

ww



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

AIRPORT BLDG., LOUISVILLE RD., (U.S. 60-WEST)

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

May 11, 1981

JOHN Y. BROWN, Jr.
GOVERNOR

JOHN C. ROBERTS
CHAIRMAN

CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

KOSHRC #794

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SKILTON CONSTRUCTION COMPANY

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Timothy T. Green, issued under date of February 25, 1981, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Summary of the Case

The case below involves alleged serious violation of 29 CFR 1926.652(b), 1926.652(e), 1926.651(i)(1) and 1926.652(h) (as adopted by 803 KAR 2:030). A penalty of \$350 was proposed.

At the outset of the hearing the Respondent admitted violation of 29 CFR 1926.652(h). The Recommended Order sustains the violations as alleged and imposes a penalty of \$350.

hbl

Decision of the Commission

The Respondent has set forth, in its answer, at the hearing and by way of briefs, various claims alleging improper inspection procedures which violated specific rights provided by the statute and regulations. Specifically, Skilton claims that the inspector had been at the job site and had taken photographs prior to the official inspection date, without identifying himself, presenting credentials or advising the employer or employees of their rights. The Respondent further questions the number of inspections they have been subjected to on a statewide basis.

As noted by the Hearing Officer below, these charges go to the very heart of this case and must be addressed at the outset.

Compliance Officer Townsend has stated, under oath, that he properly presented his credentials, held an opening conference and afforded Mr. Gibson, the Respondent's superintendent, an opportunity to accompany him on the actual walkaround inspection. This testimony is not controverted in the record.

The Compliance Officer has further testified, under oath, that the seven photographs introduced as Complainant's exhibits, were made on July 23, 1980, the inspection date and the only time he was on the site.

Mr. Townsend and his supervisor both explained the reason for frequent inspection of construction contractors and further noted that any failure to inspect other contractors which may have been on the site is not relevant to Skilton's citation.

Hearing Officer Green concludes that the inspection was made on July 23, 1980, in compliance with the purposes and directives of the Act. This finding is amply supported by the record and is hereby affirmed.

A second issue in this case involves the obvious discrepancies between the seven photographic exhibits introduced by the Complainant and the two photographs submitted by the Respondent. Although a significant amount of time and energy has been expended on this issue below, we do not believe the issue merits such attention.

The Complainant's photographs were properly introduced after being identified and described by the Compliance Officer. The Respondent's photos were introduced at the conclusion of the hearing without establishment of a proper foundation. The Respondent's representative, Mr. Bowman, stated that the photos were taken by an employee of a subcontractor. This photographer was not present and subject to cross examination, and the date on which these photographs were taken was never clearly established by testimony under oath.

Compliance Officer Townsend clearly stated that his photographs were taken on the inspection date whereas Mr. Gibson expressed confusion regarding the Complainant's exhibits as well as the site conditions on various dates. (T.R., pp. 105-109, 123.)

The trench at issue in this action measured 165 feet in length, 6 feet deep and 3 feet wide at the base. (T.R., p. 27.)

The photos introduced by both parties indicate that the sides of the trench are not shored, sheeted, braced or otherwise supported to protect employees.

The Hearing Officer finds that the trench was not adequately sloped to protect employees working within. We affirm the finding as amply supported by the record.

The instability and fill nature of the material in which this trench was excavated is clearly established by testimony of the Compliance Officer and the Respondent's witness.

In light of the above-noted findings, we agree with the Hearing Officer's determination that a violation of 29 CFR 1926.652(b) has been established.

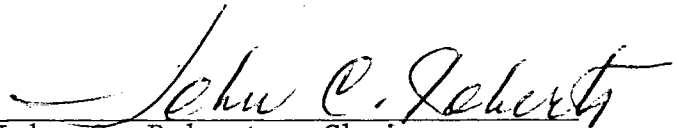
The record establishes that the trench was in close proximity to a well-traveled roadway and heavy machinery was operated in close proximity to the excavation. Additional precautions by way of shoring and bracing were not taken to prevent slides or cave-ins from these conditions. The finding of a violation of 29 CFR 1926.652(e) is supported by the record and is hereby affirmed.

The photographic exhibits and testimony supports the finding of a violation of 29 CFR 1926.651(i)(1). We hereby affirm the Hearing Officer's disposition of this change.

The Respondent has admitted the violation of 29 CFR 1926.652 (h).

ORDER

IT IS THE UNANIMOUS ORDER of this Commission that the Recommended Order, sustaining a serious violation of 29 CFR 1926.652(b), 1926.652(e), 1926.651(i)(1) and 1926.652(h) (as adopted by 803 KAR 2:030) is hereby AFFIRMED. The penalty of \$350 is likewise AFFIRMED. All other findings of the Hearing Officer not inconsistent with this opinion are incorporated herein.


John C. Roberts, Chairman

s/Carl J. Ruh
Carl J. Ruh, Commissioner

s/Charles E. Braden
Charles E. Braden, Commissioner

DATED: May 11, 1981
Frankfort, Kentucky

DECISION NO. 999

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

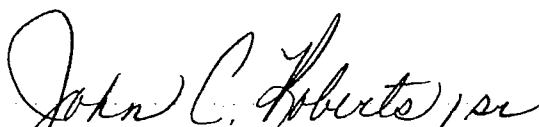
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Frederick G. Huggins (First Class Mail)
Deputy General Counsel
Department of Labor
801 West Jefferson Street
Louisville, Kentucky 40202

Mr. Paul L. Bowman (Cert. Mail #P27 9171703)
Skilton Construction Corp.
4610 Schuff Avenue
P. O. Box 32006
Louisville, Kentucky 40232

Skilton Construction Corp. (First Class Mail)
1360 Pridemore Court
Lexington, Kentucky 40505

This 11th day of May, 1981.



John C. Roberts, Chairman
KOSH Review Commission

ww

3-22
4-6

tbl



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

REVIEW COMMISSION
Airport Bldg., Louisville Road

MERLE H. STANTON
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

FRANKFORT, KENTUCKY 40601

Carl J. Ruh
MEMBER

PHONE (502) 564-6892

JOHN C. ROBERTS
MEMBER

February 25, 1981

KOSHRC # 794

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

SKILTON CONSTRUCTION CORPORATION

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.

tbl

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:

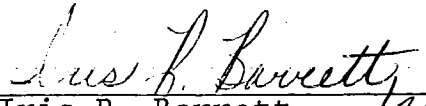
Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Frederick G. Huggins (First Class Mail)
Deputy General Counsel
Department of Labor
801 West Jefferson Street
Louisville, Kentucky 40202

Mr. Paul L. Bowman (Cert. Mail # 0067053)
Skilton Construction Corp.
4610 Schuff Avenue
P. O. Box 32006
Louisville, Kentucky 40232

Skilton Construction Corp. (First Class Mail)
1360 Pridemore Court
Lexington, Kentucky 40505

This 25th day of February, 1981.



Iris R. Barrett
Executive Director

KENTUCKY OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION

KOSHRC #794

EUGENE F. LAND,
COMMISSIONER OF LABOR,
COMMONWEALTH OF KENTUCKY

COMPLAINANT

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

SKILTON CONSTRUCTION CORPORATION

RESPONDENT

APPEARANCES:

Hon. Frederick G. Huggins
Department of Labor
801 W. Jefferson Street
Louisville, KY 40202
Attorney for Complainant

Paul L. Bowman
Skilton Construction Corp.
4610 Schuff Avenue
P. O. Box 32006
Louisville, KY
Representative for Respondent

Hon. Timothy T. Green
Harbison, Kessinger, Lisle & Bush
400 Bank of Lexington Building
101 East Vine Street
Lexington, Kentucky 40507
Hearing Officer

* * * * *

This case originated as a result of an inspection conducted on July 23, 1980, by a Compliance Officer of the Department of Labor, at a place which employees of the Respondent were employed. The Respondent company is located at 4610 Schuff Avenue, in Louisville, Kentucky, and is engaged in the business of excavating and pipeline construction.

As a result of the inspection on July 23, 1980 of a construction site on the northwest side of the High Street

Bridge in Lexington, Kentucky, one alleged serious violation citation was issued as follows:

- (a) An alleged violation of 29 CFR 1926.652 (b) in that the size of a trench approximately 160 feet long, 6 feet wide and 6 feet deep located on the northwest side of the High Street Bridge were not shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect employees working within them.
- (b) An alleged violation of 29 CFR 1926.652 (e) in that additional precautions by way of shoring and bracing were not taken to prevent slides or cave-ins in the trench where the trench was subjected to vibrations from highway traffic and the operation of heavy machinery.
- (c) An alleged violation of 29 CFR 1926.651 (i) (1) in that fill back dirt, rock, and other material were not stored and retained at least two feet or more from the edge of the trench.
- (d) An alleged violation of 29 CFR 1926.652 (h) in that adequate means of exit such as a ladder or steps and located so as to require no more than 25 feet of lateral travel were not provided in the trench.

The violations alleged above were considered to be serious within the meaning of the Act, and the abatement date of August 4, 1980 was proposed, and a proposed penalty of \$350.00 was proposed for the grouped violations. A hearing was held on October 30, 1980, under the provisions of KRS 338.071 (4), one of the provisions dealing with the safety and health of the 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 hearing. Under the provisions of KRS 338.081, a hearing was authorized by

the provisions of said chapter and as such 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.

The pertinent procedural information is as follows:

1. Inspection of the premises on July 23, 1980 at the northwest side of the High Street Bridge in Lexington, Kentucky, the place of operation of the Respondent company.

2. One citation was issued on July 29, 1980, alleging four (4) serious violations of the Act and Standards.

3. Notice of Contest was received on August 14, 1980, contesting the items above stated. Notice of Receipt of Contest was mailed on August 22, 1980, and certification of employer form was received August 27, 1980.

4. Complaint was received September 10, 1980.

5. Response by the Respondent, SKILTON CONSTRUCTION CORPORATION, was received September 16, 1980.

6. The case was assigned to a Hearing Officer on September 23, 1980 and a hearing was held on October 20, 1980 at the First National Building, 167 West Main Street, Lexington, Kentucky.

7. At the beginning of said hearing, the Respondent admitted violation 29 CFR 1926.652 (h) in that an adequate means of exit such as ladder or steps located so as to require no more than 25 feet of lateral travel was not provided in the trench.

8. Brief for the Complainant was received on September 26, 1980 and the Respondent's Brief was received on February 5, 1981.

DISCUSSION OF EVIDENCE

In the opening statement by the representative of the Respondent, it was alleged that the inspection by the Compliance Officer of the Department of Labor, Calvin Mitchell Townsend, that was held on July 23, 1980, was an illegal inspection. Mr. Bowman stated that rights of the Respondent were violated due to the method the Department of Labor used in making the inspection, and that it was the opinion of the Respondent that the photographs that were taken by the inspector were taken on the day prior to the inspection and done by the Compliance Officer without identifying himself to the Contractor - Respondent.

Since this allegation goes to the heart of the validity of the inspection, it is important to deal with this first. After being duly sworn, Calvin Mitchell Townsend, the Compliance Officer stated that he arrived at the construction site on July 23, 1980, and held an opening conference with Mr. Finus Gibson, superintendent of the work site for the Respondent, at which time Mr. Townsend presented Mr. Gibson with his credentials, stated his purpose and held the opening conference. (TE 16-17). Mr. Gibson testified that the Compliance Officer did introduce himself and present his credentials at the opening conference. (TE 122) Both parties introduced photographs into proof and the Respondent argued that the difference

in the photographs indicated that the Respondent's photographs were taken on different days from the Complainant's photographs. The Complainant argued that the difference in the hue of the photographs was merely a difference in camera and exposure.

The Complainant offered a series of 7 photographs taken at different angles showing a trench approximately 160 feet long, 6 feet in depth and 3 feet wide at the bottom (Complainant's Exhibits A, B, D, E, F, G, H). The Exhibits also identify a junction area where 2 pipes were to connect at the end of the 160 foot long trench, said area being approximately 7 feet in depth, 10 feet long and 18 feet wide. This junction area was at the west end of the 160 foot long trench. Numerous photographs (Complainant's Exhibits A, B, E, and F) showed 1 or 2 employees working within the trench. Complainant's Exhibits A, B, E, and F all showed heavy machinery on the edge or close to the edge of the open trench.

Complainants also offered into evidence (Complainant's Exhibit C) a diagram prepared by Compliance Officer Townsend, showing the proper angle of repose as the Compliance Officer understood the Table in 29 CFR 1926.652 at Table P-1.

The Respondents offered into evidence 2 photographs (Respondent's Exhibit A and B) showing the trench in question on the day of the inspection. Respondent's Exhibit B shows Respondent's superintendent, Gibson, standing in the trench holding an eight foot rod approximately shoulder level to indicate that the approximate width of the trench at its apex was 8 feet.

Testifying on behalf of the Complainant were Calvin Mitchell Townsend, the Compliance Officer who made the inspection and Howard Whitley, a supervisor for the Kentucky Department of Labor, Division of Occupational Safety & Health. Testifying on behalf of the Respondent was Mr. Finus Gibson, Jr. of 3016 Stanford Drive, Lexington, Kentucky, the superintendent of Skilton Construction Corporation.

DISCUSSION OF CASE

It was the position of the Respondent that the Compliance Officer made an illegal entry onto the premises inspected on July 22, 1980, and took the photographs which the Complainant offered into evidence. The Respondent further maintained that on July 23, 1980, the date of the inspection, that the Compliance Officer did not identify himself properly to the Superintendent for the Respondent, Gibson, and did not advise Gibson of his legal rights concerning the inspection and a right to demand a search warrant.

On direct examination, Compliance Officer Townsend testified that the only visit to the construction site by Townsend was on the date of the inspection and that a proper opening conference was held prior to a walk-around inspection and a closing conference. (TE 14) The Respondent's own witness, Gibson, affirmed the testimony of Townsend when asked if Townsend, in fact, presented his credentials. (TE 122) Gibson responded that he had. Compliance Officer Townsend denied entry of the premises on July 22, 1980, and no proof was offered by the Respondent to the contrary. Therefore, it is the opinion of the Hearing Officer that no

illegal entry was made on the premises prior to the inspection. The weight of the testimony offered by both the Complainant and Respondent leaves the Hearing Officer to conclude that the inspection that was in fact made on July 23, 1980, was in compliance with the Act, its purpose and directives.

Having disposed of the threshold matter of illegal entry and illegal inspection, we now turn to the validity of the three (3) individual serious citations which were contested by the Respondent-Employer. First we have an alleged violation of 29 CFR 1926.652 (b) in that the size of the trench which was approximately 160 feet long, 6 feet wide and 6 feet deep were not shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect employees working within the trench. It is undisputed that the trench was approximately 160 feet long, 6 feet deep and 3 feet wide at the base. (TE 25) All of the evidence by way of photographs presented by both parties indicated that the sides of the trench were not shored, sheeted, braced or otherwise supported by means of sufficient strength to protect the employees working within the trench. (TE 29)

The Respondent has argued that the trench was properly sloped or that the angle of repose as set out in 29 CFR 1926.652 at Table P-1 was satisfactory within the Standard. It is uncontroverted that the trench in question was 6 feet deep or more. Respondent's Exhibit B indicates that the trench at its apex was 8 feet wide.

The angle of repose indicates how much slope is required for a given depth in a trench. The Respondent has the option of shoring the trench or providing an adequate angle of repose. 29 CFR 1926.652 (g) (2) the table showing the approximate angle of repose indicates that the width of the trench at its apex should be a minimum of 9 feet for a trench 6 feet deep and 3 feet wide at its bottom in an area where the soil is unstable or soft. (TE 30, 31) Respondent's Exhibit B admits the trench was not adequately sloped.

Respondent contested the interpretation of the Complainant's Compliance Officer stating that the soil was unstable. On direct testimony (TE 33-35) Townsend testified that the area had been filled, that the soil was not a natural contour, and that rock had been brought in creating unstable characteristics for the soil. On examination by the Hearing Officer, Mr. Gibson, witness for the Respondent (TE 115-119) testified that the material in which the trench was placed was quarry stone that could not be compacted. It was loose rock (TE 118).

It is the opinion of the Hearing Officer that the Respondent did in fact violate 29 CFR 1926.652 (b) in that the trench was over 5 feet in depth in unstable material and that the sides of the trench were not shored, sheeted, braced or otherwise supported by means of sufficient strength to protect employees working therein. Further, it is the opinion of the Hearing Officer that the angle of repose was not satisfactory, and that a violation of this Standard did in fact occur.

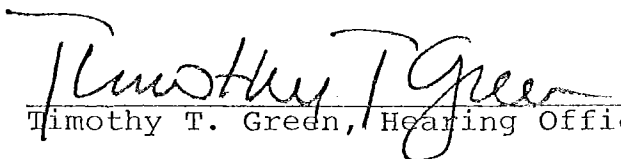
Complainant's Exhibits A, B, D, E, F, and Respondent's Exhibits A and B all indicate that the trench was exposed to the operation of heavy machinery and possible vibrations from highway traffic which would require the Respondent to comply with 29 CFR 1926.652 (e) and providing additional precautions by way of shoring and bracing to prevent slides and cave-ins in the trench thus exposed. The testimony indicates and the Respondent admits that the additional precautions were not taken, and therefore, it is the opinion of the Hearing Officer that this Standard was violated.

Complainant's Exhibit A, B, D, E, F, and G as well as Respondent's Exhibit's A and B indicate that back fill dirt, rocks, and other material were stored at the edge of the trench in question and were not retained at least 2 feet or more from the edge of the trench. Therefore, it is the opinion of the Hearing Officer that the Respondent violated 29 CFR 1926.651 (i) (1) in that fill back dirt, rocks, and other material were not stored or retained at least 2 feet or more from the edge of the trench.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that Item 6 (a) of the Complainant's Complaint, consisting of a violation of 29 CFR 1926.652 (b), violation of 29 CFR 1926.652 (e), violation of 29 CFR 1926.651 (i) (1), and violation of 29 CFR 1926.652 (h) are hereby sustained and that the penalty for \$350.00 is likewise sustained.

DATED: February 25, 1981
Frankfort, Kentucky


Timothy T. Green, Hearing Officer

DECISION NO. 981