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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

CHARLES B. UPTON
MEMBER

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

Decision No. 689

March 13, 1979

KOSHRC #486

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ACTIVE CONSTRUCTORS

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 16 November 1978, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

This Commission is of the opinion that in fairness to both parties, Complainant's Motion to Dismiss the action in favor of the Commissioner of Labor should be overruled, as the Complainant has failed to show that the Commissioner was prejudiced by Respondent's failure to file a formal Answer herein.

We find no error in the application of the law to the facts herein, and that the evidence adequately supports the findings and conclusions of the Hearing Officer.

Accordingly, it is ORDERED that Complainant's Motion to Dismiss this action in favor of the Commissioner is hereby OVERRULED. It is further the unanimous Order of this Commission that the Recommended Order of the Hearing Officer be and it is hereby AFFIRMED.

Merle H. Stanton
Merle H. Stanton, Chairman

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

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

DATED: March 13, 1979
Frankfort, Kentucky
DECISION NO. 689

Copy of this Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

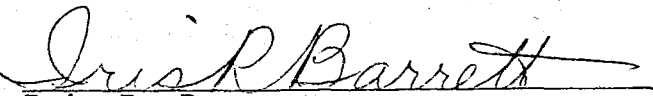
Honorable Kenneth E. Hollis (Messenger Service)
General Counsel
Department of Labor
Frankfort, Kentucky 40601
Attention: Larry D. Hamfeldt
Assistant General Counsel

Mr. Dan Krusenklau (Certified Mail #678457)
Active Constructors
9607 Britannia Court
Louisville, Kentucky 40272

Honorable O. Grant Burton (First Class Mail)
MIDDLETON, REUTLINGER & BAIRD
501 South Second Street
Louisville, Kentucky 40202
(Representing Estate of David Henry George)

Honorable Raymond L. Suell (Certified Mail #678458)
Citizens Plaza Office Bldg.
Louisville, Kentucky 40202

This 13th day of March, 1979


Iris R. Barrett
Executive Director

Staggs



Being called

486

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 &
Order No. 639*

November 16, 1978

KOSHRC # 486

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ACTIVE CONSTRUCTORS

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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

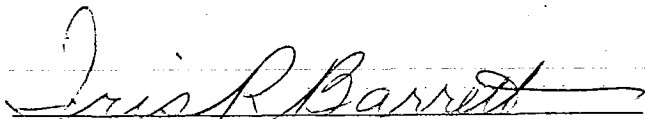
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Honorable O. Grant Bruton (First-Class Mail)
MIDDLETON, REUTLINGER & BAIRD
501 South Second Street
Louisville, Kentucky 40202
(Representing Estate of David Henry George)

Honorable Raymond L. Suell (Certified Mail #458445)
Citizens Plaza Office Bldg.
Louisville, Kentucky 40202

This 16th day of November, 1978.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC #486

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

ACTIVE CONSTRUCTORS

RESPONDENT

This matter arises out of a citation issued May 16, 1978, against Active Constructors, hereinafter referred to as "Active", 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 2, 3, and 4, 1978, a Compliance Officer for the Commissioner made an inspection of a construction site where Active was performing as a subcontractor. As a result of the inspection, the Commissioner issued a citation on May 16, 1978, charging Active with one serious violation of the Act, and proposing a penalty therefor of \$700.00.

On May 25, 1978, and within 15 working days from receipt of the citation, Active filed a notice with the Commissioner contesting the citation. Notice of the contest was transmitted to this Review Commission on May 30, 1978, and notice of receipt of the contest was sent by this Review Commission to Active on the same day. Thereafter, on June 13, 1978, the Commissioner filed its Complaint and on July 10, 1978 this matter was assigned to a Hearing Officer and scheduled for hearing to be held on August 10, 1978. On motion of the Commissioner, the hearing was continued by Order dated July 18, 1978 to August 16, 1978.

property. However, although Active did not have a contract relating specifically to the job, it did have a general unit price agreement with Sherman and Fletcher and it was under this agreement that it was performing.

The construction site was in an open area near Hurstborne Lane upon which heavy trucks occasionally travel. As in all open areas, wind would occasionally traverse the site.

The four walls were being constructed on a foundation that was 37 feet wide by approximately 120 feet long. The four walls ran the entire width of the slab and were 24 feet apart. The outside walls were also 24 feet from the ends of the foundation. The unit consisted of a basement and two floors and the walls under construction were designed to be 27 feet high above the first floor of the unit when completed.

On the day previous to the inspection, one of the inner walls had collapsed and fallen into the other inner wall causing it to collapse as well. The first when it collapsed was almost completely constructed and was approximately 27 feet high. The wall into which it fell was only 10 feet high. Neither wall was shored or braced, there was, though, a stud framework in the area between the wall that fell and the outer wall closest to it, and between the first and second floors of the apartment unit. However, the stud framework was not connected to the walls and the designed lateral strength had not been reached.

When the wall collapsed an employee of Active, Pat Keene, was working on the second floor between the outer wall and the wall that fell. He was thus working away from the direction of the fall. Mr. Keene was in the process of dismantling a scaffold next to the wall that fell and erecting that same scaffold next to the outer wall. This scaffold was used by the blocklayers in building the wall, and since they had completed building the wall that collapsed, the scaffold was being moved to the outer wall so that it too could be completed.

The hearing was held in Louisville on August 16, 1978, pursuant to KRS 338.070(4). That section of the statutes 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 this Review Commission on appeal timely filed by either party, or upon the Review Commission's own motion.

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

ANSI Standard A10.9 1970 Section 12.5 as adopted by 1976.700(a)	A wall, constructed by Active Constructors of eight (8) inch by eight (8) inch concrete blocks at Unit 47 of Wessex Place, which was not temporarily shored or braced until the designed lateral strength was reached to prevent collapse due to wind or other forces, exposed an employee of Active Constructors working on the second floor level, where the wall was 17 feet high at its peak by 37 feet long to the hazard of falling concrete blocks, and exposed two (2) employees of D. S. E. Incorporated working on the first floor level on the opposite side where the wall was 27 feet high at its peak by 37 feet long to the hazard of falling concrete blocks.	\$700.00
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FINDINGS OF FACT

Active is a masonry contractor who, at the time of the inspection, was erecting four concrete block walls which were to be part of a unit of an apartment complex under construction. The general contractor on the project was Sherman and Fletcher. Active had no written contract with Sherman and Fletcher to perform work on this project and had apparently been called in by Sherman and Fletcher as an additional masonry contractor because the project was not progressing fast enough to satisfy the owners of the

Apparently, there were no other employees of Active working in the area at the time of the collapse, but there were two employees of another subcontractor working between the two interior walls. One of these employees was killed when the wall fell on him.

Except for the stud wall between the wall that collapsed, and the outer wall closest to it, none of the walls had any shoring or bracing. It is a rule of thumb in the construction industry that concrete block walls whose height are more than 10 times the width of the wall should be shored or braced until their designed lateral strength is reached. Since the block here was 8 inches wide, by applying this rule, the walls should have been shored or braced when it reached 80 inches in height.

The Compliance Officer proposed a penalty of \$700.00 for the alleged violation. This penalty was proposed in accordance with guidelines established by the Commissioner for its Compliance Officer to follow in order to achieve uniformity in its penalties. Under these guidelines, all serious violations carry an unadjusted penalty of \$1000.00. The unadjusted penalty can be reduced by up to 20% for the good faith shown by an employer in complying with the Act, as demonstrated by the employer's safety program, by up to 10% for the size of the employer in terms of the number of employed, and by up to 20% for the history of the employer in complying with the Act. The Compliance Officer found that Active had an average safety program and allowed only 10% for good faith. The Compliance Officer also allowed only 10% for history because the company had been inspected and cited on previous occasions for other violations. The maximum of 10%, however, was allowed for size. The reduced the penalty by 30% to the proposed amount of \$700.00.

CONCLUSIONS OF LAW

29 CFR 1926.700(a) provides:

All equipment and materials used in concrete construction and masonry work shall meet the applicable requirements for design, construction.

inspection, testing, maintenance, and operations as prescribed in ANSI A 10.9-1970, Safety Requirements for Concrete Construction and Masonry Work.

ANSI A 10.9-1970 Section 12.5 provides:

Shoring and Bracing. Masonry walls shall be temporarily shored and braced until the designed lateral strength is reached to prevent collapse due to wind or other forces.

There is little question that under the evidence in the record to date, the failure to shore or brace the concrete block walls created a hazardous condition to which Active's employees were exposed. Further, under the same evidence the failure to shore or brace the walls was contrary to the requirements of Section 12.5 of ANSI 10.9-1970. However, it does not follow that a violation of that ANSI section is also a violation of 1926.700(a).

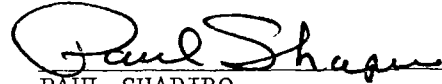
This precise issue was raised in Dunlop vs. Ashworth, 532 Fed2d 562 (CA 4, 1976). There the Court affirmed a U. S. OSHA Review Commission's decision that 1926.700(a) incorporated ANSI's guidelines covering equipment and materials used in masonry construction, but not Section 12.5 guidelines pertaining to building techniques or processes. In short, the Court held that 1926.700(a) related to equipment while Section 12.5 related to techniques, two different subjects.

In its decision the Court cited with approval, the decision in Tolar Construction Co. CCH-OSHD # 19,078, (1974) in which the U.S. OSHA Review Commission reached the same decision, but held that under similar circumstances there was a violation of the general duty clause. However, in the instant case, the only question now presented is whether Active, by failing to brace or shore the concrete walls, violated 29 CFR 1926.700(a). The answer is it did not and the citation should, therefore, 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 1926.700(a) (as adopted by 803 KAR 2:030) and proposing a penalty therefor of \$700.00, be and is hereby dismissed.

A handwritten signature in cursive script, reading "Paul Shapiro", written over a horizontal line.

PAUL SHAPIRO
HEARING OFFICER
KOSHRC

DATED: November 16, 1978
Frankfort, Kentucky

DECISION NO. 639