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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 14, 1979

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #516

IRIS R. BARRETT
EXECUTIVE DIRECTOR

*Decision &
Order No. 690*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WHALEN ERECTING COMPANY, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer J. D. Atkinson, Jr., issued under date of 9 January 1979, is presently before this Commission for review, pursuant to petition for discretionary review filed by the Complainant.

In accordance with our decision in Active Constructors, KOSHRC #486, this Commission is of the opinion that in fairness to both parties, Complainant's Motion for Judgment on the Pleadings should be overruled, as the Complainant has failed to show that the Commissioner of Labor (hereinafter, "the Commissioner,") was prejudiced by Respondent's failure to file a formal Answer herein.

The Commission further finds that the Hearing Officer erred in his decision to affirm Paragraph 6(a) of the Complaint as a non-serious violation of the Kentucky Occupational Safety and Health Act (hereinafter, "the Act").

After a thorough review of the evidence, we find that the record indicates that the Commissioner proved a serious violation of 29 CFR 1926.652 (b) (as adopted by 803 KAR 2:030) as alleged in Paragraph 7 of the Complaint.

The Commission finds that a penalty of \$500.00 is appropriate under the circumstances as indicated by the record.

Accordingly, it is ORDERED that Complainant's Motion for Judgment of the Pleadings be and it is hereby OVERRULED. It is further the unanimous Order of this Commission that the Recommended Order, insofar as the citation of 29 CFR 1926.652(b) is affirmed as a non-serious violation of the Act is hereby REVERSED, and that the Citation in question is AFFIRMED as a serious violation of the Act. Abatement shall be immediate upon receipt by Respondent of this Order. A penalty in the amount of \$500.00 is hereby ASSESSED. All other findings of the Hearing Officer not inconsistent with this decision are hereby AFFIRMED.


Merle H. Stanton, Chairman

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

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

DATE: March 13, 1979
Frankfort, Kentucky

DECISION NO. 690

Haynes

*FOR
Rose*



516

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

CHARLES B. UPTON
MEMBER

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

January 9, 1979

*Decision of
Order No. 657*

KOSHR # 516

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

WHALEN ERECTING COMPANY, 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
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
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Larry D. Hamfeldt
Assistant General Counsel

Mr. R. D. Basham, Jr. (Certified Mail #988955)
Company Safety Officer
Whalen Erecting Co. of Ohio, Inc.
7231 Longview Avenue
Cincinnati, Ohio 45216

Hon. Tom Thole (Certified Mail #988956)
Attorney at Law
7736 Beachmont Avenue
Cincinnati, Ohio 45230

This 3rd day of January, 1979.


Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION.

KOSHRC # 516.

COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY,

COMPLAINANT,

VS: : : : : FINDING OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

WHALEN ERECTING COMPANY, INC.,

RESPONDENT.

An inspection was made on or about June 27, 1978, at a construction site in Boone County where the Respondent was working as a sub-contractor. As a result of this inspection, Respondent was issued one (1) citation alleging one (1) serious violation of the Act and Standards, as follows:

(a) Violation of 29 CFR 1926.652(b) in that:

Three employees working on the north side of the construction site in a trench approximately twelve and one-half (12½) feet deep and approximately eight and one-half (8½) feet wide at the bottom were not protected from a cave-in or falling dirt and rock by means of shoring, sheeting, bracing or sloping or by other means of support of sufficient strength.

A penalty of \$900.00 was proposed for this violation. The proposed penalty has since been reduced by motion of Complainant to \$500.00

The pertinent procedural information is as follows:

- (1) Inspection was conducted on or about June 27 or 28, 1978, by the Commissioner at the above location.
- (2) Citation was issued as above mentioned on July 12, 1978.
- (3) Notice of contest was received July 19, 1978.
- (4) Notice of receipt of contest was mailed on July 25, 1978.
- (5) Certification of Employer form was received on July 31, 1978.
- (6) Complaint was filed on August 8, 1978, and no formal answer is in the file.
- (7) Notice of assignment to a Hearing Officer and Notice of Hearing were mailed on August 31, 1978.

- (8) Hearing was held as scheduled on October 5, 1978, at Bureau of Highways, District #6 Offices, Covington, Kentucky.
- (9) Notice of Receipt of Transcript and Briefing Order was issued on November 9, 1978.
- (10) Respondent's Brief was received on November 30, 1978, and the case stood submitted as of that date.

DISCUSSION OF THE CASE.

The Compliance Officer testified that the construction site involved had a trench across it approximately 100 feet in length. This trench was approximately 12½ feet wide at the top and 12½ feet deep, and 8½ feet wide at the bottom. The Compliance Officer observed three (3) employees of the Respondent in the trench attaching metal plates to a concrete block at the bottom of the trench. There were some loose rocks near the upper portion of this trench, incorporated into a loose earth fill. These rocks were for the most part six to eight inches long and possibly two inches thick. There were a few larger rocks as much as a foot square and three and one-half to four inches thick. The lower portion of the trench was dug in a clay soil with nearly vertical sides, and the upper perhaps one-third of the trench was in the loose fill as described and sloped back on each side. The photographs introduced are most helpful in describing the trench. Part of the length of the trench was shored, but the part in which the Respondent's employees were observed was not shored or supported in any manner. Respondent had not constructed the trench. The Compliance Officer stated that the hazard here was the possibility of loose rocks sliding down the side of the fill and falling into the trench, possibly hitting a workman and causing serious injury or death.

Respondent's Area Superintendent, Richard Bashem, stated that his men

were installing reinforcing steel in the forms that had been installed in the trench by the general contractor. Respondent had no responsibility for the maintenance or construction of the trench. There had been no complaints of safety hazards nor had there been any injuries prior to the inspection. After the inspection, Respondent's foreman was not told that there was any violation or that there would be any citation. He further stated that it was not a condition of employment for Respondent's employees or supervisors to know the OSHA Code requirements concerning excavations, since that was not within their area of responsibility.

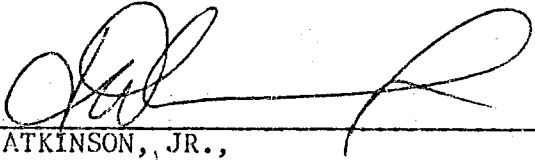
FINDING OF FACT AND CONCLUSIONS OF LAW.

The Hearing Officer finds, from the testimony, and especially from the photographs, that there is very little hazard of serious injury to employees of the Respondent in this situation. It appears that the lower two-thirds of this trench are cut out of firm clay, with vertical sides that go up approximately seven feet from the bottom of the trench. Above that there is a vein of limestone that has deteriorated into small fragments, and above this layer appears to be fill dirt, mostly dry clay, sloped away from the trench at a fairly sharp angle. It seems evident that any stones that fell into the trench would merely drop straight down the sides to the bottom. There appears no danger of a massive slide, rock fall or cave-in. The men are wearing hard hats and most of the rocks are small. While the Hearing Officer agrees that there is a technical violation of the Standard to which Respondent's employees were exposed, Complainant has failed to prove a serious violation. Merely to say there is a danger of serious injury without factual evidence to support it does not meet the burden of proof. Respondent is guilty of one non-serious violation.

RECOMMENDED ORDER.

Now, therefore, 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 1926.652(b) and proposing a penalty of \$500.00 therefore is affirmed as a non-serious violation, and the proposed penalty of \$500.00 is hereby ordered vacated. That the violations must be abated without delay, but no later than Thirty (30) days from the date hereof.



J. D. ATKINSON, JR.,

HEARING OFFICER.

Dated: January 3, 1978
Frankfort, Kentucky

DECISION NO. 657