

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE INDIANA BOARD OF
SAFETY REVIEW

F I L E D

IN THE MATTER OF:)
)
COMMISSIONER OF LABOR,)
)
Complainant,)
)
v.)
)
NIBLOCK EXCAVATING, INC.)
)
Respondent.)

NOV 13 2015

Indiana Board of
Safety Review

CASE DOCKET NO. 15-002
INSPECTION NO. 317457315

AGREED ENTRY

The parties to the above-captioned proceeding, the Commissioner of the Indiana Department of Labor (hereinafter "Complainant") and Niblock 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 August 22, 2014 through January 28, 2015, authorized employees of the Indiana Department of Labor conducted an inspection at the Respondent's worksite located at 2581 East Kercher Road, Goshen, Indiana 46528.
2. On February 2, 2015, Complainant issued a Safety Order and Notification of Penalty (hereinafter "Safety Order") resulting from Indiana Department of Labor Inspection No. 317457315 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 adopted thereunder. The Safety Order is attached hereto as Exhibit A and is incorporated herein.
3. On or about February 25, 2015, Respondent duly and timely petitioned for review of

the Safety Order.

PART II.

4. The Safety Order consists of Item Nos. 01 and 02.
5. Safety Order No. 01, Item No. 001 alleges a "Serious" violation of I.C. 22-8-1.1-2 and assesses a total penalty of Two Thousand Five Hundred Dollars (\$2,500).
6. Safety Order No. 01, Item No. 002 alleges a "Serious" violation of 29 CFR 1926.20(b)(1) and assesses a total penalty of Two Thousand Five Hundred Dollars (\$2,500).
7. Safety Order No. 01, Item No. 003 alleges a "Serious" violation of 29 CFR 1926.21(b)(2) and assesses a total penalty of Two Thousand Five Hundred Dollars (\$2,500).
8. Safety Order No. 01, Item No. 004 alleges a "Serious" violation of 29 CFR 1926.1000(e) and assesses a total penalty of Seven Hundred Fifty Dollars (\$750).
9. The total penalty for Safety Order No. 01 is Eight Thousand Two Hundred Fifty Dollars (\$8,250).
10. Safety Order No. 02, Item No. 001 alleges a "NonSerious" violation of 29 CFR 1904.32(b)(3) and assesses a total penalty of Five Hundred Dollars (\$500)
11. The total penalty for Safety Order No. 02 is Five Hundred Dollars (\$500).

PART III.

12. Safety Order No. 01, Item No. 001 is amended by reducing the penalty to One Thousand Eight Hundred and Seventy-Five Dollars (\$1,875).
13. Safety Order No. 01, Item No. 002 is amended by reducing the penalty to One Thousand Eight Hundred and Seventy-Five Dollars (\$1,875).
14. Safety Order No. 01, Item No. 003 is deleted in its entirety.
15. Safety Order No. 01, Item No. 004 is deleted in its entirety.
16. Safety Order No. 02, Item No. 001 is amended by reducing the penalty to Zero (\$0).

17. The AGREED total penalty for the amended Safety Order and all alleged violations, Items, and all subparts under this Agreed Entry is Three Thousand Seven Hundred and Fifty Dollars (\$3,750).

18. As noted in the Safety Order and Notification of Penalty, Respondent's prior provision of documentation/evidence to Complainant confirming abatement of Safety Order No. 01, Item Nos. 001 and 002 at the time of the inspection is accepted by Complainant as proof of response/abatement of the amended Safety Order and those Items and/or subparts thereunder. With respect to such abatement, the parties agree that, in addition to employee training, employers must take necessary precautions to prevent employee entry into a swinging superstructure's radius and such precautions do not have to be (and do not have to include) erection of barricades or warning lines, as long as other excavation industry recognized procedures are followed. In this regard, the parties agree that, in addition to employee training, adherence to the IOSHA-suggested abatement steps in Safety Order 01, Item 001 are to be followed to prevent employee entry into a swinging superstructure's radius.

19. Respondent has previously provided documentation to Complainant confirming abatement of Safety Order No. 02, Item No. 001 and such documentation is accepted by Complainant as proof of response/abatement of the amended Safety Order and that Item and/or subparts thereunder subject to this Agreed Entry.

20. As consideration for the penalty reduction under this Agreed Entry, Respondent has taken certain safety improvement steps (although not required to do so by any law, regulation or standard) and has also agreed to voluntarily undertake certain actions as follows:

- Revised its written safety policy to include more specific reference to heavy machinery and proximity hazards (which has been done);

- Will emphasize heavy machinery proximity hazards in annual training;
- Established a new awareness procedure in which an employee on the ground confirms the equipment operator's awareness of his presence in connection with operations in and around the swing arm radius. Training regarding this procedure and the updated reference to heavy machinery and proximity hazards noted above will be completed within 60 days of the parties' execution of this Agreed Entry and documentation of such training content and sign-in sheets will be provided to IOSHA (to the attention of Tony Hardman, General Counsel to the Commissioner of Labor) within 10 business days of completion of the last session of such training;
- Placement of signage at jobsites reminding workers of various hazards, including swing arm radius hazards (which has already begun – example photo has been provided to IOSHA); and
- Conduct periodic and unannounced visits to random jobsites for the purpose of checking compliance with safe work practices (copies of check sheet/form to be used for documentation attached and accepted by Complainant). The frequency of the visits will be determined by the size, location and complexity of the jobs at issue.

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

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

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

PART IV.

24. 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. Nothing contained in this Agreed Entry shall be construed to affect Respondent's interpretation of the Act or be construed as a waiver of any defense available to Respondent in any future proceeding.

25. Except for this Agreed Entry, and IOSHA matters arising out of this Agreed Entry 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. The agreements, statements, findings, and actions taken herein are made in order to compromise and settle this IOSHA matter economically and amicably, and they shall not be used for any other purpose, except as herein stated.

26. 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.

27. 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 27 day of October, 2015.

NIBLOCK EXCAVATING, INC.

By:  _____

Printed: Richard R Niblock

Title: Sec/Treasurer


COMMISSIONER OF LABOR

By:  _____

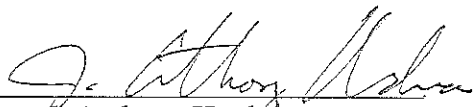
Jerry Larder
Director of Construction Safety

Approved as to Form:

FAEGRE BAKER DANIELS LLP

By:  _____

Gregory N. Dale
Counsel for Niblock Excavating, Inc.

By:  _____

J. Anthony Hardman
General Counsel for the
Commissioner of Labor

Indiana Department of Labor

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



Certified mail #917190 0005 2720 0041 4677 2-2-15 jto

Safety Order and Notification of Penalty

To:
Niblock Excavating & Asphalt Inc
908 Maple Street
Bristol, IN 46507

Inspection Number: 317457315
CSHO ID: U8836
Optional Report No.: 00115
Inspection Date(s): 8/22/2014 - 1/28/2015
Issuance Date: 2/2/2015

Inspection Site:
2581 East Kircher Road
Goshen, IN 46528

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 place 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 of the 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 agency appointed by the governor with authority to conduct hearings and to issue decisions concerning disputed safety order(s) and notification(s) of penalty. 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

NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with IOSHA to discuss the safety order(s) issued on 2/2/2015. The conference will be held at the IOSHA office located at 402 West Washington Street, Room W195, Indianapolis, IN 46204 on _____ at _____. 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: 317457315
Inspection Date(s): 8/22/2014 - 1/28/2015
Issuance Date: 2/2/2015
CSHO ID: U8836
Optional Report No.: 00115

Safety Order and Notification of Penalty

Company Name: Niblock Excavating & Asphalt Inc
Inspection Site: 2581 East Kircher Road, Goshen, IN 46528

Safety Order 01 Item 001 Type of Violation: **Serious**

IC 22-8-1.1 Section 2: 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 employees were exposed to the swing radius of the excavator bucket:

Horn Stage Ditch System Project # 14-019 ----- On or about, August 15, 2014 one employee was struck by the bucket attached to 2005 Caterpillar 330 C Excavator, Product ID # CAT 0330 CA DKY 04138 and another fell down when the force of the impact caused the first victim hit him. Among other methods, one feasible and acceptable abatement method to correct this hazard is to never approach an excavator from the blind side, follow the warning to stay out of the swing area and always face the excavator.

Date By Which Violation Must Be Abated:	Corrected During Inspection
Proposed Penalty:	\$2,500.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317457315
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Issuance Date: 2/2/2015
CSHO ID: U8836
Optional Report No.: 00115

Safety Order and Notification of Penalty

Company Name: Niblock Excavating & Asphalt Inc
Inspection Site: 2581 East Kircher Road, Goshen, IN 46528

Safety Order 01 Item 002 Type of Violation: **Serious**

29 CFR 1926.20(b)(1): The employer did not initiate and maintain accident prevention programs as necessary to comply with this part:

Job Site ----- On or about August 15, 2014, the employer's written safety and health program did not include anything on entering the excavators swing radius and to always work facing the machine both of which employees were exposed to.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$2,500.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317457315
Inspection Date(s): 8/22/2014 - 1/28/2015
Issuance Date: 2/2/2015
CSHO ID: U8836
Optional Report No.: 00115

Safety Order and Notification of Penalty

Company Name: Niblock Excavating & Asphalt Inc
Inspection Site: 2581 East Kircher Road, Goshen, IN 46528

Safety Order 01 Item 003 **Type of Violation: Serious**

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury:

Job Site ----- On or About August 15, 2014, employees were not instructed in the recognition and avoidance of unsafe conditions applicable to their work environment such as but not limited to those connected with motor vehicles including mechanized equipment i.e. material handling equipment.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$2,500.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317457315
Inspection Date(s): 8/22/2014 - 1/28/2015
Issuance Date: 2/2/2015
CSHO ID: U8836
Optional Report No.: 00115

Safety Order and Notification of Penalty

Company Name: Niblock Excavating & Asphalt Inc
Inspection Site: 2581 East Kircher Road, Goshen, IN 46528

Safety Order 02 Item 001

Type of Violation: **NonSerious**

29 CFR 1904.32(b)(3): The Summary of Work -Related Injuries and Illnesses (OSHA Form 300A or equivalent) was not properly certified:

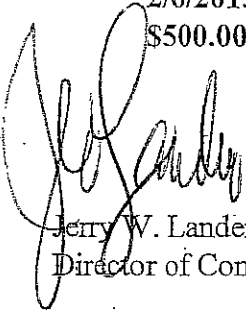
Company Office - On and before, September 25, 2014 the 2013 Form 300A had not been certified by the highest company executive in the establishment or at the corporate level.

Date By Which Violation Must Be Abated:

2/6/2015

Proposed Penalty:

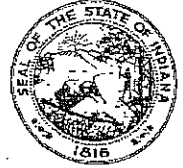
\$500.00



Jerry W. Lander
Director of Construction Safety

Indiana Department of Labor

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



INVOICE/DEBT COLLECTION NOTICE

Company Name: Niblock Excavating & Asphalt Inc
Inspection Site: 2581 East Kircher Road, Goshen, IN 46528
Issuance Date:

Summary of Penalties for Inspection Number: 317457315

Safety Order 1, Serious	= \$8,250.00
Safety Order 2, NonSerious	= \$500.00
TOTAL PENALTIES	= \$8,750.00

Penalties are due within fifteen (15) working days of receipt of this notification unless contested. Make your check or money order payable to: "Indiana DOL/IOSHA". Please indicate IOSHA's Inspection Number (indicated above) on the remittance.

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 work sheet has been provided to assist in providing the required abatement information. A completed copy of this work sheet should be posted at the worksite with the safety order(s).



Jerry W. Lander
Director of Construction Safety



Date