



399

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRÉTT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision  
Order No. 546*

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 15, 1978

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC #399

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

GENERAL STEEL CONTRACTORS, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer Paul Shapiro, issued under date of January 9, 1978, is presently before this Commission for review, pursuant to a Petition for Discretionary Review filed by the Complainant.

A citation was issued to the Respondent after a work-place accident which fatally injured an employee. The citation alleges a serious violation of 29 CFR 1926.550(a)(15)(i) (as adopted by 803 KAR 2:030) with a proposed penalty of \$500.00.

The Hearing Officer has found that the power lines were not de-energized or grounded, nor were any insulating barriers present to prevent contact. He further finds that the 10 foot minimum clearance was breached and the standard was violated. We agree with these findings which are clearly supported by the record in this case. Mr. Shapiro has dismissed the citation and penalty, however, finding that the violation was not foreseeable and should not be sustained. We disagree with and REVERSE this finding and recommended decision.

The employees did not measure the distance between the power lines and the silos. They were aware that the pipe was to be lifted very near energized lines. The fatally injured worker was told to hold a tag line and it was admitted that the purpose of such a line was to prevent sway or movement of the pipe.

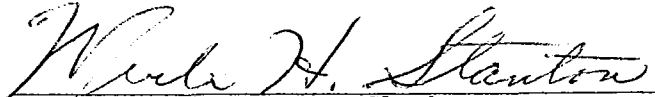
KOSHRC #399  
(Decision and Order of Review Commission)

The Respondent has presented extensive expert testimony in this case. The testimony made by the expert is somewhat suspect in that it concerns a reconstruction of the position of various objects at the time of the accident. The calculations were based in part on a spot where the crane boom allegedly hit the silo while flexing during the lift. Assuming the accuracy of the distances presented by the expert they serve to establish the Respondent's care by showing foreseeability. The figures submitted contend that the pipe was a minimum of 10.386 feet from the energized lines.

From the evidence presented it is clear that an extremely hazardous condition existed. The crew chief was aware that the operation was very near the minimum clearance. The presence of tag lines indicates that sway was seen as a possible condition. The deceased employee was instructed to hold the tag line but was not given further instructions or warning.

The standard was obviously violated. The violation was foreseeable as indicated by the record. The supervision of the procedure was inadequate and this factor further serves to negate the company's claim that the accident was unpreventable or unforeseeable.

Therefore, IT IS ORDERED by this Commission that the Hearing Officer's dismissal of the citation and penalty is hereby REVERSED. A violation of 29 CFR 1926.550(a)(15)(i) (as adopted by 803 KAR 2:030) is AFFIRMED. The penalty of \$500.00 is likewise AFFIRMED.

  
Merle H. Stanton, Chairman

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

Dated: March 15, 1978  
Frankfort, Kentucky

DECISION NO. 546

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

KOSHRC #399  
(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:

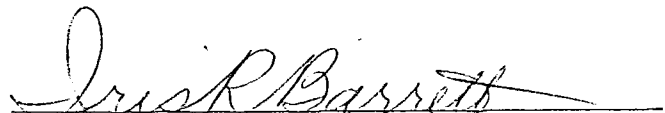
Commissioner of Labor (Messenger Mail)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Mail)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Hon. Timothy O'Mara  
Assistant Counsel

Honorable W. Douglas Myers (Certified Mail #783040)  
Keith & Myers  
Attorneys at Law  
317 West Ninth Street  
Hopkinsville, Kentucky 42240

Mr. Larry Joe Johnston, Pres. (First Class Mail)  
General Steel Contractors, Inc.  
123 Sanderson Drive  
Hopkinsville, Kentucky 42240

This 15th day of March, 1978.

  
Iris R. Barrett  
Executive Director

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*399 (5/16)*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

JULIAN M. CARROLL  
GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

*KOSHRC  
Decision #  
Order No 516*

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

January 9, 1978

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC # 399

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

GENERAL STEEL CONTRACTORS, 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:

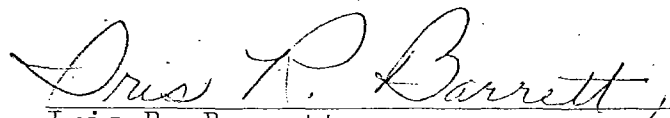
Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
Frankfort, Kentucky 40601  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Timothy P. O'Mara  
Assistant Counsel

Honorable W. Douglas Myers (Certified Mail #783003)  
Keith & Myers  
Attorneys at Law  
317 West Ninth Street  
Hopkinsville, Ky. 42240

Mr. Larry Joe Johnston, Pres. (First Class Mail)  
General Steel Contractors, Inc.  
123 Sanderson Drive  
Hopkinsville, Ky. 42240

This 9th day of January, 1978.

  
Iris R. Barrett  
Executive Director *ISE*

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION  
KOSHRC #399

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDED DECISION

GENERAL STEEL CONTRACTORS, INC.

RESPONDENT

STATEMENT OF THE CASE

This matter arises out of a citation issued July 21, 1977, against General Steel Contractors, Inc., hereinafter referred to as "General", 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 July 18 and 19, 1977, a Compliance Officer for the Commissioner made an inspection of a job site in Henderson, where General was installing a standpipe. As a result of that inspection, the Commissioner issued a citation on July 21, 1977, charging General with one serious violation of the Act, and proposing a penalty therefor of \$500.00.

On July 26, 1977, and within 15 days from receipt of the citation, General filed a notice with the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on July 27, 1977, and notice of receipt of the contest was sent by this Review Commission to General on the same day. Thereafter, on August 8, 1977, the Commissioner filed its Complaint and on August 9, 1977, General filed its Answer. On August 17, 1977, this matter was assigned to a Hearing Officer and scheduled for hearing.

The hearing was held in Bowling Green on August 17, 1977, pursuant to KRS 338.070(4). That section of the statute authorizes this Review Commission to rule on appeals from citations, notifications 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 discretionary review by the Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

The standard allegedly violated (as adopted by 803 KAR 2:030), the description of the alleged violation, and the penalty proposed for same, are as follows:

29 CFR 1926.550 (a)(15)(i)	A nine (9) ton Pitman hydra-lift truck crane was being operated with the load closer than ten (10) feet to electrical lines rated below 50 KV, which had not been de-energized and visibly grounded at point of work, or in lieu of the above, insulating barriers, not a part of or an attachment to the equipment or machinery, were not used.	\$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

General is in the business of lifting heavy equipment, machinery, and structural parts with the use of cranes and other lifting machines. On July 15, 1977, it sent one of its crews to the Central Soya plant in Henderson to install a standpipe between two of Central Soya's storage tanks. These tanks are approximately 85 feet high, are circular in shape and are connected by a concave wall.

Immediately to the east of the storage tanks were five power lines running parallel to them. The nearest power line was approximately 10 feet from the wall of the storage tanks at their closest point. Because of the circular shape of the storage tanks and the concave shape of the connecting wall, this distance was slightly greater from the center of the connecting wall to the nearest power line. At the time the men were sent to install the standpipe, the power lines were not de-energized or visibly grounded at the point of work, nor were there any insulating barriers not a part of any equipment erected to prevent physical contact with the lines.

To install the pipe the men had a truck equipped with a nine (9) ton Pitman Hydra-lift Crane, and a service truck. The crew consisted of Bill Pollard, the foreman and crane operator, and Van Oscar Rose and Mike Henry, his two helpers.

The pipe to be installed was 86 feet in length, 4 inches in diameter and 927 pounds in weight. Before attempting to lift it, General's crew first moved it into position with the pickup truck so that it lay adjacent to the two tanks between which it was to be installed. Mr. Pollard then placed his crane beyond the wires and extended his boom over them to the top of the storage tanks. This was done to determine whether he had at least a ten (10) foot clearance between the boom on the crane and the power lines.

After the boom was extended, Mr. Pollard apparently decided he did not have the required clearance, and he moved his truck closer to the wires. This increased the angle of the boom and its distance above the wires. He then extended the boom again to the top of the storage tank. He estimated that this time the boom came no closer than 15 feet to the wires.



After the crane was in place, the crane's cable was lowered from the boom and attached by means of a choker to the standpipe at a point on the pipe approximately 20 feet from the end. Lines, referred to as "tag lines", were attached to both ends of the pipe for use in guiding it into place. Mr. Rose then went to the top of the storage bins, and the crane lifted the standpipe. When the standpipe was fully raised, it was not in position to be attached to the wall and had to be lowered back to the ground. The choker was moved slightly on the pipe and it was raised again. This time, however, Mr. Rose stayed on the ground to direct the crane operator. For both lifts Mr. Henry also stayed on the ground to help guide the pipe into place with the tag line attached to the lower end.

While the standpipe was being lifted the second time, it suddenly and unexpectedly swung into the power lines and became energized. Mr. Henry, who was holding the lower end of the pipe, was electrocuted by the energized pipe and fatally injured.

After the accident the job was discontinued and it was decided not to install the pipe unless the power lines were de-energized. When this could not be arranged, the standpipe was installed in a different location on the storage tanks.

There is considerable controversy concerning the distance maintained between the electric power lines and the cable and standpipe. All of the distances were estimates, except those made by Edward L. Roehm, a professional engineer and registered land surveyor. Based on the information furnished to him by General's supervisory employees concerning the location of the truck on which the crane was mounted, the location of the boom of the crane while it lifted the pipe, the location of the pipe on the ground before it was lifted, and the location of the choker attaching the pipe to the cable, it was his opinion that if the pipe had gone straight up

from the ground it would not have come closer than 10.386 feet to the nearest power line. It was also his opinion that the pipe would only have deviated from a straight line while being raised if an external force exerted pressure upon it. Although the Commissioner questioned the validity of his conclusions, no competent evidence was offered to controvert them. Therefore, his findings, including this measurement, must be accepted as being accurate and correct.

It should be pointed out that the supervisory employees who furnished Mr. Roehm his information concerning the location of the truck, the boom of the crane, the pipe and chokers did not witness the accident. Therefore, his findings were based in a large part on hearsay. However, the crucial distances between the pipe and the power line were not as dependent on the location of the truck as they were on the location of the other items. The information furnished to him concerning the location of these other items was the same as the testimony concerning their location by the witnesses who saw the accident. Thus, the accuracy of his conclusions was supported by competent evidence.

General has an extensive safety program which was put together for it by W. Ed Poe Associates, a safety consulting firm. This program has been in effect for several years. As a part of the program, a safety manual was prepared for the company and when an employee is hired he is given a copy of the manual. At the same time the hazards of the business are discussed with him. In addition, monthly safety meetings are held with all employees at which various safety topics are discussed. One topic discussed at each such meeting is the safe operation of cranes which, given the nature of General's business, is to be expected. General has a good safety record and as a result its experience rating

is the maximum allowed for Workman's Compensation insurance. General has also received safety awards for several years from their Workman's Compensation insurer for its safety record and programs.

The Commissioner proposed a penalty of \$500.00 for the alleged violation. The penalty was proposed in accordance with guidelines established by the Commissioner to obtain uniformity in penalties throughout the state. Under these guidelines, a \$1,000.00 unadjusted penalty is proposed for each serious violation. The guidelines also permit an adjustment of up to 20% for the good faith demonstrated by an employer in complying with the act, up to 20% for history of complying, and up to 10% for the size of the employer in terms of the number employed. Here, General was allowed the maximum adjustment of 50% reducing the proposed penalty to \$500.00.

#### CONCLUSIONS OF LAW

29 CFR 1926.550(a)(15)(i) provides:

Cranes and derricks . . . . General requirements  
. . . . Except where electrical distribution and transmission lines have been de-energized and visibly grounded at point of work or where insulating barriers not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines, shall be operated proximate to power lines only in accordance with the following . . . .

For lines rated 50 KV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.

It is agreed that the power lines near the storage tanks where the work was being performed by General's employees were not de-energized or visibly grounded, nor were there any insulating barriers present to prevent contact with them. It is also agreed that the 10 foot minimum clearance was breached when the standpipe being lifted into place came in contact with the power lines. Thus, all parties agree that the standard was violated. However, even though the standard may have been

violated, the issue remains whether it necessarily follows that the Act was also violated. General states that it took all reasonable precautions to prevent the violation of the standard, and that the violation occurred only as a result of an external force which could not have been foreseen. Under these circumstances General contends it has not violated the Act.

This case is somewhat unusual in that most cases appealed to this Review Commission involve conditions which a company has created or permitted to exist. In those cases the Review Commission is called upon to determine if the cited conditions violate a given standard or the general duty clause of the Act and, if so, whether they presented a hazard to the employees of the company cited. Here, there is no question that the requirements of the standard were not maintained, that the standard was violated and that as a result an employee was exposed to a serious hazard. However, the weight of the evidence supports General's contention that the standard was violated because of some unknown condition which it could not have foreseen.

The purpose of this Act is to promote safety in places of employment. That does not mean that the employer must provide an absolutely safe place for his employees to work. That would be impossible under any circumstances. Instead, the Act requires the employer to provide at all times as safe a place of employment as is possible under all circumstances surrounding the work to be performed. General appears to have done this.

General is obviously engaged in a hazardous business. Because of this it has undertaken an elaborate safety program in order to minimize accidents to its employees. This program has been an apparent success judging from the company's insurance ratings and the awards from its insurer. It would be hard to imagine a better program than that described

by the company's witnesses. Specifically included as a part of this program were instructions emphasizing the importance of maintaining the 10 foot clearance required by the standard involved here.

A similar situation was presented in Katy Engineering Co., CCH-OSHD ¶ 18,269 (1974). There a citation for a serious violation of the same standard was vacated when it was found that the violation occurred as a result of human error which the employer could not have foreseen.

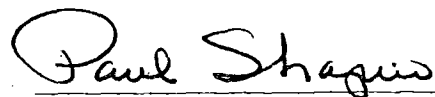
In the instant case, the employer and the employees took all precautions that they could to do the job in a safe manner and in accordance with the standard. The weight of the evidence is that they did not, and could not, have foreseen the accident. Therefore, the citation should be dismissed.

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 charging a violation of 29 CFR 1926.550(a)(15)(i) (as adopted by 803 KAR 2:030), and proposing a penalty therefor of \$500.00, be and is hereby dismissed.



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PAUL SHAPIRO  
HEARING OFFICER  
KOSHRC

Dated: January 9, 1978  
Frankfort, Kentucky

DECISION NO. 516