

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

**BEFORE THE INDIANA OFFICE OF
ADMINISTRATIVE LAW PROCEEDINGS,
SUBJECT TO THE ULTIMATE
AUTHORITY OF THE IOSHA BOARD OF
SAFETY REVIEW**

IN THE MATTER OF:)
)
COMMISSIONER OF LABOR,)
)
)
Complainant,)
)
)
v.)
)
ATLAS EXCAVATING, INC.)
AND ITS SUCCESSORS,)
)
)
Respondent.)

**OALP CASE NO. DOL-2306-001714
BSR DOCKET NO. 23-025**

AGREED ENTRY

The parties to the above-captioned proceeding, the Commissioner of the Indiana Department of Labor (hereinafter “Complainant”) and Atlas Excavating, Inc. (hereinafter “Respondent”), through their duly authorized representatives, desiring to enter into this Agreed Entry as final settlement of this matter, do hereby stipulate and agree as follows:

PART I.

1. From December 19, 2022, through March 23, 2023, authorized employees of the Indiana Department of Labor conducted an inspection at the Respondent’s worksite located at 523 S. Madison Ave., Greenwood, IN 46142.

2. On May 11, 2023, Complainant issued a Safety Order and Notification of Penalty (hereinafter “Safety Order”) resulting from Indiana Department of Labor Inspection No. 1639743 and alleging that Respondent had violated the Indiana Occupational Safety and Health Act (IC 22-8-1.1 *et seq.*) or the standards or rules thereunder. The Safety Order is attached hereto as Exhibit A and is incorporated herein.

3. On or about June 6, 2023, Respondent duly and timely petitioned for review of the Safety Order.

PART II.

4. The Safety Order consists of Safety Order 1, Item No. 1.

5. Safety Order 1, Item 1 alleges a “Serious” violation of I.C. 22-8-1.1-2 for employees being exposed to hazards pertaining to being struck and crushed by a concrete box in an excavation and assesses a penalty of Six Thousand Three Hundred Dollars (\$6,300).

6. The total assessed penalty for Safety Order 1 is Six Thousand Three Hundred Dollars (\$6,300).

PART III.

7. The Safety Order is hereby amended as follows.

8. Safety Order 1, Item 1 is upheld, but re-classified to “Non-Serious” and retains the penalty originally cited.

9. The AGREED total penalty for all violations and all subparts thereunder, subject to this Agreed Entry, is Six Thousand Three Hundred Dollars (\$6,300).

10. In consideration for reclassifying the citation, Respondent agrees to complete the following enhanced abatement as follows:

a. Engage INSafe or another third-party safety consultant for the following and provide Complainant with a record of completion within sixty (60) days of the filing of this Agreed Entry with the Office of Administrative Law Proceedings:

- i. Review and update company policies and procedures.
- ii. Update written safety audit procedure to be more intentional in observations of employee work habits.

b. Engage INSafe or another third-party safety consultant in a full-service and comprehensive safety consultation on an active jobsite and provide Complainant with confirmation of the request from the consultant within sixty (60) days of the filing of this Agreed Entry with the Office of Administrative Law Proceedings.

c. Engage INSafe or another third-party safety consultant to provide training for all employees in the following areas and provide Complainant with an agenda and class sign-in sheet for each upon completion within ninety (90) days of the filing of this Agreed Entry with the Office of Administrative Law Proceedings:

- i. All new and updated policies and procedures.
- ii. Trenching and excavation hazards.
- iii. Struck by and caught between hazards.

11. It is understood and agreed by the Respondent and Complainant that this Agreed Entry and attachments will constitute a final, enforceable OSHA Safety Order(s) and penalties for the purposes of the Indiana Occupational Safety and Health Act (“Act”).

12. Respondent confirms Complainant’s right to re-inspect its workplaces, in accordance with the Act, and to verify abatement of the alleged violations.

13. If not already identified in the Safety Order and Notification of Penalty as completed during the inspection, all abatement, including any enhanced abatement identified and agreed upon herein, must still be completed in a timely manner and certified to IOSHA by sending confirmation of abatement, including a detailed description of what was done along with any supporting documentation and photographs, to IOSHA by email to abatement@dol.in.gov.

14. Respondent hereby withdraws its petition for review previously filed in this matter.

PART IV.

15. Nothing contained in this Agreed Entry shall be construed to affect Complainant's interpretation of the Act or any standard or regulation enforced pursuant thereto or the applicable classification thereof.

16. Except for this agreement, and matters arising out of this agreement and any other subsequent IOSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by the Respondent shall be deemed an admission by Respondent of the allegations contained within the Safety Order(s) and Notification(s) of Penalty or an admission by Respondent of any violation of the Act or standards or regulations promulgated thereunder. The agreements, statements, findings, and actions taken herein are made in order to compromise and settle this matter economically and amicably, and unless Respondent consents to such use, they shall not be used for any other purpose, except as herein stated.

17. The invalidity or unenforceability of any section, subsection, clause or provision of this Agreed Entry does not affect the remaining sections, subsections, clauses, or provisions of this Agreed Entry.

18. Respondent, upon full execution of this Agreed Entry, will post this Agreed Entry for three (3) working days or until abatement is completed, whichever period is longer, pursuant to Board of Safety Review Rules of Procedure, 615 IAC 1-2-18(b)(3)(C).

AGREED this 16th day of August 2023.


ATLAS EXCAVATING, INC.

By: 

Printed: Casey D. How

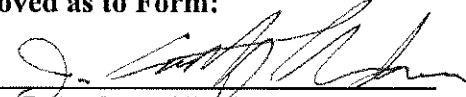
Title: President

COMMISSIONER OF LABOR

By: 

Jeremy Galloway,
Director of Safety Compliance,
IOSHA

Approved as to Form:

By: 

J. Anthony Hardman,
Counsel for Complainant

Indiana Department of Labor

Indiana Occupational Safety and Health Administration
402 West Washington Street, Room W195
Indianapolis, Indiana 46204
Phone: (317) 232-1979 FAX: (317) 233-3790



Safety Order and Notification of Penalty

To:
Atlas Excavating, Inc.
and its successors
4740 Swisher Road
West Lafayette, IN 47906

Inspection Number: 1639743
CSHO ID: Q9916
Optional Report No.: N/A
Inspection Date(s): 12/19/2022 - 03/23/2023
Issuance Date: 05/11/2023

Inspection Site:
523 South Madison Avenue
Greenwood, IN 46142

The violation(s) described in this Safety Order and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

An inspection of your workplace of employment has revealed conditions which we believe do not comply with the provisions of the Indiana Occupational Safety and Health Act (Indiana Code Chapter 22-8-1.1) or the standards or rules adopted thereunder. Accordingly, enclosed please find safety order(s) and notification(s) of penalty describing such violation(s) with references to applicable standards, rules or provisions of the statute and stating the amount of any penalty(ies).

Informal Conference – Please be advised that it may be possible to informally settle any potential dispute without initiating the more elaborate proceedings brought on by a petition for review. Prior to filing a petition for review, you may request an informal conference concerning any results of the inspection (safety orders, penalties, abatement dates, etc.) by contacting the Indiana Department of Labor/IOSHA, preferably by telephone, in a prompt manner. Please be advised that a request for an informal conference cannot extend the fifteen working day period for filing a petition for review. Informal conferences frequently resolve any possible disputes, and therefore you are urged to take advantage of this opportunity. Because of the limited time period and in order to facilitate scheduling, any requests for an informal conference should be made promptly upon your receipt of the safety order(s) and notification(s) of penalty.

Right to Contest – You are hereby also notified that you are entitled to seek administrative review of the safety order(s), penalty(ies), or both by filing a written petition for review at the above address postmarked within fifteen working days of your receipt of the safety order(s) and notification(s) of penalty. (“Working days” means Mondays through Fridays, but does not include Saturdays, Sundays, legal holidays under a state statute or days on which the Indiana Department of Labor’s offices are closed during regular business hours). If you do not file such a petition for review (contest), the safety order(s)

and penalty(ies) shall be deemed final orders of the Board of Safety Review and not subject to review by any court or agency. The issuance of a safety order does not constitute a finding that a violation has occurred unless no petition for review is filed, or if a petition for review (contest) is filed, it must contain a statement of its basis and should reference the above inspection number. Upon receipt of your petition for review, we will affirm, amend or dismiss the safety order(s) and notification(s) of penalty. If we affirm, your petition for review will be granted (unless it was not timely) and the dispute will be certified by the Board of Safety Review for further proceedings. The Board of Safety Review is an independent board appointed by the governor with authority to conduct legal proceedings leading up to and including administrative hearings or assign an Administrative Law Judge (ALJ) to conduct the same, and to issue decisions concerning disputed safety orders and notifications of penalties. If we amend the safety order(s) or notification(s) of penalty, your petition for review shall be deemed moot. However, you will then be given an opportunity to file a petition for review concerning the amended safety order(s) and notification(s) of penalty.

Please be advised that an employee or representative of employees may file a petition for review to contest the reasonableness of the time stated in the safety order(s) for the abatement of any violation.

Posting - Upon receipt of any safety order(s) you are required to post such safety order(s), or a copy thereof, unedited, at or near each place an alleged violation referred to in the safety order(s) occurred. However, if your operations are such that it is not practicable to post the safety order(s) at or near each place of alleged violation, such safety order(s) shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. For example, if you are engaged in activities which are physically dispersed, the safety order(s) may be posted at the location from which the employees operate to carry out their activities. You must take steps to ensure that the safety order is not altered, defaced, or covered by other material. Posting shall be until the violation is abated, or for three working days, whichever is longer.

Penalties - Penalties are due within fifteen (15) working days of receipt of this notification unless contested. Abatement does not constitute payment of penalties.

Abatement - The conditions cited in the safety order(s) must be corrected (abated) on or before the date shown for each item on the safety order(s) and notification(s) of penalty unless:

(1) You file a petition for review concerning the violation, in which case the full abatement period shall commence from the issuance of a final decision by the Board of Safety Review or the courts which requires compliance with the safety order; or

(2) The abatement period is extended by the granting of a petition for modification of abatement date.

PMAs - The petition for modification of abatement date is a manner in which you may seek additional time to correct (abate) a violation without having to file a petition for review concerning the safety order, or after the expiration of the time period to file such a petition for review when it becomes apparent that you need extra time to abate the violation. A petition for modification of abatement date shall be in writing and shall include the following information:

(1) All steps you have taken, and the dates of such actions, in an effort to achieve compliance during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

(3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard employees against the cited hazard during the abatement period.

(5) A certification that a copy of the petition has been posted, and if appropriate, served on the authorized representative of affected employees, and a certification of the date upon which such posting and service was made.

A petition for modification of abatement date shall be filed with the Indiana Department of Labor/IOSHA no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay. A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice thereof or near such location where the violation occurred. The petition shall remain posted until the time period for the filing of a petition for review of the Commissioner's granting or denying the petition expires. Where affected employees are represented by an authorized representative, said representative shall be served a copy of such petition.

Notification of Corrective Action - Correction of the alleged violations which have an abatement period of thirty (30) days or less should be reported in writing to us promptly upon correction. A "Letter of Abatement" form and an "Abatement Photographs" worksheet are enclosed for your assistance in providing adequate documentation of abatement. Reports of corrections should show specific corrective action on each alleged violation and the date of such action. On alleged violations with abatement periods of more than thirty (30) days, a written progress report should be submitted, detailing what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, we should be so advised. Timely correction of an alleged violation does not affect the initial proposed penalty.

Followup Inspections - Please be advised that a followup inspection may be made for the purpose of ascertaining that you have posted the safety order(s) and corrected the alleged violations. Failure to correct an alleged violation may result in additional penalties for each day that the violation has not been corrected.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the Indiana Department of Labor/IOSHA at the address shown above.

Notice to Employees - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the Indiana Department of Labor/IOSHA at the address shown above within fifteen (15) working days (excluding weekends and State holidays) or receipt by the employer of this safety order and penalty.

If you wish additional information, you may direct such requests to us at the address or telephone number stated above.

Indiana Department of Labor
Indiana Occupational Safety and Health Administration
402 West Washington Street, Room W195
Indianapolis, Indiana 46204
Phone: (317) 232-1979 FAX: (317) 233-3790



NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with IOSHA to discuss the Safety Order(s) issued on 05/11/2023.

The Informal Conference will be held:

Date: _____

Time: _____

_____ Virtually/Telephonically via Microsoft Teams

Call-in Number: _____

Conference ID: _____

_____ **In-person at the Indiana Department of Labor, located at the following address:**

402 West Washington Street, Room W195
Indianapolis, Indiana 46204

Meeting/Conference Room: _____

Employees and/or representatives of employees have a right to attend an informal conference.

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 1639743
CSHO ID: Q9916
Optional Report No.: N/A
Inspection Date(s): 12/19/2022 - 03/23/2023
Issuance Date: 05/11/2023



Safety Order and Notification of Penalty

Company Name: Atlas Excavating, Inc.
Inspection Site: 523 South Madison Avenue, Greenwood, IN 46142

Safety Order 1 Item 1 Type of Violation: **Serious**

22.8(1)(1)(sec2): IC 22-8-1.1 Section 2: The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, when employees were exposed to struck-by and crush hazards.

Open Trench on South Madison Avenue - On 12/16/2022, two employees working in a trench, approximately 19ft long, 7ft wide at the top, and 4ft deep were not prevented from working in and around a 41 1/2" x 37" concrete box handled by a John Deere 160G excavator when the excavator operator bumped the controls and tried to correct causing the concrete box to strike one employee and crush another employee against the trench wall.

Mandate that the excavator operator get control and remain in control of the excavator controls/suspended load before and during the time exposed employees are inside of a trench.

Date By Which Violation Must be Abated:
Proposed Penalty:

Corrected During Inspection
\$6,300.00

Jeremy Galloway
IOSHA Director

JG: lr-h

Indiana Department of Labor
Occupational Safety and Health Administration



INVOICE/DEBT COLLECTION NOTICE

Company Name: Atlas Excavating, Inc.
Inspection Site: 523 South Madison Avenue, Greenwood, IN 46142
Issuance Date: 05/11/2023

Summary of Penalties for Inspection Number: 1639743

Safety Order 1 Item 1, Serious \$6,300.00

TOTAL PROPOSED PENALFIES: \$6,300.00

Penalties are due within fifteen (15) working days of receipt of this notification unless requested. Make your check or money order payable to: "Indiana DOL/IOSHA." Please indicate IOSHA's Inspection Number (indicated above) on the remittance. You may also make a payment online at <https://payingov.com/dol/>. Your account number is your inspection number.

IOSHA does not agree to any restrictions or conditions or endorsements put on any check or money order for less than full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Corrective action taken by you for each alleged violation should be submitted to this office on or about the abatement dates indicated on the Safety Order and Notification of Penalty.

A worksheet has been provided to assist in providing the required abatement information. A completed copy of this worksheet should be posted at the worksite with safety orders.



Jeremy Galloway
IOSHA Directo

May 11, 2023

Date

JG: lr-h