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JULIAN M. CARROLL

WENDE H. FORD

GOVERNOR

IRIS R. BARRETT

EXECUTIVE DIRECTOR

KOSHRC  
Decision &  
Order # 99

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 10, 1975

H. L. STOWERS

CHAIRMAN

MERLE H. STANTON

MEMBER

CHARLES B. UPTON

MEMBER

KOSHRC # 74

COMMISSIONER OF LABOR,  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SOUTHERN PLUMBING AND PIPING, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,  
Commissioners.

STANTON, COMMISSIONER:

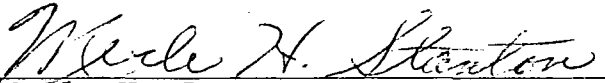
A Recommended Order of Hearing Officer Lloyd Graper dated February 6, 1975, is before the Commission for review upon my direction. That Recommended Order shall be and hereby is affirmed in all respects not inconsistent with the following concurring opinion.

Upon thorough review of the record, the Review Commission acknowledges the existence of some elements of proof of Complainant's contention that an employee of Respondent was seen working in the north end, unshored section of the subject trench. The Commission is unable to arrive at this conclusion, however, inasmuch as the Department of Labor failed to adduce sufficient concrete evidence at hearing to adequately support such a finding.

It is the further opinion of this Commission that the failure on the part of the Complainant's Compliance Officer to take soil samples at the subject inspection site and to procure soil stability analyses of such samples seriously weakened Complainant's case, and was a major cause of its failure to sustain its burden of proof on that issue at hearing.

It is the contention of this Review Commission that a citation under 29 CFR 1926.652(b), relating to trench shoring of unstable soil, might have been properly sustained, in light of the Compliance Officer's testimony that the soil in Respondent's trench was "not...compact." Inasmuch as the Complainant had instead cited Respondent under 29 CFR 1926.652(c), relating only to "hard or compact soil," the Department of Labor appears to have frustrated its own intent in failing to cite a more appropriate and readily applicable standard.

Accordingly, the Review Commission hereby affirms dismissal of Complainant's citation for serious violation of 29 CFR 1926.562(c) and the penalty proposed, modifies the judge's decision to be consistent herewith, and affirms that decision in all other respects.

  
Merle H. Stanton  
Commissioner

Concurring:

/s/ H. L. Stowers  
H. L. Stowers, Chairman

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

Date: March 10, 1975  
Frankfort, Kentucky  
Decision No. 99

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  
Commonwealth of Kentucky  
Attention: Honorable Michael D. Ragland  
OSHA Coordinator

Honorable Earl Cornett, General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Robert D. Hawkins  
Assistant Counsel

Southern Plumbing and Piping, Inc. (Certified Mail #775258)  
1313 Bernheim Lane  
Louisville, Kentucky 40210  
Attention: John E. Ralston  
Superintendent

This 10th day of March, 1975.

  
Iris R. Barrett  
Executive Director

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ACK  
SEN

JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT  
EXECUTIVE DIRECTOR



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

**REVIEW COMMISSION**

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

March 10, 1975

H. L. STOWERS  
CHAIRMAN

MERLE H. STANTON  
MEMBER

CHARLES B. UPTON  
MEMBER

KOSHRC # 74

COMMISSIONER OF LABOR,  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SOUTHERN PLUMBING AND PIPING, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON,  
Commissioners.

STANTON, COMMISSIONER:

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Upon thorough review of the record, the Review Commission acknowledges the existence of some elements of proof of Complainant's contention that an employee of Respondent was seen working in the north end, unshored section of the subject trench. The Commission is unable to arrive at this conclusion, however, inasmuch as the Department of Labor failed to adduce sufficient concrete evidence at hearing to adequately support such a finding.

It is the further opinion of this Commission that the failure on the part of the Complainant's Compliance Officer to take soil samples at the subject inspection site and to procure soil stability analyses of such samples seriously weakened Complainant's case, and was a major cause of its failure to sustain its burden of proof on that issue at hearing.

It is the contention of this Review Commission that a citation under 29 CFR 1926.652(b), relating to trench shoring of unstable soil, might have been properly sustained, in light of the Compliance Officer's testimony that the soil in Respondent's trench was "not...compact." Inasmuch as the Complainant had instead cited Respondent under 29 CFR 1926.652(c), relating only to "hard or compact soil," the Department of Labor appears to have frustrated its own intent in failing to cite a more appropriate and readily applicable standard.

Accordingly, the Review Commission hereby affirms dismissal of Complainant's citation for serious violation of 29 CFR 1926.652(c) and the penalty proposed, modifies the judge's decision to be consistent herewith, and affirms that decision in all other respects.

Merle H. Stanton  
Merle H. Stanton  
Commissioner

Concurring:

/s/ H. L. Stowers  
H. L. Stowers, Chairman

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

Date: March 10, 1975  
Frankfort, Kentucky  
Decision No. 99

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**JULIAN M. CARROLL**

GOVERNOR

**IRIS R. BARRETT**  
EXECUTIVE DIRECTOR

**KENTUCKY OCCUPATIONAL SAFETY AND HEALTH**

**REVIEW COMMISSION**

CAPITAL PLAZA TOWER

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

February 6, 1975

**H. L. STOWERS**  
CHAIRMAN

**MERLE H. STANTON**  
MEMBER

**CHARLES B. UPTON**  
MEMBER

KOSHRC # 74

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SOUTHERN PLUMBING AND PIPING, INC.

RESPONDENT

NOTICE OF RECEIPT OF DECISION,  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND 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 of our hearing officer, the Honorable Lloyd Graper, has been received and 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.

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 by the hearing officer in this matter is called for review and further consideration by a member of this Commission within 30 days of this date, 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 filed 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  
Commonwealth of Kentucky  
Attention: Honorable Michael D. Ragland  
OSHA Coordinator

Earl M. Cornett, General Counsel  
Department of Labor  
Frankfort, Kentucky 40601  
Attention: Robert D. Hawkins  
Assistant Counsel

Southern Plumbing and Piping, Inc. (Certified Mail # 775033)  
1313 Bernheim Lane  
Louisville, Kentucky 40210  
Attention: John E. Ralston  
Superintendent

This 6th day of February, 1975.

  
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Iris R. Barrett  
Executive Director

COMMONWEALTH OF KENTUCKY  
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC DOCKET NO. 74

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

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

SOUTHERN PLUMBING AND PIPING, INC.

RESPONDENT

\* \* \* \* \*

Hon. Robert D. Hawkins, Assistant Counsel, Department of Labor,  
Frankfort, Kentucky 40601, for Complainant.

Messrs. John Ralston and Mark Ralston for Southern Plumbing & Piping,  
Inc., the Respondent, Louisville, Kentucky.

GRAPER, Hearing Officer.

An inspection was made on August 1, 1974, by the Kentucky Department of Labor, Division of Occupational Safety and Health, at a place of employment located at 2925 Hale Avenue, Louisville, Kentucky, described as a place where respondent was installing storm sewers for equipment discharge. On the basis of such inspection, citations were issued on August 13, 1974, charging respondent with five non-serious and one serious violation of the provisions of KRS Chapter 338 (Kentucky Occupational Safety and Health Act of 1972).



The non-serious violations were not contested. Only the alleged serious violation which charged that the standard, regulation or section of KRS Chapter 338 allegedly violated was 29 CFR 1926.652(c) as adopted by OSH 12-2 and which described the alleged violation as follows was challenged:

The sides of a trench 150 feet long by three (3) feet wide that sloped from a depth of six (6) feet five (5) inches to nine (9) feet ten (10) inches running north and south at 2925 Hale Avenue in hard compact soil at top four (4) feet and soft to base, were shored with metal panels one-eighth (1/8) inch or less in thickness by twenty-one (21) inches wide by ten (10) feet long, and held in place by two (2) screw jacks for each panel. Four (4) panels spaced three (3) and four (4) feet apart were in use to protect three (3) employees working within the trench and between panels.

An abatement date of August 22, 1974, and a penalty of \$550.00 was proposed.

A Notice of Contest was received on August 21, 1974, and on August 28, 1974, was, together with a copy of the Citation and the Notice of Proposed Penalty transmitted to and received by the Kentucky Occupational Safety and Health Review Commission. A Complaint was filed on September 5, 1974, and, on the same date, a Notice of Receipt of Contest was mailed to the Complainant and Respondent. A Certification of Employer form was filed on August 30, 1974.

On October 2, 1974, the case was assigned to the Hearing Officer, and on the same date, a Notice of Hearing was mailed. Pursuant to such Notice, a hearing was held on October 18, 1974, at 10:00 a.m. at the District #5 Bureau of Highways Office, 977 Phillips Lane, Louisville, Kentucky, under the provisions of KRS 338.071(4), one of the provisions

of Chapter 338 of the Kentucky Revised Statutes 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 the procedural aspect of its hearings. Under the provisions of KRS 338.081 hearing authorized by the provisions of such Chapter may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing an appeal, the Review Commission may sustain, modify, or dismiss a citation or penalty.

At the hearing, the Complainant moved for default judgment, the Respondent not having filed a formal Answer. The Complainant not having shown any prejudice by reason thereof, the motion was overruled.

After hearing the testimony of the witnesses, and having considered the same together with the exhibits and the stipulations, and the representations of the parties, it is concluded that the substantial evidence on the record considered as a whole supports the following findings of fact:

#### FINDINGS OF FACT

It is found as fact that the soil in question was hard or compact soil. The Compliance Officer testified that he did not get down in the ditch, that he did not take any soil samples, and that he just looked at the trench, and that he based his analysis on general familiarity with the types of soil in the Louisville area,

believing this to be river bottom soil, a silt type of soil instead of limestone, hardrock, like would appear on top of a hill. Mr. John Ralston, testifying for the Respondent, indicated that the ground was yellow clay and that it was hard all the way to the bottom of their deepest end of the ditch and that it was deep grooved from the tractor bucket's teeth at the deepest part of the ditch, and that the Compliance Officer may have been misled that the bottom of the ditch was soft because they had put sand in it to lay the pipe on to make a good bed for it.

It is further found that the record is devoid of any evidence from which it can be determined that there was a substantial probability that death or serious physical harm could result from the condition alleged to have existed.

Upon the basis of the foregoing, the Hearing Officer makes the following:

#### CONCLUSIONS OF LAW

Under table P-2, under Section 1926.652, a trench 5 to 10 feet in depth with hard, compact earth, requires uprights of a minimum dimension of 3 by 4 inches or 2 by 6 inches spaced a minimum of 6 feet apart. For a trench of up to 3 feet in width, cross braces of 2 by 6 inches are required and maximum verticle spacing of 4 feet and horizontal spacing of 6 feet is permitted. The table also provides that trench jacks may be used in lieu of or in combination with cross braces and that, where desirable, steel sheet

piling and bracing of equal strength may be substituted for wood. It is concluded that the shoring used which consisted of 3/16" thick steel plate with verticle edges rolled two inches to a 90 degree angle; four 1-inch schedule 40 pipe braces, one at top and bottom and the other two spaced equally apart are welded into place; and two screw jacks for each panel, which jacks were made with 10-inch by 10-inch by 3/16-inch plate welded to the jacks, which jacks then covered about half the width of the panel each served, eliminating a possibility of kicking sideways, were of equal or greater strength than the wood bracing specified.

Additionally, no evidence was presented to justify the finding of a serious violation under the provisions of KRS 338.991(12).

There being no violation of the standard 29 CFR 1926.652(c) as adopted by OSH 12-2, the citation and the penalty proposed as to it should be dismissed.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation charging a serious violation, and the penalty proposed, should be and it is hereby dismissed with prejudice.

  
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LLOYD GRAPER  
HEARING OFFICER, KOSHRC

DATED: February 6 , 1975  
Frankfort, Kentucky

Decision No. 88