



John Y. Brown, Jr.
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

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July 18, 1980

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

KOSHRC #667

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

M. C. WEBB, INC.

RESPONDENT

DECISION AND ORDER
OF REVIEW COMMISSION

Before, STANTON, Chairman; UPTON and ROBERTS, Commissioners.

STANTON, Chairman, for the majority.

A Recommended Order of Hearing Officer L. Stanley Chauvin, Jr., issued under date of April 23, 1980, is currently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Complainant.

Summary of the Case

The Respondent company was engaged in a highway project on Kentucky Route 1 near the border of Lawrence and Carter counties. The particular job involved a bridge replacement and installation of a drainage pipe underneath the roadway.

A trench for the pipe, approximately 4 to 5 feet wide and 4 to 9 feet deep, was cut across the roadway in two segments in order to keep the road open for traffic. The first half of the cut was back-filled before the second portion was excavated.

Two employees of the Respondent were taking measurements in the trench when one side collapsed fatally injuring one worker and seriously injuring the other.

The OSH inspection was conducted the day after the accident and in the interim the trench was backfilled, at the direction of the state police, in order to maintain traffic flow upon the roadway.

The initial issue addressed by the Hearing Officer below concerns the scope of review jurisdiction in the case. Mr. Chauvin finds that the words "contest," "penalty," etc., as used in a Respondent's notice of contest, are words of art and a liberal interpretation of the legal meaning of these terms should prevail. The decision concludes that a liberal interpretation of this Respondent's notice of contest places the substantive violation and the penalty proposal within the jurisdiction of the Review Commission.

Reviewing the record presented, the Hearing Officer finds that it was not clearly established that the trench material was soft or unstable and further the evidence does not clearly and convincingly show whether the trench was five feet or more in depth.

The Hearing Officer concludes that the Complainant has failed to sustain the burden of proof required therefore the alleged serious violation of 29 CFR 1926.652(b) is dismissed along with the proposed penalty of \$560.

Decision of the Commission Majority

The first issue we must face on review concerns the scope of our jurisdiction in this action.

The Respondent's notice of contest appears to be limited by its terms to the penalty proposal: "Please be advised that we wish to contest the proposed penalty as of your notice dated September 14, 1979, and received in this office September 18, 1979."

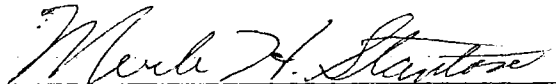
As noted above, the Hearing Officer has concluded that a liberal interpretation should be given to the legal meaning of the terms employed in the Respondent's contest and a liberal interpretation in this case places both the substantive violation and penalty proposal within the scope of our jurisdiction.

The Hearing Officer's position on this issue is in direct conflict with our prior rulings on the jurisdictional effect of the wording and drafting of the letter of notice of contest.

We hereby reverse the Hearing Officer and reaffirm our ruling that a letter of contest protesting the penalty proposal only does not place in issue the substantive violation or abatement date and those elements of the citation become final and unreviewable orders of this Commission pursuant to KRS 338.141(1).

In light of the foregoing, therefore, the sole issue for our consideration is the appropriateness of the proposed penalty assessment. We find that the conditions and hazard in existence clearly warrant the serious penalty as proposed by the Labor Department.

Now therefore IT IS ORDERED AND ADJUDGED that the serious violation of 29 CFR 1926.652(b) has become a final and unreviewable order of this Commission pursuant to and by operation of KRS 338.141(1). The penalty proposal of \$560 is deemed appropriate, the Hearing Officer's dismissal of such penalty is REVERSED and the penalty is hereby REINSTATED.


Merle H. Stanton, Chairman

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

ROBERTS, Commissioner, dissenting:

Upon careful consideration of the merits of the alleged serious violation, I find the testimony to support the rationale employed by the Hearing Officer in recommending dismissal of the violations and proposed penalty.


John C. Roberts, Commissioner

DATED: July 18, 1980
Frankfort, Kentucky

DECISION NO. 889

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

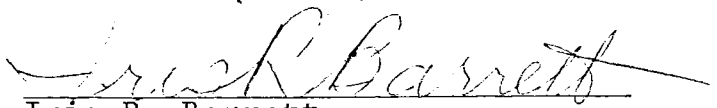
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This 18th day of July, 1980.


Iris R. Barrett
Executive Director