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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL  
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

IRIS R. BARRETT  
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 14, 1978

MERLE H. STANTON  
CHAIRMAN

CHARLES B. UPTON  
MEMBER

JOHN C. ROBERTS  
MEMBER

KOSHRC #405

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

C. L. McBRIDE COMPANY

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

ROBERTS, Commissioner, For the Majority:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of December 28, 1977, is presently before this Commission for the purpose of reviewing the Hearing Officer's decision to vacate the citation under 29 CFR 1926.651(q) (as adopted by 803 KAR 2:030) and the penalty proposed therefor.

The Hearing Officer has found that in order to sustain a violation of the requirements of 29 CFR 1926.651(q), there must be some evidence of moving or unstable ground. We feel that this interpretation of the standard is correct. By reading the standard in connection with 29 CFR 1926.651(c), the employer is given clearer notice of when bracing, piling, or shoring is required under 29 CFR 1926.651(q).

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 ORDER of a majority of this Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED. All findings

of the Hearing Officer not inconsistent with this decision are likewise AFFIRMED.

  
John C. Roberts, Commissioner

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

STANTON, Chairman, DISSENTING:

I must dissent from the opinion of the majority. The Hearing Officer should be reversed in this case, the citation under 29 CFR 1926.651(q) and the penalty of \$600.00 should be AFFIRMED. The standard in issue does not require proof of moving or unstable ground to sustain a violation.

The evidence in this case indicates that the backhoe outriggers were within 2 to 3 feet of the edge of the excavation. Protection, as outlined in the standard should have been utilized to resist the superimposed load.

/s/ Merle H. Stanton  
Merle H. Stanton, Chairman

Dated: March 14, 1978

Frankfort, Kentucky

DECISION NO. 542

Commissioner of Labor (Messenger Service)  
Commonwealth of Kentucky  
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: Larry D. Hamfeldt  
Assistant Counsel

Honorable J. Bissell Roberts (Certified Mail #783034)  
Stites, McElwain & Fowler  
3400 First National Tower  
Louisville, Kentucky 40202

C. M. McBride Company (First Class Mail)  
836 East Market Street  
Louisville, Kentucky 40206

This 14th day of March, 1978.

  
Iris R. Barrett  
Executive Director

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405 (510)

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) 564-6292

JOHN C. ROBERTS  
MEMBER

December 28, 1977

*KOSHRC  
Decision &  
Order No 510*

KOSHRC # 405

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

C. L. McBRIDE 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  
Attention: Honorable Michael D. Ragland  
Executive Director for  
Occupational Safety & Health

Honorable Kenneth E. Hollis (Messenger Service)  
General Counsel  
Department of Labor  
Frankfort, Kentucky  
Attention: Larry D. Hamfeldt  
Assistant Counsel

Honorable J. Bissell Roberts (Certified Mail #240820)  
Stites, McElwain & Fowler  
3400 First National Tower  
Louisville, Kentucky 40202

C. M. McBride Company (First Class Mail)  
836 East Market Street  
Louisville, Kentucky 40206

This 28th day of December, 1977.

  
\_\_\_\_\_  
Iris R. Barrett  
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC NO. 405

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

C. L. McBRIDE COMPANY

RESPONDENT

\* \* \* \* \*

Hon. Larry D. Hamfeldt, Assistant Counsel, Department of Labor,  
801 West Jefferson Street, Louisville, Kentucky 40202 for the  
Complainant.

Hon. J. Bissell Roberts, Attorney, STITES, McELWAIN & FOWLER, 3400  
First National Tower, Louisville, Kentucky 40202 for the Respondent.

FOWLER - Hearing Officer.

On August 8, 1977, Compliance Officers for the Department of Labor made an inspection of premises located at 2109 Plantside Drive in Jeffersontown, Kentucky, a place at which employees of Respondent Company were working. As a result of that inspection two (2) Citations were issued which were consolidated into one (1) Citation alleging a serious violation of the Act. The two (2) alleged violations, which were combined as a serious violation, were contested by the Respondent and are as follows:

(a) An alleged violation of 29 CFR 1926.651(c) in that;

Employees working in the excavation at the southwest corner of the work site at 2109 Plantside Drive were exposed to the danger of moving ground since no shoring system, sloping of ground, or other equivalent means of protection were provided.

And combined with that as a portion of the alleged serious violation,

An alleged violation of 29 CFR 1926.651(q) in that;

The north wall of the excavation was not sheet piled, shored, and braced as necessary to resist the extra pressure due to the superimposed load of the "Case" backhoetractor placed near the edge of the excavation.

The abatement date for each of the items was set for August 15, 1977, and the proposed penalty was set at \$700.00.

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.

The pertinent procedural information is as follows:

1. Inspection on August 8, 1977, by the Department of Labor, Commonwealth of Kentucky, of premises at 2109 Plantside Drive, Jeffersontown, Kentucky, a place at which employees of Respondent Company were working.

2. Citation issued August 10, 1977, alleging the two (2) items listed previously.

3. Notice of Contest was received August 26, 1977, contesting both items.

4. Notice of Contest with copies of Citations and proposed penalty was transmitted to the Review Commission on August 29, 1977.

5. Notice of Receipt of Contest was mailed August 30, 1977 and no Certification of Employer Form is found in the record.

6. The Complaint was received September 6, 1977, and formal Answer was filed September 9, 1977.

7. The case was assigned to a Hearing Officer on September 12, 1977.

8. The Hearing was scheduled and heard on October 5, 1977, at 10:00 A.M. at the Department of Labor, 801 West Jefferson Street, Louisville, Kentucky.

9. Notice of the Receipt of the Transcript of the Evidence was mailed November 9, 1977.

10. Letter of Memorandum Brief filed by the Complainant November 23, 1977.

11. Brief for Respondent received December 2, 1977.

12. Reply Brief of the Complainant received December 6, 1977.

#### DISCUSSION OF THE CASE

At the outset of the case, Counsel for the Department of Labor stated that they wished to reduce the proposed penalty from \$700.00 to \$600.00 and that amendment to the proposed penalty was permitted.

Compliance Officer Ralston testified that he had conducted a generally scheduled inspection of the premises 2109 Plantside Drive,



in Jeffersontown, Kentucky; that he had engaged in an opening discussion, a walkaround inspection with each of the contractors and the Respondent company was one of the contractors who engaged in the opening walkaround and closing conferences (TE 6, 7, & 8).

The witness read the offenses alleged to have been committed by the Respondent and introduced photographs taken at the scene of the work (TE 9).

The excavation in question measured twenty-nine (29) feet by twenty-six (26) feet by approximately ten (10) feet in depth. The first six (6) feet of depth consisted of clay and the bottom four (4) feet was solid rock (TE 11 to 16). It is testified and the photographs indicate that there was no sloping or shoring of the sides of the excavation. No employee was seen in the excavation but footprints were visible in the photographs and testified to by the Compliance Officer indicating work had been done in the excavation (TE 17).

There was a backhoe some two (2) to three (3) feet from the wall of the excavation (TE 19).

On being questioned concerning the danger from moving earth, the Compliance Officer recites the provisions of 29 CFR 1926.652 which refers specifically to trenching requirements (TE 21 & 22). The excavation in question is not a trench within the meaning of the Standards but an excavation as so described therein. The witness states that he did not say that any ground moved or later in his testimony states that there was any indication of ground moving.

The penalty provisions and proposals are described and the penalty correction to \$600.00 (TE 26 to 29).

On cross-examination the Compliance Officer admitted that he had no court order or warrant for the inspection (TE 32); that it was a routine inspection (TE 33) and that no evidence of moving earth or cave-in existed at the time that he made his inspection (TE 34 & 35). Witness states that the soil was stable, that it consisted of compact clay, which is the most stable of all soil, except for solid rock, and that he did not know the length of time the excavation had been opened. (TE 38 & 39).

The Compliance Officer testified that no tests were performed and that the soil is very compact consisting of a combination of compact clay and rock, more stable than clay. (TE 42 & 43).

A discussion was held concerning the method of proposed penalties for alleged serious violations and a discussion was had of the new policy of the Department concerning nine (9) or fewer non-serious violations (TE 44, 45 & 48). It is admitted that there was no objection to the inspection (TE 50).

Mr. Charles Oldson testified as an employee of the Respondent Company and stated that he was present at the time of the inspection and that the excavation was being dug for the installation of three (3) twenty thousand gallon tanks. (The transcript of the evidence is evidently in error when it states twenty thousand dollar tanks and that correction is noted by your Hearing Officer. TE 52).

Mr. Oldson testified that the hole had been open for about two (2) weeks and that it had been necessary to dynamite to remove the rock from the bottom of the hole and that there had been no

objection to the inspection. (TE 54).

The questions raised during the evidence and in subsequent briefs filed by the parties indicate that three (3) questions of law and fact are germane in the decision of this case:

1. Whether or not the inspection, having been conducted without a warrant, was a legal inspection, or whether it violated the constitutional rights of the Respondent.
2. Whether or not a violation was proven by the Department, and
3. If such violation by the Department was proven, whether or not it was a serious violation within the meaning of the Act.

In addressing the issues as they are set forth above, and as your Hearing Officer views them, it is the opinion of the Hearing Officer that in view of the fact that the Respondent made no objection to the search or to the inspection, that case law applicable to the need for a search warrant and probable cause does not apply and that consent was given to the inspection and that the Respondent has waived any right to a search warrant in this case.

In the specific excavation requirements at 29 CFR 1926.651(c) the Regulation requires that 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. There is no evidence in this record which in anywise indicates any exposure or danger to any employees from moving ground and I consider that to be an essential portion of the excavation shoring requirement. In an excavation of this size, as indicated some

twenty-nine (20) feet by twenty-six (26) feet by ten (10) feet deep, in which it is admitted that the bottom four (4) feet were solid rock, and certainly not subject to cave-in or slide, that there appears to be very little danger to employees in an excavation made of the hard compacted clay soil such as described by all of the witnesses in this case.

A view of photographs of the scene of the citation show the marks of the backhoe on the sides of the trenches indicating that the soil was very hard and compact and not subject to danger of moving.

Section 1926.651(q) relates to the placement or operation of shovels, derricks, or other heavy objects on a level above or near an excavation with the requirement that they be sheet piled, shored and braced as necessary to resist the extra pressure due to such load. It is the opinion of the Hearing Officer that this regulation must be read in connection with, and together with the requirements of subsection (c) which agains refers to the danger from moving ground. It would not seem logical to require bracing or shoring for a backhoe which was located near the excavation site, unless there was the same danger from moving ground as is required in subsection (c).

This Commission has sustained, without review, the case of Commissioner of Labor v. K. A. Barker Company, Inc., KOSHRC No. 281, in which a very similar situation existed. Admittedly in the Barker Case the Compliance Officer was not present to testify, but the evidence appears to be similar to the evidence in this case and the

conclusion reached by your Hearing Officer is the same.

The evidence heard, the exhibits filed and the briefs of the parties leads your Hearing Officer to the following findings of fact.

#### FINDINGS OF FACT

1. That there was no proof of any danger to employees working in this excavation from moving ground or possible cave-in, due to the compact nature of the soil and the size of the excavation.
2. That there was no search warrant obtained by the Complainant prior to the making of its general inspection.
3. That a proper opening conference, walkaround inspection and closing conference was held with the Respondent Company in accordance with the Rules and Regulations.
4. No tests were performed and that there is no contradiction as to the compact and stable nature of the soil and rock in the excavation in this case.

#### CONCLUSIONS OF LAW

It is concluded as a matter of law as follows:

1. Jurisdiction of the parties and subject matter exists.
2. That the inspection by the Department of Labor and the subsequent citation did not constitute an illegal search and seizure nor violate the rights of the Respondent, because the right to request such warrant was waived by the Respondent Company and the inspection was permitted without objection.

3. That the contention of the Respondent that the Respondent could not voluntarily consent to an inspection because of the criminal sanctions imposed under KRS 338.991(10) is not valid and that such right to a search warrant was effectively waived by the actions of the Respondent.

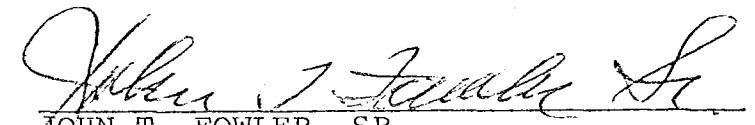
4. That no violation of 29 CFR 1926.651(c) is found in this action because of the lack of evidence of moving or unstable soil.

5. That 29 CFR 1926.651(q) must be read in connection with subsection(c) above referred to and that the placement of the backhoe some two (2) to three (3) feet from the edge of the excavation did not constitute an offense in view of the stable nature of the soil.

6. That the proof was insufficient under the law and unsupportive by the facts to prove any violation of the Complaint of the Department and that the Department failed to carry the burden of proof in either of the items of the citation.

RECOMMENDED ORDER

IT IS ORDERED that the Citations against the Respondent herein be dismissed and that the proposed penalty of \$600.00 be and the same is hereby vacated.

  
JOHN T. FOWLER, SR.  
Hearing Officer

Dated: December 28, 1977  
Frankfort, Kentucky

DECISION NO.: 510