



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

**REVIEW COMMISSION**

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

FRANKFORT, KENTUCKY 40601

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May 26, 1981

JOHN Y. BROWN, Jr.  
GOVERNOR

JOHN C. ROBERTS  
CHAIRMAN

CARL J. RUH  
MEMBER

CHARLES E. BRADEN  
MEMBER

KOSHRC #809

COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

HURST-ROSCHE ENGINEERS, INC.

RESPONDENT

DECISION AND ORDER OF  
REVIEW COMMISSION

Before ROBERTS, Chairman; RUH and BRADEN, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Wayne Waddell, issued under date of March 3, 1981, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Summary of the Case

The Respondent in this action has been issued a citation alleging a violation of KRS 338.031(1)(a), the statutory general duty clause, and proposing a penalty of \$540. A description of the alleged violation states: The employer did not furnish his employees a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm in that proper road signs were not erected on Highway Ky. 80 in Knott County during the course of the construction.

The inspection in this action was conducted on August 4 and 5, 1980, along a section of Kentucky Highway 80 under construction in Knott County. An employee of the Respondent, Hurst-Rosche Engineers, Inc., the consulting engineer on the project, was involved in a fatal accident at approximately 7:50 a.m. on August 1, 1980. The employee, traveling along the roadway in his private vehicle at a high rate of speed, was killed when his vehicle collided head-on with a truck. The fatal accident prompted the investigation inspection.

The Respondent in this case, Hurst-Rosche Engineers, Inc., was the Consulting Engineers; there was a general road construction contracting firm or prime contractor; and one other employer, a trucking company, working in the particular area involved in this situation at the time of this citation. Seven or eight employees of Hurst-Rosche worked at various locations along the construction site.

The Hearing Officer finds and concludes that the evidence presented focuses too strongly upon the fatal accident rather than on the conditions existing at the place of employment. It is further concluded that an employer on a multiple-employer site must take affirmative, realistic measures to protect its employees from exposure to hazards including those which are created by others and abatement of which is beyond their control.

#### DECISION OF THE COMMISSION

We agree with the Hearing Officer's initial determination that the occurrence of the fatal event is not the appropriate focus for this administrative proceeding. The Occupational Safety and Health Act and standards constitute a preventive and remedial program designed to produce a safe and healthful workplace through recognition and abatement of hazardous conditions.

Hurst-Rosche has been cited for an alleged violation of the statutory general duty clause. The statute is something of a catch-all designed for situations in which employees are exposed to hazards that are not specifically covered by a safety or health standard, but the statute does not subject the employer to strict liability.

The erection of warning signs would be more for the information of the local traveling public rather than for employees working in that location. Employees working in areas such as road construction know of the increased risk element in that type of work and should be so instructed to take special precaution for their own safety. There was no showing here of any lack of safety instruction.

Complainant has failed to show that the Respondent did not take affirmative and/or realistic measures to protect its employees from exposure to the hazard of failure to post warning signs as charged in the citation.

It is an accepted, well-known and usual procedure in the construction of roads that some public travel occurs on a large portion of newly constructed roadways and this is a part of the assumed risk in the road construction industry. There is a certain amount of danger inherent in many areas of work, and the employer of employees must make every feasible effort to protect the worker, but they cannot be insurers of safety nor can they protect from every possible danger, such as the traveling public's negligence.

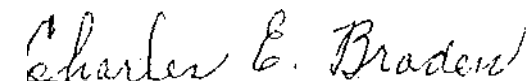
It is found by this Commission that it was not the responsibility of this Consultant Engineer-Respondent to erect road signs during the course of the construction on Highway 80 in Knott County, Kentucky. It is further found that since it was one of three employers working at this site, the duty to it <sup>Employee's ND. St. O. protect</sup> was the action of duty of another employer. Under -KRS-338-:0311-1) (a) if this Employer did not have the duty to erect the warning signs, and we so find, then its responsibility was to protect its employees, and we find no evidence shown to demonstrate such a lack of protection.

ORDER OF THE COMMISSION

IT IS THE UNANIMOUS ORDER of this Commission that the Recommended Order, sustaining a violation of KRS 338.031(1)(a) and a penalty of \$100 is hereby REVERSED. The alleged violation and penalty proposal are DISMISSED. All findings and conclusions of the Hearing Officer not inconsistent with this order are adopted and incorporated herein.

  
John C. Roberts, Chairman

L1-4./  
Carl J. Ruh, Commissioner

  
Charles E. Braden, Commissioner

DATED: May 21, 1981  
Frankfort, Kentucky

DECISION NO. 1010

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH  
REVI OMISSION  
KOSHRC #809

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COMMISSIONER OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

FINDINGS OF FACT

W AND

RECOM ENDED ORDER

HURST-ROSCHKE ENGINEERS, INC.

RESPONDENT

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For the Complainant: Hon. Kenneth J. Costelle, Assistant Counsel,  
Department of Labor; Douglas Jones, Compliance Officer

For the Respondent: Hon. Sam G. McNamara, Julian McElvoy

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Procedural Information

A compliance Officer from the Kentucky Department of Labor, Occupational Safety and Health Program, conducted an inspection on August 4 and 5, 1980, at a road construction site on Kentucky Highway 80 just west of Hindman, Kentucky. As a result of the aforementioned inspection, a citation was issued to the Respondent alleging a violation of KRS Chapter 338;

KRS 338.031 (1) Each employer:

- (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

The description of the alleged violation states:

The employer did not furnish his employees a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm in that proper road signs were not erected on Highway Ky. 80 in Knott County during the course of the construction.

The alleged violation is designated as serious in nature with a proposed penalty of \$540. A five-day abatement period has been established.

1. The inspection was conducted on August 4 and 5, 1980.
2. The citation and proposed penalty of \$540 issued on August 20, 1980.
3. Notice contesting the citation and penalty was received by the Department of Labor on September 9, 1980.
4. Notice of Contest was transmitted to the Review Commission on September 15, 1980.
5. The Complaint was filed on September 29, 1980. An answer was filed on October 6, 1980.
6. The hearing was held as scheduled on November 17, 1980, at the offices of the KOSH Review Commission before Hearing Officer Timothy Green.
7. By order dated January 15, 1981, Mr. Green withdrew from the proceeding and submitted the case record to the Review Commission.
8. By order dated January 21, 1981, the case was reassigned to Wayne Waddell for completion of adjudication by findings of fact, conclusions of law and a recommended order.

Statement of the Case

The inspection in this action was conducted on August 4 and 5, 1980, after a reported fatal accident along a section of Kentucky Highway 80 under construction in Knott County.

Kenneth Click, the fatally injured person, was an employee of the Respondent, Hurst-Rosche Engineers, Inc., the consulting engineer on the project. Hinkle Construction Company was the prime contractor.

According to the Complainant's witness, on August 4, 1980, various forms of public vehicular traffic were using the roadway, a flagman was not posted and a sign stating "Road Open to Local Traffic," or something to that effect, was the only regulatory sign observed. On August 5, 1980, advisory 35 m.p.h. signs and other regulatory signs had been erected. (T.R., 10-17).

The fatal accident occurred at approximately 7:50 a.m. on August 1, 1980. The record indicates that Mr. Click was traveling westbound in his private vehicle at a high rate of speed when he reached the bottom of a grade where construction conditions required that he cross to the eastbound side of the road which was accommodating two-way traffic. In attempting to execute this crossover, the

victim's vehicle collided head-on with an eastbound truck. (T.R., 17-20).

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A sketch-diagram of the accident scene was admitted as Complainant's Exhibit #1. (T. R., 28).

According to the Compliance Officer, speed was the primary reason for the fatal accident. It was stated several times during the testimony that the general or prime contractor is responsible for erecting proper signs on this particular construction job. (T.R., 15-30).

The penalty calculation process was explained for the record. A gravity-based penalty amount of \$900 was reduced to the proposed amount of \$540 by application of penalty reduction factors of 20 percent for size, 10 percent for history and 10 percent for good faith. The penalty worksheets were introduced as Complainant's Exhibit #2. (T.R., 40-44).

A photograph of the westbound roadway at the crossover point was introduced as Complainant's Exhibit #3. A photograph of the eastbound roadway near the accident site was introduced as Complainant's Exhibit #4. (T.R. 48,49).

On cross examination, the Complainant's witness stated that he considered the 4.2 mile road section to be the jobsite. Approximately 8 Hurst-Rosche employees were described as working on this section. It was again stated that the prime contractor is responsible for proper posting. (T.R. 50-55).

The Compliance Officer testified that it was his understanding that the fatal accident occurred at approximately 7:50 a.m. while employees usually reported to work at 7:30 or 8:00 a.m. (T.R., 58).

Mr. Julian McElvoy, project coordinator, was called as a witness for Hurst-Rosche. A plan map of the roadway area was introduced as Respondent's Exhibit #1. Mr. McElvoy noted various positions on the map where "Road Closed to Thru Traffic" signs were posted (T.R. 64-73).

McElvoy testified that seven (7) Hurst-Rosche employees worked along the 4.4 mile stretch, four (4) at the bituminous plant approximately 1500 feet from the roadway, two (2) at the pouring operation who were protected by a 13-inch unfilled

median and one (1) at the lip curb paving machine. These positions were also indicated on Respondent's Exhibit #1. (T.R., 73-77).

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The witness explained that the accident occurred at 7:50 a.m. approximately 3 miles from the employee's work area. The deceased was to report to work at 8:00 a.m. (T.R., 77-78).

A copy of a letter denying worker's compensation benefits for the accident was introduced as Respondent's Exhibit #2. (T.R., 80).

Upon cross examination the witness acknowledged that general public traffic, mainly from Hindman to Hazard, was using the roadway. Mr. McElvoy stated his belief that it is the contractor's responsibility to post the appropriate signs on the job site. (T.R., 80-85).

Respondent's Exhibit #3, the cover sheet for the surfacing plans, was introduced. (T.R., 93).

*Findings of Fact*  
*Conclusions of Law*

After review of the record and consideration of relevant legal authorities, it is apparent that several fundamental issues must be initially addressed in reaching a decision in this case.

Although a fatal accident prompted the inspection and investigation in issue, it must be kept in mind that the Occupational Safety and Health Act and standards are preventative and remedial in nature. The evidence in this case focuses too strongly upon the fatal accident rather than on the conditions existing upon the place of employment.

Respondent's Exhibit #2, a copy of the letter denying compensation benefits, is illustrative of the over-emphasis on the event of occurrence of the accident. The exhibit is introduced to support the position that Mr. Click was on his way to work when the accident occurred and was therefore not an employee covered by the safety and health statute. The record contains ample uncontroverted evidence that the deceased, as well as other employees of Hurst-Rosche, worked and drove

along the roadway while the relevant conditions were essentially identical to those • present on the-date of-the-accident.\_\_\_\_The "employee" status of the deceased at the time of the accident is therefore somewhat irrelevant to the safety and health proceeding.

A second point concerns the multiple employer worksite situation present in this case. At several points in the record the witnesses stated that it is the duty of the general or prime contractor to post the necessary signs on the job. It is, however, a clearly established point of safety and health law that an employer on a multi-employer site cannot avoid its statutory duty by contract or an understanding with other contractors or employers.

Further, the decisions have consistently held that an employer on a multiple employer site must take affirmative or realistic measures to protect its employees from exposure to hazards even if those hazards are created by others and abatement is beyond their control.

There is a specific safety standard applicable to the situation at hand in this case.

1926.200(g) Traffic signs (1) Construction areas shall be posted with legible traffic signs at points of hazard.

(2) All traffic control signs or devices used for protection of construction workers shall conform to American National Standards Institute D6.1 - 1971, Manual on Uniform Traffic Control Devices for Streets and Highways.

The aforementioned standard is, however, mandatory only for employers engaged in construction work as defined in 29 CFR 1910.12. Under the rationale set forth in the federal case of Skidmore, Owings & Merrill 1977-78 OSHD (22,101), this Hearing Officer finds that the construction standards are not directly applicable to Hurst-Rosche as a consulting engineer for the project.

The inapplicability of a standard does not, however, relieve the Respondent }from all responsibility. The citation in this action alleged violation of KRS 338.031(1)(a). The employer's obligation set forth in that section of the statute is



known as the "general duty clause." The provision is designed for instances in which employees may be exposed to serious workplace hazards to which a safety and health standard does not specifically or fully apply.

To establish a general duty violation there must be a showing that the employer failed to furnish employment and a place of employment free from recognized hazards causing or likely to cause death or serious physical harm.

As previously noted, the employment status of the deceased at the time of the accident is not of great consequence here, other employment exposure having been established in the record.

A liberal interpretation has generally been applied for "place of employment" which in the present action encompasses the entire working area over which the Respondent and its employees must exercise responsibility.

The critical element in this case is a "recognized hazard.." The federal cases of Belten Processing Corp., 1974-75 OSHD (19,481) and Madison Foods, Inc., 1976 OSHD (24,001), indicate that the existence of an ANSI standard places an employer on notice of a "recognized" hazard. In Belten, as in the present case, the ANSI standard had been incorporated by a construction standard which was not directly applicable to the Respondent.

This Hearing Officer finds that if an advisory ANSI standard can be evidence of a "recognized" hazard, by the same reasoning a mandatory construction standard establishes a recognized hazard for an employee working on a construction project though not engaged in "construction work."

Employees of the Respondent were thus exposed to a recognized hazard by working upon a roadway area which was not posted with sufficient and proper signs.

It is further found that the hazard was likely to cause death or serious bodily injury in light of the public traffic utilizing the road.

Although a violation of the general duty clause is established, there are factors in the record which justify a reduction of the proposed penalty assessment.

While it is the Respondent's duty to protect employees from exposure to haz-

ards on the job, whatever the source, from a practical standpoint the prime contractor\_on **this** project is—in the most suitable position to eliminate the hazard to all employees by erecting the appropriate signs and devices.

Secondly, the Hearing Officer feels that the amount of the proposed sanction in this case is inflated to some degree by the unfortunate fatal accident. As previously noted, there is very little connection between the accident which prompted the investigation and the violation in issue.

Thirdly, the Complainant's own calculation process was to some extent based upon incorrect information. Mr. Jones stated that approximately 8 employees were exposed for 3-5 hours per day in close proximity to the danger. The record reveals that only the worker at the lip curb operation was continually and proximately exposed to the hazard presented by the insufficiently posted roadway.

As a final factor the Hearing Officer believes that compliance and abatement by posting of the required signs would not wholly eliminate the underlying danger which is the flow of public traffic upon the uncompleted roadway.

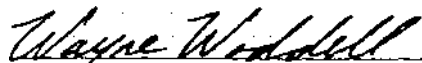
In consideration of the above-noted factors, a penalty assessment of \$100 is deemed appropriate for the violation established.

Recommended Order

IT IS ORDERED that a violation of KRS 338.031(1) (a) is SUSTAINED.

IT IS FURTHER ORDERED that the penalty proposal of \$540 is reduced to \$100 and is hereby SUSTAINED.

Abatement shall take place within five (5) days of the date of this order.



Way /e Waddell, Hearing Officer  
KOSH Review Commission

DATED: March 3, 1981  
Frankfort, Kentucky

DECISION NO. 983