

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE IOSHA BOARD OF
SAFETY REVIEW

FILED

IN THE MATTER OF THE)
COMMISSIONER OF LABOR,)

DEC 04 2018

Complainant,)

Indiana Board of
Safety Review

v.)

CASE DOCKET NO. 18-029

DUKE ENERGY)
AND ITS SUCCESSORS,)

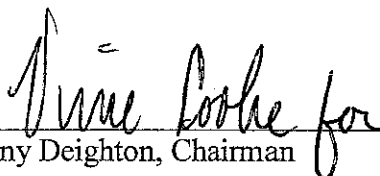
Respondent.)

FINAL ORDER

This matter is before the Board of Safety Review upon the motion to dismiss safety order heretofore filed by the Commissioner of Labor, Complainant, in connection with the above referenced matter. The Board, being duly advised in the premises, now

ORDERS that the motion to dismiss safety order in the above referenced matter, is hereby GRANTED with prejudice.

Dated this 4th day of December, 2018.



Danny Deighton, Chairman

Copies to:

James D. Schoeny
FROST BROWN TODD LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, OH 45202-4182

J. Anthony Hardman
General Counsel
Department of Labor
402 W. Washington St., Rm. W195
Indianapolis, IN 46204



INDIANA

DEPARTMENT OF LABOR

ERIC HOLCOMB, GOVERNOR
Rick J. Ruble, Commissioner
402 West Washington Street, Room W195
Indianapolis, Indiana 46204-2751
Phone: (317) 232-2655
Fax: (317) 233-3790

November 26, 2018

Sent via U.S. Mail, First Class

Mr. James D. Schoeny
Frost Brown Todd, LLC
3300 Great America Tower
301 E. 4th St.
Cincinnati, Ohio 45202

Re: *Commissioner of Labor v. Duke Energy*
IOSHA BSR Docket No. 18-029

Dear Mr. Schoeny:

Please find enclosed a file-stamped copy of *Complainant's Motion to Dismiss* that I filed in the above referenced matter. This now concludes our litigation of this matter. You should receive a *Final Order* from the Board of Safety Review sometime after it meets next month. Please contact me if you have any questions or would like to further discuss this matter.

Sincerely,

J. Anthony Hardman
General Counsel
Indiana Department of Labor

Enclosure

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE IOSHA BOARD OF
SAFETY REVIEW
CASE DOCKET NO. 18-029

IN THE MATTER OF:)
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THE COMMISSIONER OF LABOR,)
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Complainant,)
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DUKE ENERGY)
AND ITS SUCCESSORS,)
)
Respondent.)

FILED

NOV 26 2018

Indiana Board of
Safety Review

COMPLAINANT’S MOTION TO DISMISS

The Complainant, the Commissioner of the Indiana Department of Labor (hereinafter “Complainant”), by counsel, hereby files this motion to dismiss and in support thereof states the following:

1. During discussions with Duke Energy (hereinafter “Respondent”) and union representation, Complainant obtained information that supports dismissal of all citations against Respondent in this matter.

2. Regarding Safety Order 1, Items 1 and 2, sufficient evidence has been produced that shows on or about May 14, 2018, Respondent’s employees who were removing equipment from the coal sampling building, including the decedent, were instructed by employer regarding the scope of work for that day and hazards associated with that scope of work.

3. Evidence also shows that where the decedent was killed was outside of the scope of work for that day. No one knows why he was there and Respondent did not authorize it or have knowledge that he would attempt to work there without planning the work and identifying hazards.

4. Regarding Safety Order 1, Item 3, sufficient evidence has been produced that shows that Respondent will testify that it had no knowledge of such a hazard. No other evidence has been produced to rebut this or to show how long employee exposure to the hazard existed to know if the Respondent or one of its representatives had a reasonable opportunity to even discover the hazard in order to correct it. Respondent's knowledge cannot be established.

5. Regarding Safety Order 1, Items 4 and 5, these cite different standards, but the AVDs essentially describe the same hazard. Like Item 3 described above, sufficient evidence has been produced that shows that Respondent will testify that it had no knowledge of such a hazard. No other evidence has been produced to rebut this or to show how long employee exposure to the hazard existed to know if the Respondent or one of its representatives had a reasonable opportunity to even discover the hazard in order to correct it. Furthermore, Respondent provided a generator for the employees to use as a source of electricity so the exposed outlet did not have to be used. Respondent's knowledge cannot be established.

6. Regarding Safety Order 1, Item 6, this is a citation under the demolition standards, however, the work that was being done to the coal sampling building does not fall within OSHA's definition of demolition work and is, therefore, outside of the scope of this standard. The standard cited does not apply to the work being done.

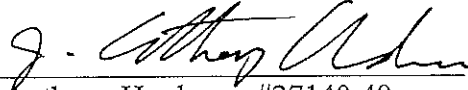
7. For the reasons set forth herein, Complainant agrees to dismiss all of the citations against Respondent in this matter with prejudice and Respondent does not oppose this motion.

WHEREFORE, the Complainant respectfully moves the Indiana Board of Safety Review to dismiss, with prejudice, all citations and claims it has against Respondent, Duke Energy, related to BSR Case Docket No. 18-029 and resulting from IOSHA Inspection No. 318098092, and remove the case from the docket.

Respectfully submitted,

On behalf of the Commissioner of the

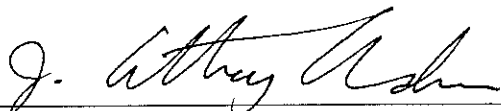
INDIANA DEPARTMENT OF LABOR

By: 
J. Anthony Hardman, #27140-49
General Counsel

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing document upon the individual(s) listed below, by causing this document to be placed in first-class, United States Mail, postage prepaid, this 26th day of November, 2018.

Mr. James D. Schoeny
Frost Brown Todd, LLC
3300 Great America Tower
301 E. 4th St.
Cincinnati, Ohio 45202


J. Anthony Hardman

Indiana Department of Labor
402 West Washington Street, Room W195
Indianapolis, Indiana 46204
JoHardman@dol.in.gov
(317) 232-2696

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



Safety Order and Notification of Penalty

To:
Duke Energy
30 Jackson Street
New Albany, IN 47150

Inspection Number: 318098092
CSHO ID: C0068
Optional Report No.: 02918
Inspection Date(s): 5/14/2018 - 9/18/2018
Issuance Date: 9/18/2018

Inspection Site:
30 Jackson Street
New Albany, IN 47150

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 9/18/2018. 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: 318098092
Inspection Date(s): 5/14/2018 - 9/18/2018
Issuance Date: 9/18/2018
CSHO ID: C0068
Optional Report No.: 02918

Safety Order and Notification of Penalty

Company Name: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150

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:

Jobsite –30 Jackson Street, New Albany, IN 47150 - On or about May 14, 2018, during construction activities, one employee was exposed to hazard of struck by/crushing hazards when the bolts/rods of the weighfeeder conveyor were cut, and it swung down, striking the employee.

Among other methods, one feasible and acceptable abatement method to correct this hazard is to instruct employees not to work in certain areas and to complete tasks not assigned that are prohibited without management supervision.

Date By Which Violation Must Be Abated: **11/5/2018**
Proposed Penalty: **\$4,200.00**

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318098092
Inspection Date(s): 5/14/2018 - 9/18/2018
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Safety Order and Notification of Penalty

Company Name: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150

Safety Order 01 Item 002 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/her environment to control or eliminate any hazards or other exposure to illness or injury:

Jobsite – 30 Jackson Street, New Albany, IN 47150 - On or about May 14, 2018, during construction activities, an employee was not instructed in the recognition and avoidance of unsafe conditions applicable to their work environment such as but not limited to those connected with removal of equipment.

Date By Which Violation Must Be Abated: **11/5/2018**
Proposed Penalty: **\$4,200.00**

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318098092
Inspection Date(s): 5/14/2018 - 9/18/2018
Issuance Date: 9/18/2018
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Safety Order and Notification of Penalty

Company Name: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150

Safety Order 01 Item 003

Type of Violation: **Serious**

29 CFR 1926.403(b)(1): Employer did not ensure that electrical equipment is free from recognized hazards that are likely to cause death or serious physical harm to employees:

Jobsite – 30 Jackson Street, New Albany, IN 47150 – On May 21, 2018, during construction activities, the employer allowed employee(s) to use a Metabo WP 8-125 QuickProtect hand grinder with exposed wires exposing employee(s) to shock, burns, and/or fire hazards.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$4,200.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318098092
Inspection Date(s): 5/14/2018 - 9/18/2018
Issuance Date: 9/18/2018
CSHO ID: C0068
Optional Report No.: 02918

Safety Order and Notification of Penalty

Company Name: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150

Safety Order 01 Item 004 Type of Violation: **Serious**

29 CFR 1926.403(i)(2)(i): Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact by cabinets or other forms of enclosures, nor by any of the means listed in subparagraphs (A) through (D) of this paragraph.

Jobsite – 30 Jackson Street, New Albany, IN 47150 – On May 21, 2018, during construction activities, the employer allowed employee(s) to plug a hand grinder into a receptacle with a missing faceplate and live, exposed parts that was not guarded or protected by any means and had a gap large enough for a finger or thumb to enter along one side.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$4,200.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318098092
Inspection Date(s): 5/14/2018 - 9/18/2018
Issuance Date: 9/18/2018
CSHO ID: C0068
Optional Report No.: 02918

Safety Order and Notification of Penalty

Company Name: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150

Safety Order 01 Item 005 Type of Violation: **Serious**

29 CFR 1926.405(b)(2): In energized installations, each outlet box did not have a cover, faceplate, or fixture canopy:

Jobsite – 30 Jackson Street, New Albany, IN 47150 – On May 21, 2018, during construction activities, the employer allowed employees to use an outlet box with a receptacle mounted in it with no face plate installed, that had a gap large enough for a finger or thumb to enter along one side.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$4,200.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318098092
Inspection Date(s): 5/14/2018 - 9/18/2018
Issuance Date: 9/18/2018
CSHO ID: C0068
Optional Report No.: 02918

Safety Order and Notification of Penalty

Company Name: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150

Safety Order 01 Item 006

Type of Violation: **Serious**

29 CFR 1926.805(a) A written engineering survey was not performed by a competent person to determine the conditions of the framing, floors, and walls and the possibility of unplanned collapse of any portion of the structure prior to permitting employees to start demolition operations.

Jobsite – 30 Jackson Street, New Albany, IN 47150 - On May 14, 2018, during construction activities, a written engineering survey was not performed by the competent person prior to the start of demolition operations.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$4,200.00



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: Duke Energy
Inspection Site: 30 Jackson Street, New Albany, IN 47150
Issuance Date: 9/18/2018

Summary of Penalties for Inspection Number: 318098092

Safety Order 1, Serious = \$25,200.00
TOTAL PENALTIES = \$25,200.00

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. Eander
Director of Construction Safety

9/18/18

Date