

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE IOSHA BOARD OF
SAFETY REVIEW
CASE DOCKET NO. 15-006

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

FILED

APR 13 2016

Indiana Board of
Safety Review

AGREED ENTRY

The parties to the above-captioned proceeding, the Commissioner of the Indiana Department of Labor (hereinafter "Complainant") and Rothenberger Company, 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 18, 2014 through February 9, 2015, authorized employees of the Indiana Department of Labor conducted an inspection at the Respondent's worksite located at the intersection of Kentucky Ave. and State Blvd. in Fort Wayne, Indiana 46805.

2. On April 7, 2015, Complainant issued a Safety Order and Notification of Penalty (hereinafter "Safety Order") resulting from Indiana Department of Labor Inspection No. 317861110 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 April 15, 2015, Respondent duly and timely petitioned for review of the Safety Order.

PART II.

4. The Safety Order consists of Safety Order 1, Item Nos. 1a, 1b, 2, 3, and 4; and Safety Order 2, Item Nos. 1, 2, and 3.

5. Safety Order 1, Item 1a alleges a "Serious" violation of 29 CFR 1926.20(b)(2) and assesses a total shared penalty, grouped with Item 1b, of Two Thousand Dollars (\$2,000).

6. Safety Order 1, Item 1b alleges a "Serious" violation of 29 CFR 1926.651(k)(1) and assesses no additional penalty above what is assessed in Item 1a.

7. Safety Order 1, Item 2 alleges a "Serious" violation of 29 CFR 1926.100(a) and assesses a total penalty of Six Hundred Dollars (\$600).

8. Safety Order 1, Item 3 alleges a "Serious" violation of 29 CFR 1926.651(j)(2) and assesses a total penalty of Two Thousand Dollars (\$2,000).

9. Safety Order 1, Item 4 alleges a "Serious" violation of 29 CFR 1926.652(b) and assesses a total penalty of Two Thousand Dollars (\$2,000).

10. The total penalty for Safety Order 1 is Six Thousand Six Hundred Dollars (\$6,600).

11. Safety Order 2, Item 1 alleges a "Repeat Serious" violation of 29 CFR 1926.21(b)(2) and assesses a total penalty of Two Thousand Dollars (\$2,000).

12. Safety Order 2, Item 2 alleges a "Repeat Serious" violation of 29 CFR 1926.651(k)(2) and assesses a total penalty of Four Thousand Dollars (\$4,000).

13. Safety Order 2, Item 3 alleges a "Repeat Serious" violation of 29 CFR 1926.652(a)(1) and assesses a total penalty of Four Thousand Dollars (\$4,000).

14. The total penalty for Safety Order 2 is Ten Thousand Dollars (\$10,000).

15. The total penalty for Safety Order 1 and 2 combined is Sixteen Thousand Six Hundred Dollars (\$16,600).

PART III.

16. The Safety Order is hereby amended as follows.

17. Safety Order 1, Item 1a is deleted in its entirety.

18. Safety Order 1, Item 1b is deleted in its entirety.

19. Safety Order 1, Item 2 remains a "Serious" violation as cited, but the total penalty is reduced to Four Hundred Eighty Dollars (\$480).

20. Safety Order 1, Item 3 remains a "Serious" violation as cited, but the total penalty is reduced to One Thousand Six Hundred Dollars (\$1600).

21. Safety Order 1, Item 4 is deleted in its entirety.

22. Safety Order 2, Item 1 is deleted in its entirety.

23. Safety Order 2, Item 2 remains a "Repeat Serious" violation as cited, but the total penalty is reduced to Three Thousand Two Hundred Dollars (\$3,200).

24. Safety Order 2, Item 3 remains a "Repeat Serious" violation as cited, but the total penalty is reduced to Three Thousand Two Hundred Dollars (\$3,200).

25. The AGREED total penalty for all violations and all subparts thereunder, subject to this Agreed Entry, is Eight Thousand Four Hundred Eighty Dollars (\$8,480).

26. Respondent further agrees to the following:

- a. Add the evaluation/identification of the soil type to its Safety Program.
- b. Train its employees on the soil type addition to the Safety Program.
- c. Provide OSHA 10 hour or equivalent training/re-training to all employees in the position of supervisor/foreman/competent person, which should also include

an emphasis on excavation safety and hazard recognition/job safety analysis.

Copies of the changes and proof of training must be sent to Complainant within sixty (60) days of the filing of this Agreed Entry with the Indiana Board of Safety Review.

27. 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").

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

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

PART IV.

30. 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.

31. 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. The agreements, statements, findings, and actions taken herein are made in order to compromise and settle this matter economically and amicably, and they shall not be used for any other purpose, except as herein stated.

32. 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.

33. 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 31 day of March, 2016.

ROTHENBERGER COMPANY, INC.

By: Daniel A. Rothenberger

Printed: DANIEL R. Rothenberger

Title: PRESIDENT

COMMISSIONER OF LABOR

By: Jerry W. Lander

Jerry W. Lander
Director, Construction Safety
IOSHA

Approved as to Form:

By: J. Anthony Hardman
J. Anthony Hardman,
Counsel for Complainant

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 # 91 11900052 7200043 2602 4-7-15 jto

Safety Order and Notification of Penalty

To:
Rothenberger Company Inc
PO Box 457, 13380 M-60
Concord, MI 49237

Inspection Number: 317861110
CSHO ID: F6081
Optional Report No.: 03615
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015

Inspection Site:

Intersection of Kentucky Avenue & State Boulevard
Fort Wayne, IN 46805

STATE [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 4/7/2015. 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: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury or illness.

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

29 CFR 1926.20(b)(2): The employer did not initiate and maintain programs which provided for frequent and regular inspections of the job site, materials and equipment to be made by a competent person(s)

Job Site ----- On December 16, 2014, the employer's competent person, on the site, failed to identify existing and predictable hazards and/or take the necessary measures to alleviate the hazard(s) of caught-in, struck-by, and falls.

Date By Which Violation Must Be Abated: 5/11/2015
Proposed Penalty: \$2,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

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

29 CFR 1926.100(a): Employees working in areas where there was a possible danger of head injury from impact, or falling or flying objects, or from electrical shock and burns, were not protected by protective helmets:

Job Site/Trench at Kentucky Ave. and State Blvd. ---- On December 16, 2014, one employee working in an unprotected trench approximately 5feet-2inches deep is not wearing a protective helmet.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$600.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

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

29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations, or by a combination of both if necessary.

Job Site, Trench in the Southwest Corner of Kentucky Ave. and State Blvd. ----- On December 16, 2014, excavated spoil and equipment were placed directly on the edge of the excavation and not at least 2 feet from the edge.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$2,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

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

29 CFR 1926.652(b): The slopes and configurations of sloping and benching systems were not in accordance with the requirement options of 29 CFR 1926.652(b)(1), (b)(2), (b)(3), or (b)(4):

Job Site, Trench in the Southwest Corner of Kentucky Ave. and State Blvd. ----- On December 16, 2014, slopes for type "C" soil were not in accordance with Appendix B(c)(1) in that the soil was not classified.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$2,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

Safety Order 02 Item 001

Type of Violation: **Repeat 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:

Job Site ----- On December 16, 2014, employees were not instructed or adequately instructed in the recognition and avoidance of unsafe conditions applicable to their work environment such as but not limited to those connected with excavations and personal protective equipment.

Rothenberger Company Inc. was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent Standard 29 CFR 1926.21(b)(2), which was contained in OSHA inspection number 315862987, citation number 01, item number 01, issued on 04/04/12, with respect to a workplace located at 7486 Nancy Circle, Buffalo, IN 47960.

Date By Which Violation Must Be Abated: 5/11/2015
Proposed Penalty: \$2,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

Safety Order 02 Item 002

Type of Violation: **Repeat Serious**

29 CFR 1926.651(k)(2): Where the competent person found evidence of a situation that could result in possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employee(s) was/were not removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

Job Site, Trench in the Southwest Corner of Kentucky Ave. and State Blvd. ----- On December 16, 2014, the competent person failed to perform the duties as required, in that he did not correct conditions, and did not prevent employees from being exposed to, or cause them to be removed from, the hazards of a cave in, in a trench-excavation 5 feet-2 inches deep.

Rothenberger Company Inc. was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent Standard 29 CFR 1926.651(k)(2), which was contained in OSHA inspection number 315862987, citation number 01, item number 03, issued on 04/04/12, with respect to a workplace located at 7486 Nancy Circle, Buffalo, IN 47960.

Date By Which Violation Must Be Abated: 5/11/2015
Proposed Penalty: \$4,000.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 317861110
Inspection Date(s): 12/18/2014 - 2/9/2015
Issuance Date: 4/7/2015
CSHO ID: F6081
Optional Report No.: 03615

Safety Order and Notification of Penalty

Company Name: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805

Safety Order 02 Item 003 Type of Violation: **Repeat Serious**

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that th

Job Site/Trench at Kentucky Ave. and State Blvd. ---- On December 16, 2014, no cave-in protection was provided for the employee in the trench-excavation that was 5 feet - 2 inches deep that had vertical sides.

Rothenberger Company Inc. was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent Standard 29 CFR 1926.652(a)(1), which was contained in OSHA inspection number 315862987, citation number 01, item number 04, issued on 04/04/12, with respect to a workplace located at 7486 Nancy Circle, Buffalo, IN 47960.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$4,000.00

Jerry W Lander ^{JG}
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: Rothenberger Company Inc
Inspection Site: Intersection of Kentucky Avenue & State Boulevard, Fort Wayne, IN 46805
Issuance Date: 4/7/2015

Summary of Penalties for Inspection Number: 317861110

Safety Order 1, Serious	= \$6,600.00
Safety Order 2, Repeat Serious	= \$10,000.00
TOTAL PENALTIES	= \$16,600.00

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 ^{SG}

Jerry W. Lander
Director of Construction Safety

4/7/15

Date