

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD**

**OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

WEEKS CONSTRUCTION COMPANY,

RESPONDENT.

DOCKET NO. OSHANC 90-1767  
OSHA INSPECTION NO. 18478628  
CSHO ID NO. M2361

**ORDER**

**APPEARANCES**

Complainant:

No appearance by waiver and stipulation of Ranee S. Sandy, Associate Attorney General

Respondent:

No appearance by waiver and stipulation of Jay M. Wilkerson, Attorney for Respondent

**BEFORE**

Review Board:

Robin E. Hudson, Chair

Kenneth K. Kiser, Member

Hugh M. Wilson, Member

**DECISION OF THE REVIEW BOARD**

This cause was heard by consent of all the parties at or about 9:00 A.M. on the 10th day of March, 1995 in the Conference Room in the office of the Safety and Health Review Board of North Carolina at 217 West Jones Street, Raleigh, North Carolina. This matter came to be heard on remand to the Review Board from the Superior Court of Wake County to recalculate the penalty in light of the Superior Court's modification of the alleged violation of 29 CFR 1926.950(c)(1) from willful to serious.

**ISSUES PRESENTED**

1. The only issue presented is the recalculation of the penalty as serious rather than willful.

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

1. 29 CFR 1926.950(c)(1) which prohibits an employer from allowing an employee to approach an exposed energized part closer than those distances allowed in Table V-1 without properly insulated tools and equipment

or without the energized part being insulated from the employee or without the employee being properly guarded and insulated from the exposed energized parts.

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Having reviewed and considered the stipulation of the parties and the record, the Safety and Health Review board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

## **FINDINGS OF FACT**

1. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
2. The employer (Respondent) Weeks Construction Company is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128). The Respondent is a employee owned utility contractor located in Asheboro, North Carolina which employs more than 100 persons.
3. From March 5, 1990 through April 4, 1990, the Respondent was inspected by the North Carolina Department of Labor as a result of a fatality by electrocution of one of Respondent's employees.
4. On April 27, 1990, Weeks Construction Company (hereinafter "Weeks") was issued a citation alleging a willful violation of 29 CFR 1926.21(b)(2) and a willful violation of 29 CFR 1926.950(c)(1) and assessed a penalty in the amount of \$8,000.00 for each violation for a total penalty of \$16,000.00.
5. Weeks timely filed its notice of contest and this matter was heard by the Honorable Richard M. Koch, Hearing Examiner, Safety and Health Review Board. On January 17, 1992, the Hearing Examiner entered his Order which dismissed the alleged violation of 29 CFR 1926.21(b)(2) and the associated \$8,000.00 penalty and upheld the alleged violation of 29 CFR 1926.950(c)(1) as willful and upheld the associated \$8,000.00 penalty.
6. Weeks appealed the Hearing Examiner Koch's Order to the Safety and Health Review Board (hereinafter "Board"). On April 7, 1993, the Board sustained the Hearing Examiner's decision. Weeks then filed its Petition for Judicial Review with the Wake County Superior Court.
7. On January 11, 1995, the Honorable Jack Thompson entered an Order on Weeks' Petition for Judicial Review. In that Order, the Court found that the Board's conclusion of law that Weeks willfully violated 29 CFR 1926.950(c)(1) was not supported by the Board's findings of fact; however, the Court did find that the record supported the conclusion of law that the alleged violation of 29 CFR 1926.950(c)(1) was serious. The Court then modified the Board's Order to provide that Weeks' violation of 29 CFR 1926.950(c)(1) was serious rather than willful and remanded this matter to the Board in order for the Board to recalculate the penalty for the serious violation.
8. The parties through their attorneys, Ranee S. Sandy for the Complainant and Jay M. Wilkerson for the Respondent by agreement dated February 27, 1995 stipulated and agreed that the appropriate penalty for the serious violation of 29 CFR 1926.950(c)(1) sustained by the Superior Court in this matter is \$800.00 in accordance with the North Carolina Field Operations Manual which was in effect at the time the inspection occurred.
9. The Board after a review of the record (T, Vol 2B, pp. 163-165) accepts the stipulation of the parties that the appropriate penalty for the serious violation of 29 CFR 1926.950(c)(1) is \$800.00.
10. The Respondent employs over 100 employees.
11. The Respondent has been cited for 7 fatalities in the twelve years preceding the present fatality, three of those fatalities happened during the three years previous to the present fatality.

## **CONCLUSIONS OF LAW**

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Pursuant to the Order of the Superior Court, the Board finds that the alleged willful violation of 29 CFR 1926.950(c)(1) is modified from a willful to a serious violation.
3. The Board finds that appropriate penalty for the serious violation of 29 CFR 1926.950(c)(1) is \$800.00.

## **DISCUSSION**

When determining the appropriate penalty for a violation, the Commissioner must consider (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith and (4) the record of the employer's previous violations. N.C.G.S. § 95-138(a) (1993). A review of the transcript of the hearing before the Hearing Examiner in Volume 2B, at pages 163 and 164 indicated that the Commissioner used a formula from the Field Operations Manual to determine that the gravity of the violations warranted a gravity based penalty of \$800.00. The respondent employed over 100 persons and had eight fatalities including the present fatality in the twelve years previous to the present fatality. These factors allow no reduction for size, previous history of violations or good faith. This leaves the gravity based penalty of \$800.00 as the final penalty for the serious violation because there is no reduction for size, history or good faith.

## **ORDER**

For the reason stated herein, the Review Board hereby **ORDERS** that the violation of 29 CFR 1926.950(c)(1) is serious and that the Respondent is to pay the \$800.00 penalty within thirty (30) days after the signed Order of the Review Board is filed with the Review Board.

This the 15th day of June, 1995.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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HUGH M. WILSON, MEMBER