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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

March 13, 1978

KOSHRC #391

*KOSHRC
Decision #
Order No 536*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY FOUNDATION DRILLING, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of November 16, 1977 is before this Commission for the purpose of reviewing Hearing Officer Fowler's decision to dismiss the citation under 29 CFR 1926.651(q) (as adopted by 803 KAR 2:030) and the penalty proposed therefor.

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 be and it hereby is AFFIRMED, and the citation and penalty are VACATED.

Merle H. Stanton
Merle H. Stanton, Chairman

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

Dated: March 13, 1978
Frankfort, Kentucky

/s/ John C. Roberts
John C. Roberts, Commissioner

DECISION NO. 536

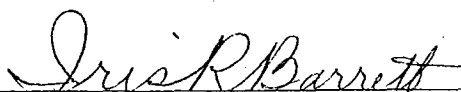
This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

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

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

Mr. Jack D. Jordan, President (Certified Mail #783026)
Kentucky Foundation Drilling Co., Inc.
3113 Fern Valley Road
Louisville, Kentucky 40213

This 13th day of March, 1978.



Iris R. Barrett
Executive Director

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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

John C. Roberts
MEMBER

*KOSHRC
Decision of
Order No 490*

November 16, 1977

KOSHRC # 391

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTUCKY FOUNDATION DRILLING, INC.

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

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

Mr. Jack D. Jordan, Pres. (Certified Mail #240845)
Kentucky Foundation Drilling Co., Inc.
3113 Fern Valley Road
Louisville, Kentucky 40213

This 16th day of November, 1977.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 391

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

KENTUCKY FOUNDATION DRILLING, INC.

RESPONDENT

* * * *

Hon. Frederick G. Huggins, Assistant Attorney General, Department of Law, 801 West Jefferson Street, Louisville, Kentucky 40202, for the Complainant.

Mr. Jack Jordan, President, Kentucky Foundation Drilling, Inc., pro-se for the Respondent.

FOWLER, Hearing Officer.

* * * *

On June 14, 15 and 16, 1977, the Department of Labor of the Commonwealth of Kentucky, through and by its Compliance Officer made an inspection of premises located at 4617 Outer Loop in Louisville, Jefferson County, Kentucky, a place at which employees of the Respondent were working.

As a result of that inspection the Department of Labor issued a citation against the Respondent alleging violations of 29 CFR 1926.651(c) and 29 CFR 1926.651(q) in that:

The employee working in the excavation at the southeast section of the parking lot was exposed to the danger of moving ground since no shoring system, sloping of ground, or some other equivalent means of protection was provided. The excavation was approximately nine (9) feet deep.

A truck equipped with drilling equipment was placed near the excavation which was not sheet-piled, shored, and braced

as necessary to resist the extra pressure due to such superimposed loads.

The alleged violation was determined to be a serious violation and an abatement date was set for June 27, 1977 and a proposed penalty of \$500.00 was made by the Department of Labor and that is the matter which is in contest by the Respondent in this case.

The pertinent procedural information is as follows:

1. The inspection took place on June 14, 15 and 16, 1977 at 4617 Outer Loop, Jefferson County, Kentucky.

2. The citation as aforesaid was issued June 20, 1977 listing one alleged serious violation.

3. Notice of Contest of the alleged violation was received July 6, 1977, contesting the combined violations of 29 CFR 1926.651(c) and (q) as aforesaid.

4. Notice of Contest with copy of citations, and proposed penalty was transmitted to the Review Commission on July 8, 1977.

5. Notice of Receipt of Contest was mailed July 8, 1977 and Certification of Employer Form was received July 15, 1977.

6. The Complaint was filed July 20, 1977, and no formal answer is filed by the Respondent herein.

7. The case was assigned to a Hearing Officer on August 9, 1977.

8. The Hearing was scheduled and heard September 1, 1977 at 10:00 A.M. at the Department of Labor, 801 West Jefferson Street in Louisville, Kentucky 40202.

9. A Notice of Receipt of the Transcript of the Testimony of the Hearing was mailed October 4, 1977.

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.

DISCUSSION OF THE FACTS

The Respondent, at the time of the citation, was engaged in a construction site in which they were digging holes to be used for the base of lighting fixtures in a parking lot for use at a shopper's mall called the Jefferson Mall being constructed at the Outer Loop in Louisville, Kentucky. There were several contractors on the job, but the Respondent was the only contractor performing that particular type of work.

The hole which was being dug and which is the basis of the alleged violation by the Department of Labor was approximately nine (9) feet deep and four (4) feet in diameter. The first six and one-half feet of earth consisted of compact clay, and the bottom two and one-half feet of rock.

The hole in question was a round hole for the placing of the foundation for a light standard and it appears that in drilling for the hole after the Respondent had augered a hole approximately six and one-half feet deep that they ran into rock which required a jack hammer or some type of power removal for the bottom two and one-half feet which constitutes the nine feet at the time of the inspection. It was pretty well agreed that it was about four feet in diameter.

The evidence reveals that Compliance Officer Ralston made a general scheduled inspection and talked to some ten (10) or eleven (11) contractors (TE 10); that he held an opening conference and a walk-around inspection and a closing conference all in accordance with the regulations and with apparently all of the contractors including the Respondent herein (TE 11).

It was agreed by the Compliance Officer that the composition of the ground was one of compact clay, and that the moisture content was unknown to the Compliance Officer (TE 15); photographs were introduced showing the employee in the hole removing excess rock from the floor, and also showing a Mr. Brown, an employee of the Respondent Company in the hole. (TE 16). The two photographs introduced are filed as exhibits and the Compliance Officer testifies that there is no shoring or sloping back of the ground which apparently he feels is a violation.

Compliance Officer testifies that section (q) of the alleged violated section does not specifically mention a certain height nor does section (c) of the regulation (TE 20); there is a

conflict in the testimony concerning whether or not the rope shown in the picture was a rope used to excavate the rock or whether it was an escape rope to be used by the employee in the event of any impending cave-in (TE 48).

At page 21 of the evidence, Compliance Officer states that in answer to the question of what depth he would have started to cite and whether or not he would have cited this company had the hole been over five (5) feet deep, the Compliance Officer answered that he would have taken the measurements, discussed it with the supervisor, and states that the Department does have experts with whom they would discuss to determine what the chances are of employees being hurt (TE 21); Compliance Officer states that he did discuss this matter with the supervisor and that the supervisor concurred in the citation.

The Compliance Officer states that the hazard involved was a cave-in of the earth and the difficulty that the employee allegedly would have had in removing himself from the hole in the event of such cave-in.

The Compliance Officer testifies that in his opinion the hole such as the one in this case would not necessarily have to be shored to be in compliance, but could be made in compliance by sloping of the ground and refers to table P-1 which is contained in 29 CFR 1926.652 which is specifically for trenching requirements.

The penalty factors are discussed at pages 28 to 30 and appeared to be in conformity with the Department of Labor standards and regulations in serious cases.

The Compliance Officer, under questioning by the Hearing Officer states that there was no earth moving or no portion of the earth was falling at the time of his examination and that no soil samples of any kind were taken to determine the soil content (TE 33). The Compliance Officer further states at the same page that the walls of the excavation were such that there were no cracks in it or anything like that, and that no indications that the earth was about to move or could move or was unstable.

Mr. Jack Jordan testified for the Respondent as President of the Kentucky Foundation Drilling, Inc., and explained a pier hole which was a type of hole that was being dug in the instant case. He stated that it is a round hole or a drill shaft in the purposes for foundations for commercial buildings or light posts standards and that drilling is done with an augered type of rig (TE 35). Testimony previously adduced indicated that the drill rig, which was the equipment situated close to the hole which is alleged to have caused a greater danger to cave-in was some ten (10) feet from the hole, and Mr. Jordan stated that in his opinion the hole wasn't caving-in and that there was no danger that the hole would cave-in because of the good, hard, compacted earth which existed at that place (TE 36-37).

Mr. C. D. Brown is called as witness on behalf of the Respondent and stated that he was an employee of the Kentucky Foundation Drilling, Inc., was a laborer and was what was called a hole man (TE 38); Mr. Brown testified that on the date of the inspection he was running a hammer breaking up the rock which was in the bottom of the hole and that there was no danger in the hole,

and there was no cracks and the hole consisted of good solid dirt, and that he could take his hand and reach up to the top of the ground, and also that he had previously worked in that type of dirt and that in his opinion no danger existed (TE 40); Mr. Brown explained that the rope that was hanging down which we had seen in the picture was a safety rope that was tied on the side of an A-frame and that if anything happened he could pull himself out with the rope (TE 41).

On cross-examination Mr. Brown was asked concerning the knots that were suppose to be in the rope, and he explained that he had seen a knot on the top of the photograph, and again reiterates that the rope which is shown in the picture was an escape rope and was not the rope used to haul rock out of the hole (TE 42).

Mr. Walter Bowens was called as a witness for the Respondent and testified that he had been employed about seven (7) years for the Respondent and had been working previously to that for the McKinney Company for about twelve (12) years (TE 43). Mr. Jordan testifies that the hole was on a slope and that the top side was six (6) feet and three (3) inches and that the bottom side was five (5) feet, which is in controversy with the other evidence previously introduced (TE 44). The questions of whether or not the rope shown in the picture was the rope to remove the rock or a safety rope is cleared up in questioning by the Hearing Officer at pages 46 to 48 of the Transcript of the Evidence.

There was no other significant fact brought out in the factual evidence.

DISCUSSION OF THE LAW

The opinion of the Hearing Officer that the facts of this case are essentially the same as the case previously decided by this Commission on October 25, 1976 in Public Service Commission of Kentucky for and on behalf of the Commissioner of Labor, Commonwealth of Kentucky vs. Louisville Gas and Electric Company, KOSHRC NO. 233. The charges in that case are precisely the same as in the current case and we agree with the essential element cited in that case that in order to find a violation of 29 CFR 1926.615(c) it is necessary to show that "employees are exposed to danger from moving earth." Your Hearing Officer finds that there is no proof that the employees in this case were exposed to any danger from moving earth.

In the Louisville Gas and Electric Company case, KOSHRC NO. 233, various decisions are cited which are applicable herein including B & W Pool Construction Company, CCH Paragraph 17,808, Coulee Construction Company, Inc., CCH Paragraph 18,506 and numerous other cases which are quoted in the Louisville Gas and Electric Company case.

As in the Louisville Gas and Electric Company case, this case shows a total lack of proof that the Respondent's employees were exposed to the danger of moving ground. All that was proven was that they were present in an unshored cavity.

Under the law as your Hearing Officer understands it, the hole in question was a excavation and not a trench and not subject to the trenching requirements and indeed no trenching requirements

were cited.

Contrary to the Louisville Gas and Electric Company case, your Hearing Officer finds also a total lack of evidence of any danger which exists by reason of the presence of a back hoe within ten (10) feet of the excavation. The only proof concerning the back hoe is found at page 14 of the Transcript of the Evidence in which the Compliance Officer states that the drilling rig itself and its wheels were within ten (10) feet of the excavation. This is the total amount of testimony concerning the presence of the rig and there is no evidence whatsoever that its presence constituted any danger to the occupants of the excavation in question. Your Hearing Officer differentiates this case from a later case of this Commission, Commissioner of Labor, Commonwealth of Kentucky vs. Kentucky Underground Contractors, KOSHRC NO. 345, and holds that the excavation in question was not a trench and was not being used as a trench in any sense of the word, and that the trenching requirements did not apply to the case at hand.

There is no evidence of danger to employees in the record in this case as to the violation of either section which is cited and it is the feeling of the Hearing Officer that the previous decisions of this Commission are in direct accord with this reasoning.

FINDINGS OF FACT

It is found as a matter of fact by your Hearing Officer:

1. That the hole was an excavation and not a trench under the standards.

2. That the soil was of compact clay and rock and that no soil samples were taken and no danger to employees was shown.

3. That proper identification, opening conference, walk-around rights and closing conference were afforded to the Respondent.

4. That no danger was shown by the evidence to employees by reason of the presence of a rig some ten (10) feet from the excavation in question.

CONCLUSIONS OF LAW

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

1. That the Commission has jurisdiction of the parties and the subject matter of this controversy.

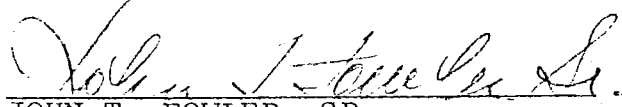
2. That the case of Public Service Commission of Kentucky vs. Louisville Gas and Electric Company, KOSHRC NO. 233, is applicable to the facts in this case and is controlling.

3. That the law is for the Respondent because the Complainant has failed to show any hazard to the employees by reason of either the excavation or the presence of the back hoer which are the basis of the citations in this action.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation against the Respondent herein may be and is hereby dismissed and the proposed penalty therefore may be and is hereby vacated.

Dated: November 16, 1977
Frankfort, Ky.


JOHN T. FOWLER, SR.
Hearing Officer

DECISION NO. 490