FINAL ORDERS OF THE VIRGINIA COURTS

IN

CONTESTED CASES ARISING UNDER THE

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT

VOLUME XXI
JULY 1, 1999 - JUNE 30, 2000

The Virginia Department of Labor and Industry
Powers-Taylor Building
13 South Thirteenth Street
Richmond, Virginia 23219

PREFACE

This publication contains the orders of the Virginia Circuit Courts in contested cases from July 1, 1999, through June 30, 2000, arising under Title 40.1 of the Code of Virginia, 1950, as amended. The Department of Labor and Industry is responsible for publishing the final orders by virtue of §40.1-49.7 which states, "The Commissioner of Labor shall be responsible for the printing, maintenance, publication and distribution of all final orders of the General District and Circuit Courts. Every Commonwealth's Attorney's office shall receive at least one copy of each such order (1979, C. 354)."

The Table of Contents provides an alphabetical listing of the reported cases for the fiscal year. Reference is made to Title 29 of the Code of Federal Regulations, Parts 1910 and 1926. These regulations were adopted by the Virginia Safety and Health Codes Board pursuant to § 40.1-22, as amended.

TABLE OF CONTENTS

VOLUME XXI **JULY 1, 1999 - JUNE 30, 2000** **Page**

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

JOHN MILLS BARR, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
V.	)	Chancery No. 99-178
BRADYSMITH ELECTRIC CO., INC.	)	
Defendant	)	

AGREED ORDER

Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. *Serious citation 1, item 1* is affirmed and the proposed penalty of $3,500.00 is affirmed as issued;

2. *Serious citation 1, item 2* and the proposed penalty were previously vacated by the Commissioner of Labor and Industry (Commissioner);

3. that Bradysmith Electric Co, Inc., (Bradysmith) shall pay the amount of $3,500.00 within fifteen (15) days of the date of entry of this order. Payment shall be made by check or money order, payable to the Commonwealth of Virginia, with VOSH inspection number 125434464 noted on the payment;

4. that in accordance with the requirements of § 40(1) of the Virginia Occupational Safety and Health Administrative Regulations Manual, Bradsysmith will post a copy of this Order for ten (10) working days, beginning from the date of entry of this Order, at its workplaces in Virginia in conspicuous locations where notices to its employees are generally posted;

5. that Bradysmith withdraws its original notice of contest filed with respect to the above-styled

case and waives its right to contest the terms contained in this Order;

6. that this Order is meant to compromise and settle the above contested claims, and does not purport to limit the effect of Virginia Code § 40.1-51.3:2; and this Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia; and this Order shall not be construed as an admission of liability by Bradysmith of civil liability for any violation alleged by the Commissioner;

7. that Bradysmith certifies that the violation affirmed in this Order has been abated;

8. that the Clerk shall strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both counsel of record.

Entered this *13th* day of July, 1999.

Joanne Alper
Judge

WE ASK FOR THIS:

JOHN MILLS BARR,
Commissioner of Labor and Industry

By: *Nicole Whitman* *July 9, 1999*
Counsel for Plaintiff Date

Nicole Whitman
Assistant Commonwealth's Attorney
County of Arlington
1425 N. Courthouse Road, 5th Floor
Arlington, Virginia 22201
phone 703/ 228-4410
fax 703/ 228-7009

SEEN AND AGREED TO:

BRADYSMITH ELECTRIC CO. INC.

By: *Robert D. Windus* *July 9, 1999*
Counsel for Defendant Date

Robert D. Windus
BRAUDE & MARGULIES, P.C.
888 Seventeenth St., N.W., Ste. 500
Washington, D.C. 20006
phone 202/ 293-2993
fax 202/ 331-7916

VIRGINIA:

IN THE CIRCUIT COURT OF BRUNSWICK COUNTY

JOHN MILLS BARR, Commissioner of Labor and Industry, Plaintiff,	)	
v.	)	Chancery No. CL98-20
CROWDER CONSTRUCTION COMPANY, Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER

Appearances:

Alfred B. Albiston, Special Assistant Commonwealth Attorney, for the Commissioner.

Robert G. Walsh, Esq., admitted *pro hac vice*, for Crowder Construction Company.

James A. Luke, Judge

STATEMENT OF THE CASE

This cause came before the Court upon the Bill of Complaint filed by the Commissioner of Labor and Industry ("Commissioner") against Defendant Crowder Construction Company ("Crowder"), requesting this Court to affirm two citations issued to Crowder for violations of the Virginia Occupational Safety and Health (VOSH) provisions of Virginia Code Title 40. 1, and the standards, rules and/or regulations adopted pursuant to that statutory authority. This Court has jurisdiction of this action under Va. Code § 40.1-49.4 (E).

The citations allege that, as a result of a VOSH inspection made on December 12, 1996, through February 18, 1997, at a workplace located in Brunswick County, Crowder violated Va. Code §§ 40.1-51.1(A) and 40.1-51.1(D), and VOSH Std. §§ 1926.605(b)(1) and 1926.451(d)(10) for the Construction Industry. The citations describing 2 Serious and 1 Other Than Serious violations, were issued on May

16, 1997. Crowder timely filed a general notice of contest, and thereafter the Commissioner filed a Bill of Complaint requesting that the citations and proposed penalties against Crowder be affirmed. The cited statutes and regulations, general allegations, and proposed penalties involved in the contest on the merits are as follows:

Serious Citation 1, Grouped Item la & lb:

Virginia Code § 40.1-51.1(A): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that at the west side of the pump house on Lake Gaston, employees were backing Moxi dump trucks onto a barge system, without making provisions to prevent the trucks from accidentally backing off the barge. The proposed civil penalty for this grouped item is $2,500.00.

VOSH Std. § 1926 605(b)(1): At this jobsite, the two wooden ramps being used by the Moxi dump trucks to access the barge system, were not equipped with sideboards. There is no separate proposed civil penalty for this grouped item.

Serious Citation 1, Item 2:

VOSH Std. § 1926.451(d)(10): At the south side of the pump house, the tubular welded frame scaffold, with work platforms approximately 26 feet high and being used in masonry operations, did not have standard guardrails installed at all open sides and ends. The proposed civil penalty for this item is $625.00.

Other Than Serious Citation 2, Item 1:

Virginia Code § 40.1-51.1(D): The employer did not furnish an oral or written report of a fatality at its jobsite to the Department of Labor and Industry within 8 hours of its occurrence. The fatal accident occurred at 11:30 a.m. on December 11, 1996, and Crowder first reported it to the Department at 7:30 a.m. on December 12, 1996. The proposed civil penalty for this item is $5,000.00.

A hearing on the merits was held in Brunswick Circuit Court on October 29, 1999. The Commissioner's

case consisted of the testimony of VOSH Lead Compliance Officer Danny J. Burnett, expert consultant on construction projects over water, Mr. Douglas F. Walters, and photographs excerpted from the videotape filmed by Officer Burnett. Crowder's case was presented through the testimony of five Crowder employees and an expert witness, Mr. John P. Coniglio.

JURISDICTION AND ISSUES

Jurisdiction is conceded. For each violation, the issues for consideration are (1) whether Crowder violated each of the cited statutes or regulations, and if so, (2) whether each was properly characterized as Serious, and, (3) what civil penalty is appropriate for each violation. The following will set forth the Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court makes the following findings of fact:

1. On December 11, 1996, Crowder was constructing a municipal water supply pumping station on the shore of Lake Gaston near Gasburg, Virginia in Brunswick County. On this day the driver of a loaded dump truck, James C. Procise, drowned when his loaded Moxi dump truck rolled backwards off the end of a barge into approximately 38 ft. of water. (Transcript 17-18) The truck had just received a load of dredged material from a nearby crane, and was expected to drive forward towards shore over a temporary pier constructed of three linked barge units connected to the shore by a wooden ramp. In order to approach the crane and the area being dredged, Crowder's dump trucks regularly backed out onto the connected barges. (Tr. 18)
2. On the day of the accident, no vehicle barrier was in place on, or near, the end of the temporary pier. (Tr. 18)
3. Certain construction industry practices and standards recognize and address the necessity for a vehicle stop or barrier, where equipment or vehicles could roll into the water. The Commissioner’s expert witness Mr. Douglas F. Walters, an independent safety consultant and a

past safety coordinator for marine construction contractors, testified that placing such a vehicle stop is a normal industry practice, and is required by regulation in construction projects similar to Crowder's, by federal OSHA when over navigable water, or on any construction projects directed by the U.S. Army Corps of Engineers.

4. The vehicle access ramp connecting the temporary pier to the shoreline was regularly traveled by the dump trucks and by a forklift. No sideboards were present on this ramp, neither on the initial day of the inspection, nor afterwards when Crowder had filled in the open space between the two ramp members. (Tr. 28, and Commissioner's Exh. 5)

5. On the day after the accident, VOSH compliance Officer Danny J. Burnett observed employees working from a tubular welded frame masonry scaffold, on the south side of the pump house, with work platforms at least 26 ft. high, which did not have standard guardrails installed at all open sides and ends. (Tr. 34)

6. The cited masonry scaffold was erected in plain view, and employees working from it were exposed to potential falls of at least 26 ft. (Tr. 39)

7. The accident occurred at 11:30 a.m. on December 11, 1996. The Department of Labor and Industry first received notice of the accident 20 hours later, through a telephone call at 7:30 a.m. on December 12, 1996, from Crowder's supervisor. (Tr. 41)

OPINION

Citation 1, grouped Item la and 1b, describes Crowder's failure to take adequate measures to prevent trucks from accidentally backing off the end of the temporary pier, and failing to provide sideboards on the access ramp to the same structure. The first of these grouped items cites a violation of Va. Code § 40.1-51.1(A), otherwise known as the general duty clause." To support a "general duty clause" violation, the Commissioner must establish four elements by a preponderance of evidence: 1) that the employer exposed employees to a serious hazard; 2) to which no specific safety regulation applied; 3)

that the hazard was obvious or generally recognized within the pertinent industry; and 4) that a feasible means of abating the hazard existed. *National Realty and Construction C v. OSAHRC,* 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973).

The combined circumstances, of having insufficient measures to prevent vehicles from rolling off the end of the barge unit, and lacking sideboards on the access ramp, presents a serious hazard, in that Crowder's employees were exposed to a "substantial probability that death or serious physical harm could result" from these conditions. The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition, but to the likelihood that, if illness or injury does occur, death or serious physical harm would be the result. *VOSH Administrative Regulations Manual*, § 1.1 Definitions (August 1, 1995).

The recognition of a hazard may include the standard of knowledge within the industry, and is a matter for objective determination. *National Realty*, 489 F.2d at 1265 n.32. Following *National Realty,* the federal OSHA Review Commission has upheld industry recognition, established both through expert testimony, *Secretary of Labor v. Cormier Well Service*, 4 BNA OSHC 1085, 1087 (OSHA Review Commn. 1976), [recognition established within the oil-drilling industry through opinion testimony regarding industry practice requiring safety belts], and by referring to other related safety standards, *Secretary of Labor v. Kokosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1873-74 (OSHA Review Commn. 1996), [recognition established in the concrete and masonry construction industry, both through ANSI standard, and through proposed OSHA standard].

Hazard recognition may also be inferred upon the employer, based upon the hazard's obvious nature and common knowledge. *Usry v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2nd Cir. 1977) [expertise in the industry is not required to recognize danger of dumping bricks 26 ft. above an unbarricaded alleyway between occupied buildings]; *Secretary of Labor v. Litton Systems, Inc.*, 10 OSHC 1179, 1182 (1981) [30 ft. blind spot in front of a 30 ton load-carrying vehicle presented an

obvious hazard]; *Secretary of Labor v. Eddy's Bakeries Company*, 9 BNA OSHC 2147, 2150 (1979) [danger of gasoline vapors near a source of ignition is a mater of common knowledge].

The Court finds that the Commissioner proved all four of the required elements to establish a violation of Va. Code § 40.1-51.1(A). First, the hazard of accidentally backing a vehicle into 38 ft. of water is serious on its face. Second, VOSH Compliance Officer Danny Burnett testified that no specific safety regulation applied to the cited hazard in this particular case. Regarding industry recognition of the hazard, Mr. Douglas F. Walters testified that in similar construction projects over water, namely over tidal water, or on projects for the U.S. Army Corps of Engineers, published safety regulations required provisions be made to prevent vehicles from rolling into the water. *U.S. Army Corps of Engineers Safety and Health Requirements Manual, §* 16.A.20 (1996). (Commissioner's Exh. 1) In Mr. Walters' extensive experience working in marine construction, he had observed a past practice of erecting vehicle stops or barriers on operating surfaces adjacent to the water's edge.

Crowder has argued that sub-item 1-1a is improper as a matter of law, due to the fact that failing to erect a barrier at the end of the barge did not present a hazard generally recognized within the specific industry of construction over non-tidal waters. The "recognition" element refers not to recognition of the method of abatement, but to knowledge of the hazard. *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979). The hazard of operating vehicles near deep water does not vary in different legal jurisdictions. As the 2nd federal circuit observed in *Marquette Cement Mfg.,* "it hardly matters to the employee whether the overall business of the employer is construction or manufacturing when the hazardous activity is the same." *Supra*, 568 F.2d at 910. And regardless of whether or not industry recognition may be established through other standards, the danger of having a multi-ton vehicle roll into 38 ft. of water is obvious. Crowder acknowledged this hazard when it initially required spotters to flag the Moxi trucks into position. (Tr. 106) Crowder discontinued using spotters before this accident occurred. (Tr. 139). In addition to the obvious danger of having trucks back off the temporary pier,

similar construction projects over water, bearing the same hazards of vehicles rolling into bodies of water, are subject to specific regulations to take such precautions.

Regarding a feasible means of abatement, an appropriate barrier could have consisted of any immovable structure capable of impeding a vehicle's progress, and alerting the driver that he or she was approaching the edge of the platform. (Tr. 27 & Commissioner's Exh. 4) Crowder's foreman, Mr. Tom Leslie, also admitted that a wooden crane mat would have created a impediment noticeable to the driver of a Moxi dump truck. (Tr. 123-124) Crowder's procedures of having the crane operator blow his horn to position the dump trucks did not provide sufficient protection to impede or prevent a truck from rolling off the barge unit, and furthermore, would not have provided a sufficient alternative to the OSHA or Army Corps of Engineers regulations referenced by the Commissioner's expert witness. Crowder also could have abated the hazard by repositioning and extending the temporary pier, so that the Moxi trucks would not have to approach the end of the platform. Crowder's safety director admitted the feasibility of this abatement measure. (Tr. 155-156).

The second part of the grouped serious violation 1-1b is supported by VOSH Compliance Officer Burnett's testimony that no sideboards existed on the vehicle access ramp, and that he observed Crowder employees using the ramp in this condition. Crowder did not dispute the lack of sideboards, but rather challenged the serious nature of the violation. Rolling off the access ramp would likely result in a jarring fall of 3 to 4 feet, possibly causing the operator to be thrown around inside the cab. (Tr. 29). Crowder's safety director admitted that vehicles smaller than the Moxi dump trucks, including a front end loader and a pickup truck, also traveled over the access ramp. (Tr. 153). A vehicle driver in this accident situation could likely suffer head, neck or back injuries. Both sub-items in this grouped violation are sufficiently supported through testimony and exhibits. The proposed civil penalty of $2,500.00 was calculated in accordance with the requirements of Va. Code 40.1-49.4(A)(4)(a), and also is upheld.

The second Serious violation, Item 1-2, citing the lack of guard rails on a masonry scaffold, is

supported through Officer Burnett's observations, and admissions made to him by Crowder's supervisor. A fall of up to 26 ft. would likely result in serious injuries or even death. Employees were observed working from this scaffold. Crowder's argument that it could not have reasonably been aware of the violation is not supported. The scaffold was in plain view, and the VOSH Compliance Officer observed employees working from it. (Tr. 39). Crowder's safety director was aware that general contractors are responsible for all hazardous conditions created by their subcontractors. (Tr. 153-154). The proposed civil penalty of $625.00 was calculated in accordance with Va. Code § 40.1-49.4(A)(4)(a), and is also upheld.

With regard to the Other Than Serious violation, Item 2-1, 20 hours elapsed between the accident's occurrence, and the time the Department of Labor and Industry first received notification from Crowder. (Tr. 41). Even if the employee's death was not immediately certain, the subsequent unsuccessful rescue attempts, combined with the ambient water temperatures common in mid-December, reasonably indicated within a few hours afterwards that a drowning was likely. Crowder's director of personnel was unable to explain why he did not attempt to leave a message, when he telephoned the Department within the eight hour period and heard a recording. (Tr. 127). The 20 hour delay between the accident and contacting the Department, could not have been based on a reasonable expectation of the employee's survival. In calculating the proposed civil penalty, the Commissioner properly applied its internal directive authorizing a uniform $5,000.00 penalty for failing to notify in a timely manner. *VOSH Field Operations Manual*, Chapter IV, § C.2.n.3.c.1 (March 1, 1995).

CONCLUSIONS OF LAW

Crowder committed one grouped Serious violation of Va. Code § 40.1-51.1(A) and VOSH Std. § 1926.605(b)(1), a second Serious violation of VOSH Std. § 1926.451(d)(10), and the penalties of $2,500.00 for grouped Item 1-la & lb, and $625.00 for Item 1-2 are appropriate. Crowder committed an Other Than Serious violation of Va. Code § 40.1-51.1(D), and the

penalty of $5,000.00 is appropriate. FOR THESE REASONS, the Court affirms the Commissioner's citations and proposed penalties of $8,125.00.

Entered this *11th* day of April, 2000.

James A. Luke
The Hon. James A. Luke

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

JOHN MILLS BARR, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
V.	)	Chancery No. 98-162
THE DONOHOE COMPANIES, INC.	)	
Defendant	)	

AGREED ORDER

Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. *Serious citation 1, item 1* is amended to an Other Than Serious, and the proposed penalty of $975.00 will be paid by The Donohoe Companies, Inc. (Donohoe).

2. *Serious citation 1, item 2* and the proposed penalty of $1,625.00 are both vacated;

3. that Donohoe shall pay the amount of $975.00 within fifteen (15) days of the date of entry of this order. Payment shall be made by check or money order, to the Commonwealth of Virginia, with VOSH inspection number 126633338 noted on the payment;

4. that in accordance with the requirements of § 40(1) of the Virginia Occupational Safety and Health Administrative Regulations Manual, Donohoe will post a copy of this Order for ten (10) working days, beginning from the date of entry of this Order, at its workplaces in Virginia in conspicuous locations where notices to its employees are generally posted;

5. that Donohoe withdraws its original notice of contest filed with respect to the above-styled case and waives its right to contest the terms contained in this Order;

6. that this Order is meant to compromise and settle the above contested claims, and does not

purport to limit the effect of Virginia Code § 40.1-51.3:2; and this Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia; and this Order shall not be construed as an admission of liability by Donohoe of civil liability for any violation alleged by the Commissioner;

7. that Donohoe certifies that the violation affirmed in this Order has been abated;

8. that the Clerk shall strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both counsel of record.

Entered this 15th day of September, 1999.

John Whittier Scott, Jr.
Judge

WE ASK FOR THIS:

JOHN MILLS BARR,
Commissioner of Labor and Industry

Charles L. Sharp — *9/10/99*
Counsel for Plaintiff — Date

The Honorable Charles L. Sharp
Commonwealth's Attorney
City of Fredericksburg
P.O. Box 886
Fredericksburg, Virginia 22404-0866
540/372-1040, Fax: 540/372-1181

Seen and Agreed:

THE DONOHOE COMPANIES, INC.

Curtis M. Hairston, Jr. — *9/7/99*
Curtis M. Hairston, Jr. — Date
The Donohoe Companies, Inc.
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS
Two James Center, 1021 East Cary Street
Richmond, Virginia, 23219-1320
804/ 783-6482, Fax: 804/ 783-6507

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ORANGE

JOHN MILLS BARR, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Chancery No. CH99000142
GENERAL EXCAVATION, INC.	)	
Defendant	)	

AGREED ORDER

Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1 Serious citation 1, item 1 is affirmed as issued, and $6,000.00 will be paid by General Excavation, Inc., (hereinafter General Excavation); in lieu of the proposed penalty of $7,000.00.

2. *Other Than Serious citation 2, item 1* is affirmed as issued, and the proposed penalty of $4,000.00 will be paid by General Excavation, Inc., (hereinafter General Excavation); in lieu of the proposed penalty of $5,000.00.

3. *Other Than Serious citation 2, item 2a-c* is affirmed as issued, with no civil penalty.

4. Upon endorsement of this Agreed Order, General Excavation will present payment to the Commonwealth for ten thousand dollars ($10,000.00), in the form of a check or money order made payable to the Treasurer of Virginia, with the VOSH inspection number noted on the payment.

AMENDMENTS TO GENERAL EXCAVATION'S EMPLOYEE SAFETY PROGRAM

5. In further consideration for modifying the original citations and penalties, General

Excavation agrees to ensure the implementation of the following measures within sixty (60) days of the entry of this Order:

5a. General Excavation will revise its existing written safety program, to add policies and procedures for recognizing and protecting employees from hazards associated with working around motorized vehicles and equipment. These policies, at a minimum, will include employee training, and work site hazard recognition, prevention and control. To emphasize hazard prevention and control, an essential component of this program will be that detected hazards must be corrected as soon as possible in a reasonable manner. The only consideration given to a hazard's immediate correction shall be actual feasibility, and not cost.

5b. The safety program will list and discuss the respective responsibilities of management and supervisors with respect to safety, especially regarding working around trucks, backhoes and other large equipment. Responsibility and authority will be transferred to supervisors and lead persons for compliance and enforcing safety rules. General Excavation will delegate authority to job supervisors and foremen to issue internal Employer Disciplinary Action Forms, for violations of safety and health rules. Additionally, these persons must have the authority to halt unsafe work likely to cause injury or death, when they observe unsafe conditions on the jobsite.

5c. General Excavation agrees to insure that a person qualified as a competent person regularly monitors all its construction sites, to determine that they comply with all applicable VOSH regulations and requirements.

5d. Within sixty (60) days of the effective date of this Agreed Order, General Excavation will provide to the Commissioner’s representative for review documentation of all the requirements of subparagraphs 6(a) through 6© above. Documentation of the competent

person training will include the outline of the contents of the sessions, the names of the persons who attended, the dates of the sessions and the names and qualifications of the persons conducting the training sessions. All documentation will be delivered to:

Mr. Charles E. Franklin, VOSH Compliance Manager
Department of Labor and Industry
10515 Battleview Parkway
Manassas, Virginia 20109

6. General Excavation's failure to comply with any term of this Agreed Order in a timely manner shall constitute a breach of this Order.

7. In accordance with the requirements of § 40(1) of the Virginia Occupational Safety and Health Administrative Regulations Manual, General Excavation will post a copy of this Order for ten (10) working days, beginning from the date of entry of this Order, at its workplaces in Virginia, in conspicuous locations where notices to its employees are generally posted.

8. General Excavation shall withdraw its original notice of contest filed with respect to the above-styled case and waive its right to contest the terms contained in this Order; and will certify that the violations affirmed in this Order have been abated.

9. This Order is meant to compromise and settle the above contested claims, and does not purport to limit the effect of Virginia Code § 40.1-51.3:2; and this Order will not be construed as an admission of liability by General Excavation of civil liability for any violation alleged by the Commissioner.

10. The Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and will send an attested copy of this Order to both parties.

Entered this *13th* day of April, 2000.

F. Harkrader
Judge

Seen and Agreed:

JOHN MILLS BARR,
Commissioner of Labor and Industry

Alfred B. Albiston
Alfred B. Albiston (VSB #29851)
Special Assistant Commonwealth's Attorney
Department of Labor and Industry
13 South Thirteenth Street
Richmond, Virginia 23219
Phone: 804/786-6760
Fax: 804/786-8418

Seen and Agreed:

GENERAL EXCAVATION, INC.

Dana L. Rust
Dana L. Rust, (VSB #28408)
McGuire, Woods, Battle & Boothe, LLP
901 E. Cary Street
Richmond, Virginia 23219
Phone: 804/ 775-1000
Fax: 804/ 698-2063

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

JOHN MILLS BARR, Commissioner of Labor and Industry, Plaintiff,	)	
v.	)	Chancery No. CL98-000011-00
DAVID KRUCKENBERG d/b/a KRUCKENBERG SERVICE COMPANY, Defendant	)	

AGREED ORDER

Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. *Serious citation 1, item 1* is affirmed as issued, and the proposed penalty of $600.00 will be paid by Kruckenberg Service Company (hereinafter collectively Kruckenberg);

2. *Serious citation 1, item 2* is affirmed as issued, and the proposed penalty of $600.00 will be paid by Kruckenberg;

3. *Serious citation 1, item 3* is affirmed as issued, and the proposed penalty of $750.00 will be paid by Kruckenberg;

4. *Willful citation 2, item 1* is amended to a Serious violation, and $4,000.00 will be paid by Kruckenberg, in lieu of the proposed penalty of $33,000.00;

5. that Kruckenberg will begin payment of $5,950.00 to the Commonwealth, upon execution of this Order, in the form of an initial payment of $450.00, previously received on December 22, 1999, and eleven (11) subsequent monthly payments of $500.00 each. Each subsequent payment is due on the first day of each month for the next eleven (11) successive months beginning March 1, 2000. Payments will be made by check or money order and will be payable to the

Commonwealth of Virginia, with VOSH inspection number 125630599 noted on each payment;

AMENDMENTS TO KRUCKENBERG'S EMPLOYEE SAFETY PROGRAM

6. In further consideration for modifying the original citations and penalties, Kruckenberg agrees to ensure the implementation of the following measures within sixty (60) days of the entry of this Order:

6a. Kruckenberg will revise its existing written safety program, to add policies and procedures for recognizing and protecting employees from hazards associated with working in trenches and excavations. These policies, at a minimum, will include employee training, and work site hazard recognition, prevention and control. To emphasize hazard prevention and control, an essential component of this program will be that detected hazards must be corrected as soon as possible in a reasonable manner. The only consideration given to a hazard's immediate correction shall be actual feasibility, and not cost.

6b. The safety program will list and discuss the respective responsibilities of management and supervisors to perform duties as Competent Persons, as the term is described in VOSH Std. § 1926.650(a), with respect to safety in trenches and excavations. Responsibility and authority will be transferred to supervisors and lead persons for compliance and enforcing safety rules. Kruckenberg will delegate authority to job supervisors and foremen to issue internal Employer Disciplinary Action Forms, for violations of safety and health rules. Additionally, these persons must have the authority to halt unsafe work likely to cause injury or death, when they observe unsafe conditions on the jobsite.

6c. Kruckenberg agrees to insure that a person qualified as a competent person monitors all its work sites containing trenches and excavations, to determine that they comply with all

applicable VOSH regulations and requirements pertaining to trenching and excavations.

6d. Within sixty (60) days of the effective date of this Agreed Order, Kruckenberg will provide to the Commissioner's representative for review documentation of all the requirements of subparagraphs 6(a) through 6© above. Documentation of the competent person training will include the outline of the contents of the sessions, the names of the persons who attended, the dates of the sessions and the names and qualifications of the persons conducting the training sessions. All documentation will be delivered to:

Mr. Charles E. Franklin, VOSH Compliance Manager
Department of Labor and Industry
10515 Battleview Parkway
Manassas, Virginia 20109

7. that Kruckenberg's failure to comply with the terms of this Agreed Order in a timely manner, particularly the terms of paragraphs 5 and 6 above, shall constitute a breach of this Order;

8. that in accordance with the requirements of § 40(1) of the Virginia Occupational Safety and Health Administrative Regulations Manual, Kruckenberg will post a copy of this Order for ten (10) working days, beginning from the date of entry of this Order, at its workplaces in Virginia, in conspicuous locations where notices to its employees are generally posted;

9. that Kruckenberg withdraws its original notice of contest filed with respect to the above-styled case and waives its right to contest the terms contained in this Order; and that Kruckenberg certifies that the violations affirmed in this to Order have been abated;

10. that this Order is meant compromise and settle the above contested claims, and does not purport to limit the effect of Virginia Code § 40.1-51.3:2; and this Order will not be construed as an admission of liability by Kruckenberg of civil liability for any violation alleged by the Commissioner;

11. that the Clerk will strike this matter from the docket of this Court, place it among the ended

chancery cases, and will send an attested copy of this Order to both parties.

Entered this *22nd* day of March, 2000.

James W. Haley, Jr.
Judge James W. Haley, Jr.

WE ASK FOR THIS:

JOHN MILLS BARR,
Commissioner of Labor and Industry

Alfred B. Albiston _____
Alfred B. Albiston Date
Special Assistant Commonwealth's Attorney
Department of Labor and Industry
13 South Thirteenth Street
Richmond, Virginia 23219
Phone: 804/ 786-6760
Fax: 804/ 786-8418

Seen and Agreed:

DAVID KRUCKENBERG, d/b/a KRUCKENBERG SERVICE COMPANY

David Kruckenberg _____
David Kruckenberg, President Date
KRUCKENBERG SERVICE COMPANY
80 Buttgens Lane
Stafford, Virginia 22554
Phone: 540/ 659-4651

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

JOHN MILLS BARR, COMMISSIONER OF LABOR AND INDUSTRY Plaintiff, MAGCO OF MARYLAND, INC. Defendant.	)	Chancery No. 98-129

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER

THIS CAUSE came before the Court for trial on August 17, 1999 upon the Bill of Complaint filed by the Commissioner of Labor and Industry ("Commissioner") against Defendant Magco Inc. ("Magco") alleging a violation by defendant of the Occupational Safety and Health provisions of Va. Code Title 40.1 and the standards, rules and/or regulations adopted pursuant to that statutory authority. This Court has jurisdiction of this action under Va. Code § 40.1-49.4 (E).

The Commissioner was represented by Assistant Commonwealth Attorney Valerie Preiss. Magco was represented by attorney Bruce Lucensky of the Maryland Bar and local counsel Seth C. Berenzweig of the Virginia Bar.

Both parties presented evidence, ore tenus, and arguments to the Court. The following will set forth the Court's Findings of Fact and Conclusions of Law as required by Va. Code § 40.1-49.4 (E).

FINDINGS OF FACT

1. On December 20, 1996 Magco's employees were performing roofing work at a project located at 2425 Wilson Boulevard, Arlington, Virginia, 22201. One of the three Magco employees on site that day was John Hataloski ("Hataloski"), Magco's foreman who was, as he testified, "solely responsible for this project". Magco did not employ field superintendents; in Magco's customary

practice the foreman was the superintendent. The foreman's responsibility was inter alia, to make all field calls and to act as the safety officer responsible for project safety.

2. Hataloski had extensive experience and training in safety issues connected with roofing work, and was more familiar with the safety regulations than any of Magco's other foremen. In fact Hataloski testified that he was the "most knowledgeable foreman in the company regarding OSHA regulations."

3. In addition to the foreman Hataloski, the other Magco employees who were working at the site on December 20, 1996 were Kevin Barnes ("Barnes") a relatively new employee and another employee who was working on a different part of the roof.

4. Hataloski was aware that there was a hole in the roof of the building in close proximity to where he and Barnes would be working on December 20, which opened to a seven to eight story shaft below. He knew of the existence of this and other "holes" in the roof and had complained to the general contractor numerous times prior to December 20 about the unsafe condition that those holes created for the men working on the roof. On December 20 when Magco's employees arrived on the site, they were preparing to complete the last several hours of work needed on the job. When Hataloski arrived on the roof he noted that a portion of the shaft in question had been covered with a piece of plywood and another portion of the shaft had been covered with a wooden pallet. Neither the plywood nor the wooden pallet entirely covered the opening. Hataloski did not check to see if the pallet had been secured. Hataloski admitted that he should have checked the pallet and that he "probably" knew the pallet was a risk to the safety of the employees that morning. On top of the pallet, there was a metal beam above the shaft which rested on cinderblocks located on either side of the shaft. On Hataloski's instructions, the Magco employees moved the steel beam to better access the work area, which was approximately two feet away from the opening of the shaft. After removing the steel beam, Hataloski told the

Magco employees to be careful while working around the shaft.

5. Neither Barnes nor Hataloski used any fall protection devices while working within two feet of the shaft. Barnes and Hataloski were squatting in the two foot wide space between the penthouse wall and the shaft when Barnes leaned back as if to sit on the pallet covering the shaft. The unsecured wooden pallet shifted. with his weight and Barnes fell down the shaft with the pallet, falling approximately eight stories. He died as a result of his injuries.

6, Compliance Officer David Cline conducted an inspection of the work site and an investigation. On April 24, 1997 the Commissioner issued one “serious" fatality-related violation of Section 1926.501 (B) (4) (I) of the VOSH Standards for the Construction Industry to Magco with an assessed penalty of $7,000. Magco contested the citation and thereafter the Commissioner filed a Bill of Complaint to enforce the administrative finding of a serious violation against Magco.

CONCLUSIONS OF LAW

Magco has argued in its defense that the Commissioner's citation is improper as a matter of law due to (a) the fact that the project was a multi-employer work site and the general contractor was responsible for assuring the shaft was securely covered, and (b) Magco was not responsible since the Commissioner did not prove that Magco's officers had knowledge of the allegedly violative condition, and it was the result of individual misconduct[1].

To establish a multi-employer defense, Magco must prove three elements: 1) the employer did not create the hazardous/violative condition; 2) the employer did not control the hazardous condition such that it could have realistically have abated the condition as required by the standard, and 3) the employer did not have and within the exercise of reasonable diligence, could not have had, notice that the violative condition was hazardous. Rockwell International Corp, 17 OSHC 1801 (1996).

[1] There appears to be no issue that if the citation of Magco was proper, as a matter or fact and law, it was appropriate to issue a “serious” violation with a maximum fine, since the accident resulted in a death.

In this case the Court finds that Magco did not prove two of the three required elements of the multi-employer defense. Although it is clear that Magco did not create the hazardous or violative condition Magco failed to prove that it could not have realistically abated the condition. Clearly Hataloski, Magco's foreman, superintendent and safety officer could have checked to see whether the pallet was secured and if it was not, could have secured it himself, and/or he could have required that the Magco employees working on the roof wear safety harnesses to prevent injury in the event of a fall. Moreover, with respect to the third element Magco, by its employee Hataloski, did have notice that the violative condition was hazardous. As Hataloski testified, he clearly recognized and was concerned about the hazardous condition and he could have taken his men off the job in view of the general contractor's failure to secure the holes on the roof. Had Hataloski done any of the foregoing, it is likely that Barnes would be alive today.

Further an employer at a multi-employer work site is responsible for hazards created by other contractors to which its own employees are exposed, unless it takes reasonable alternative measures to protect its employees, or, in the absence of exposure of its own employees, for any hazardous conditions which it creates or controls. Secretary of Labor v. Anthony Crane Rental, 16 OSHC 2107, 2110 (1994). Magco knew of the violative condition through its foreman. Hataloski had reported the danger to the general contractor. In addition, Hataloski had told his employees to remove the steel beam which was placed over the pallet, presumably to alert employees to the presence of the pallet. Accordingly as a matter of fact and law there is no basis for Magco to invoke the multi-employer defense.

Magco's second defense is that it is not responsible or liable for the Commissioner's citation since the Commissioner failed to prove that Magco's officers had knowledge of the allegedly violative condition, and that the accident was the result of an individual, i.e. Hataloski's, conduct. In order to establish this misconduct defense, Magco must show that it has an established work rule in place to prevent the condition. The work rule must be adequately communicated to employees and enforced

through training, supervision, and disciplinary measures upon violation. The employer is also required to take reasonable steps to discover any alleged violation. Magco urges the Court to follow the ruling of the United States Court of Appeals for the Fourth Circuit in the case of Ocean Electric Corporation v. Secretary of Labor, 594 F. 2d 396 (4th Cir. 1979) which places the burden of proof on the government to prove the supervisory employee's act was not an isolated incident of unforeseeable or idiosyncratic behavior. The Court notes that this ruling has not been adopted by the Virginia Supreme Court, nor has it been adopted by a number of the other federal circuit courts of appeals which have dealt with this issue. Those courts have generally ruled that the burden of proving supervisory misconduct rests with the employer who is asserting the defense.

The leading Virginia Supreme Court case on this issue is Floyd S. Pike Electrical Contractor. Inc. v. Commissioner, 222 Va. 317, 281 S.E.2d 804 (1981). While the Ocean Electric case was cited by the Supreme Court in its ruling that the safety regulation at issue in that case was not designed to make the employer the insurer of an employee's safety, the Court did not adopt or endorse the shifting of the burden of proof. The Court noted that a safe workplace is not necessarily risk-free.

> 'An employer ... need not take steps to prevent hazards which are not generally foreseeable, including idiosyncratic behavior of an employee, but at the same time an employer must do all it feasibly can to prevent foreseeable hazards...'

[citations omitted] 222 Va. 317 at 322-323. In the Pike case, the Supreme Court affirmed the trial court's ruling that the employer chose a measure that would not have removed the danger to its employees, and chose to disregard other safety measures that would have prevented the accident; a situation which was virtually analogous to the facts of this case. This Court finds that the burden of proof on this issue lies with Magco, and that the defendant failed to produce evidence sufficient to meet that burden.

Magco alleges that its officers had no knowledge that Hataloski had instructed Barnes to work in close proximity to a shaft that had been securely covered and that Hataloski's actions should not be imputed to his employer. This position seems to be in conflict with the position necessary to sustain the

multi-employer defense, i.e. that Hataloski took realistic measures to protect his employees at the work site and the fault was that of other employers.

Although Magco argues that Hataloski was a mere foreman and that the knowledge of his action and conduct can not be imputed to the management of Magco, the evidence at trial clearly proves that Hataloski was a representative of management on the project. He was, as the unrebutted evidence showed, the field superintendent for this work, he had sole authority as to when and where the employees would work and he was the Magco employee who was most knowledgeable about safety. Hataloski had been most extensively trained in issues of roofing safety, and had substantial knowledge of OSHA safety regulations for roofers. Since, as he testified without contradiction, Hataloski had the authority and ability to remove his employees from the work site after discerning the dangerous condition or to direct them to take appropriate safety precautions such as harnesses, the Court concludes as a matter of law that Magco is deemed to have had the same knowledge of the violative condition as Hataloski had on December 20, 1996.

Finally to the extent Magco is relying upon the defense of "supervisory misconduct", this Court finds as a matter of law that the VOSH Administrative Regulations do not recognize that defense. The only misconduct which is recognized is that of "employee misconduct" which specifically excludes supervisors. This conduct alleged here was that of Hataloski, a supervisor, not an employee. Accordingly, this defense is not available as a matter of law to Magco.

JUDGMENT

Upon the Findings of Fact and Conclusions of Law set forth by the Court above, affirms the Commissioner's citation and proposed penalty.

Entered this *11th* day of *September* , 1999.

Joanne F. Alper
Joanne F. Alper

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

JOHN MILLS BARR, Commissioner of Labor and Industry, Plaintiff, v. **VIRGINIA MASONRY BUILDERS, INC.** d/b/a Total Investment, L.L.C. Serve: George F. Haymore, Sr. Registered Agent 6644 Elkhardt Road Richmond, Virginia 23225 Defendant.	)	Chancery No. 99627

DECREE PRO CONFESSO

This cause came to be heard upon Commissioner John Mills Barr's Motion for Decree Pro Confesso against Virginia Masonry Builders, Inc., declaring that the contested Virginia Occupational Safety and Health (VOSH) citations and penalties totaling $46,550.00, identified by VOSH Inspection Number 301817011 and as attached to the Commissioner's Bill of Complaint, be upheld. The Defendant did not appear at the hearing.

UPON CONSIDERATION WHEREOF, it appearing to the Court that more than twenty-one days have elapsed since service of process on the Defendant's sole officer and statutory agent, and that no answer or other responsive pleading has been filed by the Defendant, it is therefore

ADJUDGED, ORDERED, and DECREED that Plaintiff be and hereby is awarded judgment by default in this cause affirming the VOSH citation and penalties totaling $46,550.00, and requiring abatement of the violation. It is also ADJUDGED, ORDERED, and DECREED that the Clerk of this Court shall send to the Defendant a copy of this Decree by certified mail.

Herbert Gill, Jr. *9/2/99*
Judge Date

I ASK FOR THIS:

JOHN MILLS BARR,
Commissioner of Labor and Industry

By: *Kenneth E. Nickels*
Counsel

Kenneth E. Nickels
Deputy Commonwealth's Attorney
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