Commission to Rouck on June 13, 1977. Thereafter, on June 17, 1977, the Commissioner filed its Complaint and on June 27, 1977, Rouck its Answer. On June 30, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Louisville on July 20, 1977, pursuant to KRS 338.070(4). That section of the statutes authorizes this Review

Commission to rule on appeals from citations, notations and variances to 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 the Review Commission's own motion.

The standards allegedly violated (as adopted by 803 KAR 2:030) and in contest here, the descriptions of the alleged violations, and the penalties proposed for same, are as follows:

29 CFR 1926.651(c)	Employees working in the excavation pit at the southwest corner of Building #3 were exposed to the danger of moving ground since no shoring system, sloping of ground, or other equivalent means of protection was provided and	\$650.00
29 CFR 1926.651 (i)(1)	The excavated material was not effectively stored or retained at least two (2) feet from the edge of the excavation	
29 CFR 1926.652 (d)	A trench, in compacted clay soil, running parallel with the south wall of Building #3 had sides which were not shored or otherwise supported even though the sides were more than five (5) feet in depth and eight (8) feet or more in length. and	\$650.00
29 CFR 1926.651 (i)(1)	The excavated material was not effectively stored or retained at least two (2) feet from the edge of the excavation	

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

Rouck is a plumbing contractor who, on the day of the inspection, was engaged in excavating a trench and a pit for the installation of sewage lines and a manhole for a complex of apartment buildings being constructed at the site. The trench was approximately 28 feet long, 45 inches wide

and 75 inches deep. The walls of the trench were vertical and, from the ground level down 30 to 42 inches, consisted of hard, compact slightly moist clay. Below that level to the floor of the trench the sides were limestone rock. The floor of the trench was also limestone rock.

The pit, which was at the end of the trench, was circular in shape approximately 12 to 15 feet in diameter at the top, and approximately 5 feet in diameter at the bottom. It was on a hillside so that one side was approximately 12 feet high, and the other side was 5 feet high. Unlike the trench, the sides of the pit consisted mostly of hard, compact clay and were sloped. However, the angle of repose of the slopes was not shown. Like the trench, the pit had a limestone rock floor.

The excavations were made with jackhammers and hoes and Rouck's employees were required to enter the excavations in order to dig them. The excavated materials consisted of dirt, rock and rock dust which was thrown onto a "spoil bank" on the edge of the excavation. The excavated materials were periodically removed from the edge of the excavations to areas away from the excavations.

Because of the presence of the rock the excavation proceeded slowly and consequently the excavated materials in the spoil bank at the edge of the excavations accumulated slowly. Usually these materials were removed from the area after the employees digging the excavations finished work for the day. At the time of the inspection the spoil bank on the edge of the excavations was 1 to 1-1/2 feet high.

The ground in which the excavations were made was described as "virgin ground". By this it was meant that it was ground which had never been excavated. Although the sides of the pit or trench were not shored or otherwise supported, it was the opinion of Rouck's witnesses, including an independent excavating contractor, that the sides of both excavations were stable and presented no danger of moving ground or of a cave-in.

This was attributed in part to the fact that they were in virgin ground, and, with respect to the trench, to the fact that the lower half of the sides were in rock.

To a certain extent, this testimony was controverted by the Compliance Officer who stated that he observed some dirt sliding on one side of the pit. However, there was some question whether what he observed sliding was dust from the rock or whether it was dirt from the sides of the pit. In either event, the weight of the evidence supports Rouck's assertion that the ground was stable and not likely to move.

The Commissioner determined that the violations presented a hazard of death or serious bodily injury to Rouck's employees. The alleged violations were, therefore, considered serious violations and, in accordance with guidelines established by the Commissioner in order to ensure uniformity in proposing penalties, the Commissioner proposed an unadjusted penalty of \$1,000.00. These guidelines also permit adjustments to the penalty of up to 20% for good faith on the part of the employer in complying with the Act, up to 20% for the history of the employer in complying, and up to 10% for size of the employer in terms of the number employed. Rouck qualified for only a 5% adjustment for size, but received the maximum of 20% for good faith. However, since Rouck had been inspected 3 years earlier and had been cited for a nonserious violation, under the Commissioner's guidelines, Rouck was only allowed a 10% adjustment for history. The total adjustment of 35% reduced the proposed penalties to \$650.00 for each violation.

CONCLUSIONS OF LAW

29 CFR 1926.651(c) provides:

Specific excavation requirements The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

An "excavation" is defined by 29 CFR 1926.653(F) as any man made depression in the earth's surface formed by earth removal. A "trench" is defined by 29 CFR 1926.653(n) as a narrow excavation. Thus, while all trenches are excavations, not all excavations are trenches. However, only the pit portion of the excavation was cited by the Commissioner as being in violation of 29 CFR 1926.651(c).

In order to establish a violation of 29 CFR 1926.651(c), it must be shown that the excavation presents a danger of moving ground to employees working within it. Seaward Construction Company, Inc., CCH-OSHD ¶ 21.803 (1977). The weight of the evidence in this case is to the contrary. Witnesses for Rouck all testified that the excavation was in "virgin ground" that was very stable, and that it was unlikely to move. No evidence was presented to refute these assertions. Therefore, a the citation for violation of this standard was not proven and should be dismissed.

But even if it is assumed that the ground was not stable and would present a danger of moving "unless guarded by a shoring system, sloping of the grounds, or some equivalent means", it would not necessarily follow in this case that there was a violation of the standard. It was admitted by all parties, and as shown by Complainant's Exhibit 4, that the sides of the pit were sloped. Thus, in order to show a violation, the Commissioner had the burden of proving that the slope was inadequate. This the Commissioner failed to do.

The Commissioner contends that the requirements for sloping and shoring trenches contained in 29 CFR 1926.652, tables P-1 and P-2 are applicable to the entire excavation, including the pit. This is simply not so. Table P-1, which prescribes the proper angle of repose for sloping a trench, does not apply to other excavations. Copelan Plumbing Co., CCH-OSHD ¶ 18.074 (1974). Therefore, even if we were to find,

after calculating the angle of repose from the evidence, that the slope of the sides of the pit do not satisfy the requirements of Table P-1, it would not necessarily mean that the slope is inadequate and insufficient to satisfy the requirements of 29 CFR 1926.651. Thus, the citation for violation of this standard should also be dismissed for failure to establish that the sides were inadequately sloped.

29 CFR 1926.652(c) provides in part 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 in length. . . .

In the instant case, the trench involved was more than 5 feet in depth and 8 feet in length and was in hard or compact soil. It, therefore, fell within the requirements of this standard and the failure to comply with its provisions is a violation of the Act unless it is shown that the nature of the soil was such that it did not constitute a hazard to the employees. Lynn Barker and Ray Garren, Joint Venture, CCH-OSHD ¶ 21,935 (1977).

Here again, the weight of the evidence is that the sides of the trench, because of the nature of the ground in which it was dug presented no hazard to the employees working within it. Although the trench was 6 feet 3 inches deep, only about one-half of the sides were clay; the rest was solid rock. Furthermore, it was the uncontroverted testimony again that the trench was in "virgin ground" which, based on the experience of the witnesses, made the sides more stable. Therefore, the citation for violation of this standard should also be dismissed.

29 CFR 1926.651(i)(1) provides:

In excavations which employees may be required to enter, excavated or other material shall be effectively stored or retained at least 2 feet or more from the edge of the excavation.

Rouck concedes that a portion of the excavated materials or "spoil" was placed on the edge of the excavations by employees working within them. Rouck states, though, that the material was only put there temporarily until it could be taken away later, and contends, therefore, that the excavated materials were not "stored" on the edge of the excavation within the meaning of the standard.

Although, the excavated materials in the spoil bank were periodically removed from the excavation, while they were in the spoil bank, they were "stored" within the meaning of the standard, less than two (2) feet from the edge. Therefore, the spoil bank, because of its close proximity to the excavation, was a violation of the standard. Co-Con, Inc., CCH-OSHD ¶ 22,035 (1977). Furthermore, if the excavated material, which included some fairly large rocks, were to fall into the excavations in the vicinity of any employees working within them, there was a possibility that the employees could be seriously injured. Therefore, Rouck was in violation of 29 CFR 1926.561(i)(1) and the citation alleging a violation of the standard should be sustained.

Although, the citations made a distinction between the pit and the trench, in reality they were one continuous excavation. Therefore, it would seem proper, particularly in view of the foregoing conclusions, that only one penalty should be assessed for the violation of 29 CFR 1926.651(i)(1); otherwise the penalty seems appropriate under the circumstances.

RECOMMENDED DECISION

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

IT IS HEREBY ORDERED

That the portion of the citations issued June 2, 1977, charging a violation of 29 CFR 1926.651(c) and 1926.652(c) (as adopted by 803 KAR 2:030), be and are hereby dismissed.

That the portion of the citation issued June 2, 1977, charging a violation of 29 CFR 1926.651(i)(1) (as adopted by 803 KAR 2:030) be and are hereby sustained.

That the total penalty proposed in said citations be and is hereby reduced to \$650.00.

IT IS FURTHER ORDERED that the portion of the citation sustained must be abated immediately, and that the penalty must be paid without delay, but no later than 30 days from the date hereof.

A handwritten signature in cursive script that reads "Paul Shapiro". The signature is written in black ink and is positioned above a horizontal line.

PAUL SHAPIRO
HEARING OFFICER
KOSHRC

Dated: December 17, 1977
Frankfort, Kentucky

DECISION: 506