# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: May 6, 2016**

CLAIM NO. 201267588

JAMIE GROCE PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

VANMETER CONTRACTING, INC.
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**REVERSING IN PART, VACATING IN PART,**
**AND REMANDING**
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**STIVERS, Member.** Jamie Groce ("Groce") seeks review of the November 30, 2015, Opinion, Award, and Order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") finding her totally occupationally disabled as a result of multiple injuries sustained in a fall occurring on October 8, 2012, at Vanmeter Contracting, Inc.'s ("Vanmeter") job site in

Glasgow, Barren County, Kentucky. Groce also appeals from the January 4, 2016, Order denying her petition for reconsideration. On appeal, Groce challenges the ALJ's failure to enhance her income benefits by 30% pursuant to KRS 342.165(1).

Sometime prior to Groce's work-related fall, Scotty's Contracting and Stone, LLC ("Scotty's") had secured a contract with the Kentucky Transportation Cabinet to erect a bridge and install a retaining wall on a new portion of Ky. Hwy. 90/Burkesville Road, in Glasgow, Barren County, Kentucky. Scotty's, in turn, contracted with Vanmeter to erect the bridge and retaining wall. At the time of Groce's injury, the bridge had been erected and Vanmeter was in the process of erecting a portion of the retaining wall required by the contract. Documents of the Kentucky Labor Cabinet, Office of Occupational Safety & Health ("KOSHA") reflect the primary contractor was Kentucky Transportation Cabinet, District 3. Scotty's was listed as a subcontractor with "Type of Construction" shown as general contracting. Vanmeter was also listed as a subcontractor and the "Type of Construction" was "[h]eavy concrete and bridge construction."

Present at the job site on October 8, 2012, were Vanmeter's employees, Groce, Steve Nelson ("Nelson"),

Kenneth Decker ("Decker"), John McIntosh ("McIntosh"), Brian Lindsey ("Lindsey"), and Linden Lipe ("Lipe"). Also present was a concrete driver identified as "Mikey" and Tom Lapham ("Lapham"), an inspector with the Kentucky Transportation Cabinet.

The incident resulting in Groce's injuries also caused injuries to Nelson and McIntosh and the death of Decker triggering an investigation by KOSHA. This event also resulted in a civil suit filed in Barren Circuit Court styled as follows:

> Velma Decker, Individually and as Executrix of the Estate of Kenneth Decker; and Steve Nelson and Linda Nelson, his wife; Jamie Groce and John McIntosh (Plaintiffs)
>
> v.
>
> Greg Meredith, Individually and in his official capacity as Chief District Engineer for KYTC DO3; Kevin Geralds, Individually and in his official capacity as Engineer Supervisor for KYTC DO3; Ashley Graves, Individually and in his official capacity as Transportation Engineering Supervisor for KYTC DO3; Tom Lapham, Individually and in his official capacity as Transportation Engineer for KYTC DO3; Mark Love, Individually and his official capacity as Tech Transportation Engineer for KYTC DO3; Jon Lam, Individually and in his official capacity as Staff Engineer for KYTC DO3; and Daryl Price, Individually and his official capacity as Project

Engineer for KYTC DO3 (Defendants/Third Party Plaintiffs)

v.

Scotty's Contracting and Stone LLC and Vanmeter Contracting, Inc. (Third Party Defendants).

In addition to the medical evidence, the records pertaining to KOSHA's investigation were introduced. The parties also introduced copies of the following depositions taken in the Barren Circuit Court action:

Lindsey

Russell Mattingly – superintendent for Vanmeter

Lipe

Mark Vanmeter – owner of Vanmeter

Groce

Ashley Graves – Transportation Engineer supervisor for District 3.

Kevin Geralds – Staff Engineer – District 3. Worked under Ashley Graves.

Tom Lapham – Transportation Engineer Project Inspector with District 3.

Mark Love – Inspector with Transportation Cabinet – District 3. Helped Tom Lapham

Greg Meredith – Executive Director Kentucky Transportation Cabinet Chief District Engineer for District 3.

Daryl Price – Transportation Engineer Branch Manager for District 3.

Jon Lam – Safety Coordinator for the Department of Highways for District 3.

In addition, Nelson's deposition and hearing testimony in his workers' compensation claim (Claim No. 2012-67587) were introduced. Nelson, along with Groce, testified at the November 2, 2015, hearing in the case *sub judice*.

During her August 5, 2014, deposition in the Barren Circuit Court action, Groce testified that at the time of her injuries she was working as a carpenter. On that date, Vanmeter had no safety coordinator on the job site. Groce explained they had already poured one section of the retaining wall and were pouring another section. All sections of the retaining wall were the same size. The metal forms in which the concrete was poured were erected one day, the concrete poured the next day, and the following day the forms were taken down. The forms were attached to the concrete footer which ran adjacent to the earth wall.

On October 8, 2012, Groce, Nelson, Decker, and McIntosh were on top of the concrete form as the concrete was being poured into the form. Decker was behind Groce on the form and McIntosh and Nelson were on the front

directing the bucket in order to pour the concrete into the form. Groce requested a little more concrete be poured in order to finish off the top. As the last of the concrete was being poured into the form, Groce heard a huge pop like an explosion. She remembers nothing else until she was awakened as she lay underneath the crane on the highway pavement.[1]

Nelson testified they were constructing a twenty-four foot long, fourteen feet high concrete retaining wall next to a highway. The retaining wall was eight feet wide at the bottom and a foot wide at the top. The form in which the concrete was poured had been constructed the day before they poured the concrete. The forms were secured to a concrete footer running adjacent to the bank where the concrete wall was being erected. As more concrete was being poured into the form, Nelson heard a boom. He and the others on the form fell when the form went six feet up in the air and toppled over. Nelson, Decker, and Groce were thrown toward the road. McIntosh went off the form into the concrete. Nelson landed on the black top next to the crane. Groce was under the crane and Decker was beside Groce.

[1] The crane was used to help pour the concrete.

As did Groce, Nelson asserted a claim for enhanced benefits pursuant to KRS 342.165(1). During his November 19, 2014, deposition in his workers' compensation claim, Nelson provided the following explanation as to why he believed enhancement due to a violation of a safety regulation was merited:

> Q: Okay. If I can have just a minute. Now, you've alleged a safety violation as part of this claim. In your own words, why don't you kind of describe to me the best – the best you can what the basis of that safety violation is?
>
> A: You mean what –
>
> Q: Against the –
>
> A: -- what I think happened?
>
> Q: Yeah, or what the –
>
> A: Safety –
>
> Q: -- employer did wrong?
>
> A: -- parts?
>
> Q: Yes.
>
> A: Yeah, I can go there. Like I said, the first day we was to pour this form, like I said, they done had it set up and since I had done some of this kind of work before, the foreman asked me to get up there and put a handrail on it; and that's a safety feature where we're going to sand while we're pouring this so when this concrete bucket comes in to us and – and stops and we get up to pour concrete into the form, we've got something to stand on there with a handrail behind it so we don't – so we

don’t fall off the back of the form. Well, when I get up there putting this form on, I notice there’s nothing on top of this form to hold it down to the concrete it’s hooked to down there, and I asked the guy that it killed, ‘Where’s your tie-downs at? He says, ‘Well, they ain’t going to use them. Those bolts are going to hold it down.’ Well, when I went down to get a two-by-four and take it back up with me, I asked the foreman, which is Lindon, ‘Well, why have you all not got tie-downs on this wall?’ ‘We don’t need them. These bolts in the footer is going to hold this wall down.’ Of course, you don’t go telling the foreman, you know, what you think or they’ll fire you, more than likely, because they don’t like to hear something that maybe you know might just save somebody or something you know that worked before out to still work. So, I – so, I was like, ‘Okay then, that’s fine.’ But them bolts that holds that footer to the ground is only to hold it from going out.

Q: Uh-huh.

A: It’s not to hold that big wall down. Whoever poured that footer, which was Lindon and whoever else was there before I got there – there’s a bracket that goes down in that footer while the concrete is wet and it has got a big hole in it for a bolt, and then when that gets hard – that footer gets hard and you set this form up there, there’s a big long bolt that goes plumb up out of the top of that form and then you put a thing – if there’s two forms – say, this is one and this is one – you run a thing all of the way across that, two of them. You’ve got a great big nut about this big around that fits on that bolt and washer. Well, you put two

metal things across here. When that bolt is sticking up through, you put that washer on and put that bolt on and you tighten that down just as tight as you can get it.

Q: So, that’s the ties you’re talking about?

A: That’s the tie-down. That’s holding that to that footer and keeps that form pulled down.

Q: Okay. So, the tie-down is actually down in the form?

A: They didn’t have none.

Q: Oh, I – and I’m sorry. Generally, the tie-down is actually in the form –

A: Yes.

Q: -- as opposed to –

A: Inside it –

Q: -- something –

A: -- yes.

Q: -- over the top of the form?

A: Yes.

Q: Okay. And it’s usually a piece of metal that comes up through the –

A: Big –

Q: -- footer?

A: -- metal, yes.

Q: Okay.

A: Big old bar. I’m going to say anywhere from an inch to two inches around. It just depends on what – and

that’s another thing, the engineer had to figure out how big of one to use. He had to know how much concrete he had in there, what kind of weight was pushing up on that, and they was supposed to done have all of that figured out.

Q: As far as the screws that were holding the form down, what did they have on top of them?

A: They’re just a nut. They are just – you know, just like you’re going to turn a bolt, put a wrench on a bolt that has got a head on it that you turn. That’s all that – that’s all it was, was a bolt with a head on it.

Q: Okay. And how big were those nuts?

A: About an inch, an inch and a quarter big around and about six, seven inches long.

Q: And what held the bolt – the – the bolt down in the –

A: Just the –

Q: -- concrete?

A: Just the concrete itself. It’s called – it’s – it has got a type thread on it that actually – when you drill that hole, the hole is actually just a hair smaller than this bolt, because it has got a thread that is – sticks out, I’m going to say, an eighth of an inch out actually away from the bolt, and that’s what cuts a groove and goes down in that hole and then that’s what it holds to the concrete, is the threads.

Q: And just so I got my termination or the terms I’m using correct, that was called a tie-down bolt or a tie-down rod –

A: No –

Q: -- or was that –

A: -- that's – actually, this – that's called an anchor bolt.

Q: Yeah, and I'm – I'm sorry. Not the ones on the form, but the one that you said was missing?

A: The tie-down, yeah. Those are – I call them tie-downs. I'm sure there's another big high-class name for it – I don't know – but we – I've always called them tie-downs.

Q: And had you used those on other projects?

A: Oh, yes, on barrier walls and different places. Just anything that you're going to – that has got a batter in it. Any type of wall that has got a batter in it has got up pressure when you pour concrete in it. When you pour concrete in a battered wall, each lift comes up. That's – that's pushing up on that form. Now, if that wall was standing straight up, the only pressure you have is pushing out pressure; but this wall was a battered gravity wall, which had both, and it also pushed out and it also pushed up.

Q: Uh-huh. And just so I'm clear, there was only one of these per form or multiple per form in a form that size?

A: There was two of them.

KOSHA Report Number 003-13 for Inspection No. 315590042 describes the accident as follows:

The accident occurred on Monday, October 8, 2012, approximately 11:30 AM and 3939 Burkesville Rd. Glasgow, Ky.

> Four (4) employees were engaged in pouring concrete into a retaining wall form. The employees were working from a Form Scaffold, twenty four (24) inches wide by twenty four (24) foot long mounted to a Plate Girder Forming System retaining wall form 12.5 feet above the ground below. The retaining wall form was eight (8) foot wide at the base narrowing to one (1) foot at the top, 12.5 foot tall and twenty four (24) foot in length. The employees were pouring concrete into the form using a bucket and crane system and a vibrator machine to settle the concrete. The form was over 95% filled with approximately fifty four (54) yards of concrete. As the employees were topping off the fill, they heard a loud pop and the entire form raised and toppled to the east toward the crane. Three (3) employees were thrown toward the crane and one (1) employee fell backwards into the concrete surging out from under the toppled form.
>
> The result was that the entire form work raised and toppled to its side throwing the employees into a nearby crane and into the concrete, resulting in three (3) Vanmeter Contracting, Inc., employee injuries and the death of one (1) Vanmeter Contracting Inc., employee, Kenneth Decker. Mr. Decker died due to blunt force trauma when he collided with structural members of the crane that was located by the form wall after the form wall collapsed as employees were standing on it. The accident occurred at 3939 Burkesville Rd. in Glasgow, KY.

The October 20, 2012, University of Louisville Hospital discharge summary provides the following diagnosis of Groce's condition as well as the procedures performed:

ADMISSION DIAGNOSIS(ES)

1. Right ankle fracture dislocation

PRINCIPAL FINAL DIAGNOSIS(ES)

1. Right distal tibia fracture
2. Right tibial plateau fracture
3. Right distal fibula fracture
4. Talar neck fracture
5. Calcaneus fracture
6. Cuboid fracture
7. Pan-talar dislocation
8. Right scapular fracture
9. Right anterior shoulder dislocation
10. Right pneumothorax
11. Right sacral ala fracture

CONSULATIONS

1. Trauma Surgery

INVASIVE PROCEDURES

1. Closed reduction of pan-talar dislocation
2. Placement of right thoracostomy tube
3. External fixation of right distal tibia fracture with external fixation of the right foot ankle.
4. Open reduction and internal fixation right talus fracture
5. External fixation of pelvis with anterior frame
6. S1 transsacral screw placement

As a result of its investigations, KOSHA issued the following Citation and Notification of Penalty:

Citation 01 Item 001 - Type of Violation: Serious.

29 CFR 1926.451(g)(1)(vii): Each employee on a scaffold, not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, more than ten (10) feet (3.1 m) above

lower level was not protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

a) On or about 10-08-12, four (4) employees of Vanmeter Contracting, Inc. were working at 3939 Burkesville Rd, in Glasgow, KY from a supported scaffold over twelve (12) feet from the ground below with no end rail, no mid rail, or kick board.

Citation 01 Item 002 – Type of Violation: 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 paragraph (b) or (c) of this section.

a) On or about 10-08-12, four (4) employees of Vanmeter Contracting, Inc., had been working in a trench four (4) feet wide, twelve (12) feet deep and one hundred twenty four (124) feet long located at 3939 Burkesville Rd. in Glasgow, KY, without cave in protection.

Citation 01 Item 003 – Type of Violation: Serious

29 CFR 1926.703(a)(1): Formwork was not designed, fabricated, erected, supported, braced and maintained so that it would be capable of supporting without failure all vertical and lateral loads that could reasonably be anticipated to be applied to the formwork.

a) On or about 10-08-12, four (4) employees of Vanmeter Contracting, Inc., had been working on a Plate Girder Forming System more than twelve

> (12) feet above the surface below. The anchoring, bracing and supports gave way as a result of a Telescoping Push-Pull Pipe Brace used to hold the setup down not being used and anchor bolt spacing being irregular and not in four (4) foot intervals as prescribed by the Plate Girder Technical Data sheet (page five (5). The result was that the entire form work raised and toppled to its side throwing the employees into a nearby crane and into the concrete, resulting in three (3) Vanmeter Contracting, Inc., employee injuries and the death of one (1) Vanmeter Contracting, Inc., employee, Kenneth Decker. Mr. Decker died due to blunt force trauma when he collided with structural members of the crane that was located by the form wall after the form wall collapsed as employees were standing on it. The accident occurred at 3939 Burkesville Rd., in Glasgow, KY.

The proposed penalty for each violation was $5,600.00. The Citation and Notification of Penalty reveals all three violations were "corrected during inspection." Attached to the citations was an invoice from KOSHA in the amount of $16,800.00.

On April 9, 2013, Vanmeter forwarded a letter to KOSHA stating as follows:

> Please consider this letter as a 'Notice of Contest' for the Inspection Number: 315590026. We wish to contest the citation and proposed penalty for Citation 01 Item 003 of the citation we received on March 25, 2013.

As a result, KOSHA filed an administrative complaint before the Kentucky Occupational Safety and Health Review Commission requesting the commission affirm the citation, assess the penalty, and affirm the original period of abatement against Vanmeter.

A document styled "Kentucky Labor Cabinet – Occupational Safety & Health Program – Inspection: 315590026 pertaining to Citation 01 Item 003," provides the following explanation of how requirements of the standard were violated:

> On or about 10-08-12, four (4) employees of Vanmeter Contracting, Inc., had been working on a Plate Girder Forming System, on the top and back of the form, more than twelve (12) feet above the surface below. The anchoring, bracing and supports gave way as a result of a Telescoping Push-Pull Pipe Brace used to hold the setup down not being used and anchor bolt spacing being irregular and not in four (4) foot intervals as prescribed by the Plate Girder Technical Data sheet (page five (5). The result was that the entire form work raised and toppled to its side throwing the employees into a nearby crane and into the concrete, resulting in three (3) Vanmeter Contracting, Inc., employee injuries and the death of one (1) Vanmeter Contracting, Inc., employee, Kenneth Decker.
>
> Mr. Decker died due to blunt force trauma when he collided with structural members of the crane that was located by the form wall after the form wall

> collapsed as employees were standing on it. The accident occurred at 3939 Burkesville Rd., in Glasgow, KY.
>
> The scope of this investigation pertains to the pertinent elements and conditions at the time of the accident which resulted in the death [sic] Mr. Decker, the Vanmeter Contracting Inc., employee died and the conditions observed on site at the time of the inspection.

Under the heading, "Employer knowledge of hazard," the following is provided:

> Per Mr. Cornwell, Project Manager, a total of Sixteen (16) anchor bolts are required with the configuration of the pour, spaced at four (4) foot intervals. In this case, they were not. The employer had the plans for the form, and could have been aware of the hazard.

Under the heading, "Severity and probability assessment," is the following:

> HIGH SEVERITY: Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses. The most serious injury or illness which is reasonably predictable as a result of an employee's exposure to this hazard would be: Death.
>
> PROBABILITY ASSESSMENT
>
> GREATER PROBABILITY: The likelihood that an injury or illness will occur is judged to be relatively HIGH based on the following factors and reasons: Four (4) or more employees were engaged in retaining wall forming work on top of a Plate Girder Forming system eight (8) foot wide at the base, twelve (12) foot

> high narrowing to one (1) foot at the top with a concrete capacity of up to fifty five (55) yards for up to eight (8) hours.

In its Verified Answer, Vanmeter only denied the allegations relating to Citation 01 Item 003.

On June 28, 2013, a Notice and Motion to Withdraw Notice of Contest was filed in which Vanmeter represented all of the alleged violations issued on March 21, 2013, were abated. In addition, it represented the proposed penalty of $16,800.00 had been reduced to $14,000.00 and would be paid upon execution of the stipulation and settlement agreement. Vanmeter represented that in the future it would comply with all applicable provisions of the Act and standards. The pleading was signed by the Labor Cabinet, Office of General Counsel, Director of the Division of Compliance with the Kentucky Labor Cabinet, counsel for Vanmeter, and K. Mark Vanmeter, owner of Vanmeter Contracting.

The Stipulation and Settlement Agreement executed by the same parties states one citation was issued alleging serious violations of the Act and standards and set forth the amount of the total penalties assessed for the serious and other than serious violations. It also noted Vanmeter had filed a Notice of Contest objecting to and contesting

Citation 01 Item 003. As a result, the Secretary of the Labor Cabinet had filed a complaint with the Kentucky Occupational Safety and Health Review Commission which was timely answered by Vanmeter. Thereafter, a settlement was reached. The Stipulation and Settlement Agreement stated that after weighing the evidence in this case and all circumstances surrounding the alleged violations, the parties agreed to the following:

> a. Respondent represents the alleged violations in the citation issued on March 21, 2013, had been abated.
>
> b. Citation 1, Items 1-3 remain cited as Serious.
>
> c. The total proposed penalty shall be reduced from $16,800.00 to $14,000.00 and shall be paid upon execution of the Stipulation and Settlement Agreement. Payment shall be made payable to the Kentucky State Treasurer.
>
> d. Respondent's agreement as set forth hereinabove and its execution of this Settlement Agreement are not admissions by the Respondent of any violation of the Act or the standards or regulations promulgated thereunder nor admissions by Respondent of the truth of any of the allegations or conclusions contained in the Citations or Complaint; provided, however, that the Citations and withdrawal of Notice of Contest may be used as a basis for subsequent failure to abate or repeated Citations issued after approval of this Settlement Agreement by the Kentucky Occupational Safety and Health Review Commission, and may be referred to in

> subsequent Kentucky Occupational Safety and Health Program inspections and cases.

On July 3, 2014, a Recommended Order Sustaining a Motion to Withdraw Contest and Adopting Settlement was entered. That order specifically notes as follows:

> 1. Respondent represents that all conditions alleged in the citations have been abated.
>
> 2. Citation 1, Items 1-3 shall remain as cited, except the total penalty amount shall be reduced to $14,000.00
>
> 3. In conjunction with the Settlement Agreement, the Respondent has agreed to withdraw its notice of contest to the citation.
>
> 4. Affected employees are to be given notice of the settlement documents by posting for a minimum of ten (10) consecutive days, beginning July 1, 2013 and continuing through July 10, 2013 pursuant to Section 51 of this Commissioner's Rules of Procedure.

Therefore, it was recommended the commission enter an order sustaining Vanmeter's motion to withdraw notice of contest and adopting the parties' settlement agreement. KOSHA's records reflect in a letter dated June 27, 2013, Vanmeter's attorney forwarded a check for $14,000.00 payable to the state of Kentucky commensurate with the recommended order of the hearing officer.

In the November 30, 2015, decision, the ALJ denied Groce's claim for enhanced benefits pursuant to KRS 342.165(1) finding:

> The safety penalty claim stems from citations issued by the Kentucky Labor Cabinet, Office of Occupational Safety and Health. The first citation was for improper fall protection at the job site. The second was for inadequate trenching, or cave-in protection, at the job site. The third was for improper support or bracing of formwork to protect against the failure of vertical and lateral loads on the specific date of injury. 29 CFR 1926.703 (a)(1).
>
> KRS 342.165(1) provides in pertinent part:
>
>> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.
>
> The goal of KRS 342.165(1) "is to promote workplace safety by encouraging workers and employers to follow safety rules and regulations." *Apex Mining v. Blankenship,* 918 S.W.2d 225 (Ky. 1996). Application of the safety penalty

against an employer requires proof indicating a worker's injury was caused "in any degree" by the employer's intentional violation of a specific safety statute or regulation. KRS 342.165(1). When an injured employee seeks imposition of a safety penalty for an employer's alleged violation of a specific statute or regulation, she must: 1) prove a violation of a safety statute or regulation; 2) establish the violation was "intentional" as defined by applicable law; and 3) prove the accident was, in any degree, caused by the intentional violation.

In the KOSH proceedings, the Defendant conceded liability for the first two citations, but maintains that these job site deficiencies did not contribute whatsoever to Groce's injuries from the failure of the retaining wall, and thus cannot be used to support application of the safety penalty. The ALJ agrees. The Defendant would have been cited for these same deficiencies had the state inspected the job site prior to the failure of the wall.

The inadequate trenching clearly played no role in the failure of the wall, nor did it contribute to causing Groce's injuries because of the failure of the wall. As for the lack of fall protection, such obviously played no role in the failure of the wall, but the ALJ carefully considered whether such contributed ("in any degree") to Groce's injuries that resulted from the failure of the wall. That issue was settled for the ALJ by Jon Lamb, safety coordinator for the Department of Highways, who testified: "The fall protection referred to would be those workers that are on top of the form at a height. The fall protections or

prevention would be, for instance, railing around this platform that would prevent them from accidentally backing off or stepping off the platform. It would not have--if the form overturned, it would not have protected them from that." (p. 36). It was suggested in the depositions in the civil case that had the Employer stopped work on the project to correct the fall protection and trenching deficiencies then the accident would not have happened. But that notion only serves to support the conclusion that these two general deficiencies were unrelated to Groce's accident; the job would have resumed after being halted only long enough to cure the deficiencies, and the wall would have ultimately fallen when it progressed to the point it did on October 8, 2012.

The Defendant contested the third KOSH citation related to the alleged failure to have more properly secured the retaining wall, and, although it paid close to the original fine amount in settlement of that citation, argues that the evidence fails to support the allegation in the citation or the application of the safety penalty enhancement. Again, the ALJ agrees.

The third citation alleges: "The anchoring, bracing and supports gave way as a result of a Telescoping Push-Pull Pipe Brace used to hold the setup down not being used **and** anchor bolt spacing being irregular and not in four (4) foot intervals…" (emphasis added).

As for the first basis in this citation that the Defendant failed to utilize a telescoping push-pull pipe brace, the ALJ could find no support for that allegation anywhere in the KOSH materials – or, for that matter,

another mention of the subject. Further, the job foreman, Linden Lipe, and job superintendent, Russell Mattingly, testified pipe bracing was in fact utilized, and photographs were offered as proof of that. (Mattingly, p. 29-30). Still further, Groce did not support this contention by testifying to the lack of use of pipe bracing. And finally, even if pipe bracing was not used, Lipe, Mattingly, and Mark VanMeter testified there is no safety component to its use; they explained the bracing is used to hold the form in line until the other side is set.

As for the second basis for the third citation, that the Defendant improperly spaced the anchor bolts in the wall, evidence of that fact is lacking as well.

First of all, there is an assumption of a requirement that anchor bolts are to be spaced at four-foot intervals, but there is no direct evidence of that. The citation makes reference to such a requirement in a "Plate Girder Technical Data Sheet," but the ALJ failed to locate that document within this voluminous record.

Such a requirement is said to have been acknowledged, and violated, by "Mr. Cornwell, Project Manager" on page two of the inspector's initial report (11th page of Plaintiff's filing of KOSH records). However, in an October 29, 2012, email from Joseph Cornwell to inspector Anthony Morley, Cornwell advised Morley that the Defendant actually exceeded manufacturer's specifications in placement of the anchors, which would have satisfied the spacing requirement as well. (Appendix

E to Plaintiff's filing of KOSH records).

Indeed, Morley's own typewritten notes from the date of the accident document inspection of the failed wall and observation of at least 16 tie bolts at "4 ft spacing," the very requirement he says was violated. (Appendix D to Plaintiff's filing of KOSH records).

For perhaps these reasons, it is noteworthy that the inspector's seemingly final report (at 49th page of Plaintiff's KOSH filing) lists only two violations – unsafe excavating practices and inadequate guardrails – and is silent with respect to pipe bracing or spacing of anchor bolts.

There is no expert evidence on the requirements for building a retaining wall, and consequently, no such evidence that the Defendant violated any known statute or regulation related to the construction of the wall on October 8, 2012. The transportation cabinet witnesses did not criticize the building of the wall, and in fact seemed to dismiss the KOSH citation. There are no witnesses that challenge the expertise offered by the Defendant's representatives, including the Defendant's owner, Mark VanMeter. He said there was no design for the wall – that it was built based on the collective experience of himself and his employees. Nineteen anchor bolts were used on the wall involved in Groce's accident, which, given the wall's size, means they were placed within four-foot intervals. VanMeter said his company typically spaces the bolts at eight feet, and has built "many walls of taller nature than this and had not put them at that close of a

spacing." (p. 82). Two other retaining walls had been built with this project in the same fashion without incident. After the accident VanMeter had the accident reviewed by the company that manufactured the forms, EFCO Corporation, and it advised him that his company "had more anchor bolts in than what they even specified." (Id.)

Plaintiff makes two statements in her Brief in support of her claim to the safety penalty enhancement based on alleged violation of a specific safety rule. First, she says, "there was a specific regulation requiring the concrete form to be anchored in a specific manner." However, Groce did not identify the "specific manner" in which the form was to be anchored. If that reference is to the four-foot spacing, no such requirement was specifically identified; and, assuming such a requirement, the evidence from Morley and VanMeter, supported by photographs, is that the anchors were spaced properly. Plaintiff offered [sic] evidence or argument to the contrary.

Second, she says, "the fact the form was not properly anchored was known by the defendant prior to its collapse, as proven by Steven Nelson's testimony regarding his conversation with the foreman, when he stated the form was not anchored properly." This argument for the safety penalty raises an entirely different justification for its imposition because Nelson's testimony does not speak to any allegation made within the KOSH citations. Nelson said the Defendant should have used tie- downs in addition to the anchor bolts, a completely different matter than improper spacing of anchor bolts. The Defendant was

cited for improper spacing of anchor bolts, not for failure to have used tie-downs. Nelson is not qualified to establish the existence of a safety requirement. Plaintiff has not offered any expert evidence, or evidence of any kind of an industry standard, that requires tie-downs for a project such as was involved in this case. (Groce, a construction laborer like Nelson, did not criticize a lack of tie-downs.)

Nelson did speak, however, to the bolt spacing issue from the KOSH citation during cross examination at the Hearing. He said he did not know how many bolts had been used to anchor the form, but thought they were set "anywhere from eighteen to two foot" apart. (HT p. 47). By Nelson's own testimony, then, the bolts were spaced within four feet of each other, assuming that such was a requirement. Nelson went on to criticize the Defendant for not placing bolts every eight inches. That testimony is at odds with the rest of the evidence in this case and casts doubt on his opinion that tie-downs should have been used on this job.

The ALJ finds Groce has not sustained her burden of proving a violation of a specific safety statute or regulation.

Groce also argues that she is entitled to the safety penalty enhancement based on the Defendant's violation of the general duty clause of KRS 338.031(1)(a), which requires an employer "to furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. Groce's

> sole argument in support of this allegation is that the mere occurrence of the wall's collapse is sufficient to impute a violation of the general duty clause.
>
> An analysis of the general duty clause involves four considerations: 1) Did the condition or activity present a hazard to the employee? 2) Did the employer's industry generally recognize this hazard? 3) Was the hazard likely to cause death or serious physical harm to employee? And 4) Did a feasible means exist to eliminate or reduce the hazard? *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000). Since the evidence is that there is no prescribed, industry-accepted method for pouring forms or anchoring them to footers, none of the above considerations are invoked. Groce has not argued how the evidence supports her claim within the *Offut* framework. The ALJ finds she has not sustained her burden of proving the Defendant's violation of the general duty clause.

Groce filed a petition for reconsideration pointing out that in Nelson's workers' compensation claim, the ALJ issued a decision finding a safety violation and enhancing Nelson's benefits. Groce contended Nelson qualified as an expert witness. She noted there may have been bolts and rods to keep the form together but nothing was installed to keep the form adequately attached to the footer so that it would not collapse. Groce also took issue with the ALJ's findings regarding the anchor bolts.

The January 4, 2016, Order, denied the petition for reconsideration.

On appeal, Groce argues a safety violation occurred and a penalty should have been assessed. She argues Nelson informed a supervisor prior to the collapse that the concrete form had not been properly constructed. Consequently, Vanmeter was aware of the violation and intentionally ignored it. Groce contends Nelson's testimony established an intentional safety violation which warrants imposition of the safety penalty.

Groce also contends the finding of a safety violation in Nelson's claim is collateral estoppel. She argues although adequate anchor bolts were used to keep the form from moving, there is no evidence tie-downs were used to keep the form from collapsing because of the weight of the concrete. Accordingly, the ALJ should have found a safety violation occurred and a safety penalty should have been assessed.

Groce asserts the Kentucky Department of Labor accepted a fine for the violation pertaining to the concrete form. She notes that even though Vanmeter did not admit to committing a safety violation, it paid a substantial fine to resolve the matter. She asserts the payment of the fine is evidence of negligence *per se*.

Groce also provides a brief argument that KRS 338.031(1)(a), commonly known as the "general duty" provision, was also violated.

In Citation 01 Item 003, KOSHA stated Vanmeter was cited because its form work was not designed, fabricated, erected, supported, braced, and maintained so that it would be capable of supporting without failure all vertical and lateral loads that could reasonably be anticipated to be applied to the form work. Since Vanmeter subsequently withdrew its contest of that citation and paid a fine as a result of the citation, we vacate that portion of the ALJ's decision finding Groce did not sustain her burden of proving a violation of a safety statute or regulation.

Vanmeter was cited for its failure to properly anchor the metal concrete form and ultimately did not contest that citation and paid a fine as a result of its violation of the administrative safety regulation. The record reflects each fine was reduced proportionately. As a result of Citations 01 Items 001 and 002, Vanmeter paid a $4,667.00 fine for each. For Citation 01 Item 003, Vanmeter paid a fine of $4,666.00. Regardless of the language contained in the settlement agreement, it is abundantly clear Vanmeter withdrew its contest of Citation 01 Item

003, acknowledged its failure to comply with 29 CFR 1926.703(a)(1), and paid a fine. In the settlement agreement, Vanmeter agreed that the violation for which it paid a fine was serious. Consequently, the ALJ erred in finding Groce did not sustain her burden of proving a violation of a specific safety statute or regulation.

The ALJ's analysis should have resolved the question of whether Vanmeter's failure to comply with the safety regulation identified in Citation 01 Item 003 in any degree caused the accident and Groce's resulting injuries. In Chaney v. Dags Branch Coal Co., 244 S.W.3d 95 (Ky. 2008), the Kentucky Supreme Court noted as follows:

> The MSHA report identified three causes of Chaney's death: 1.) the absence of standards, policies, and administrative controls at the mine to ensure that workers would not position themselves in by the second row of undisturbed permanent roof supports when an extended cut was being mined; 2.) the absence of a visible warning device to alert workers to the location of the last row of permanent roof supports; and 3.) the absence of a procedure to assign responsibility for installing warning devices. It noted that although some deficiencies existed in the employer's recordkeeping, Chaney received the required sixteen hours of annual training. The report noted that the accident occurred when Chaney was positioned in by the second row of permanent roof supports, immediately after an extended cut was mined. It concluded that the presence of a

> warning device would have increased the likelihood that he would have recognized his proximity to the last row of roof bolts, but no such device was installed when an unsupported section of roof rock fell in by the second row of bolts and killed him.
>
> The employer received two federal citations. First, it was cited for violating 30 C.F.R. § 75.220(a)(1) by failing to comply with the approved roof control plan. As corrective action, the roof control plan was reviewed and explained to every employee before mining was resumed. Second, it was cited for violating 30 C.F.R. § 75.208 by failing to have a readily visible warning device or a permanent barrier to impede travel beyond the end of permanent roof supports at the approach to the unsupported crosscut between the Number 6 and Number 7 entries. As corrective action, the report indicated that either the roof bolter operator or the continuous miner operator would "install bright red reflectors on the last row of permanent supports prior to the continuous mining machine beginning a new cut."

Id. at 97-98.

In Chaney, supra, the Supreme Court concluded the report and citations of the Mine Safety and Health Administration ("MSHA") were admissible as evidence under 803 KAR 25:010 Section 14 (2) as a public record. In Chaney, supra, there is no reference to Dags Branch paying a fine as a result of the MSHA citation.

Here, Vanmeter withdrew its contest of Citation 01 Item 003, agreed its violation was serious and paid a fine. Therefore, we believe the ALJ was required to find Vanmeter committed a violation of a specific administrative safety regulation. The following language in Chaney, supra, is applicable:

> Absent unusual circumstances such as those found in *Gibbs Automatic Moulding Co. v. Bullock,* 438 S.W.2d 793 (Ky. 1969), an employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute of regulation. If the violation "in any degree" causes a work-related accident, KRS 342.165(1) applies. *AIG/AIU Insurance Co. v. South Akers Mining Co., LLC,* 192 S.W.3d 687 (Ky.2006), explains that KRS 342.165(1) is not penal in nature, although the party that pays more or receives less may well view it as such. Instead, KRS 342.165(1) gives employers and workers a financial incentive to follow safety rules without thwarting the purposes of the Act by removing them from its coverage. It serves to compensate the party that receives more or pays less for being subjected to the effects of the opponent's "intentional failure" to comply with a safety statute or regulation.

Id. at 101.

The record compels a finding Vanmeter violated 29 CFR 1926.703(a)(1) as it relates to the formwork utilized

in erecting the concrete retaining wall. Consequently, the ALJ should have found Vanmeter committed a violation of a specific administrative safety regulation. The ALJ should have then determined whether the violation of that specific administrative regulation in any degree caused Groce's work-related accident and her resulting injuries.

Accordingly, those portions of the November 30, 2015, Opinion, Award, and Order and the January 4, 2016, Order ruling on the petition for reconsideration determining Groce did not sustain her burden of proving a violation of the specific statute or safety regulation are **REVERSED**. The award of income benefits is **VACATED**. This claim is **REMANDED** for entry of an amended opinion, award, and order finding Vanmeter violated 29 CFR 1926.703(a)(1) as set forth in KOSHA's Citation 01 Item 003. The ALJ shall determine whether Vanmeter's violation of that specific safety regulation in any degree caused Groce's work-related accident and enter the appropriate award of income benefits in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

**RECHTER, MEMBER.** In this case, the ALJ provided a thorough and detailed analysis explaining why he was not convinced Vanmeter committed a safety violation regarding the security of the retaining wall. His conclusion is well supported by substantial evidence in the record. The majority has determined the ALJ was required to find a safety violation occurred because Vanmeter settled an enforcement proceeding before KOSHA.

We have been provided no authority for the proposition that settlement of a civil enforcement proceeding establishes a violation, as a matter of law, for purposes of a safety penalty in a workers' compensation proceeding. Furthermore, Vanmeter cannot be collaterally estopped from defending its position, as there is no identity of parties in either the KOSHA proceedings or in Nelson's workers' compensation claim. Finally, as a matter of policy, I strongly object to the assertion the ALJ is required to conclude a safety violation has occurred *solely* because Vanmeter settled its enforcement action. This is especially concerning given the circumstances of Vanmeter's settlement agreement: in the agreement, Vanmeter expressly stated it does not admit a safety violation occurred. Given the time, expense and uncertainty of litigation, parties often settle claims or enforcement actions for reasons

wholly unrelated to actual liability. This reality is recognized even in the criminal arena. *See* North Carolina v. Alford, 400 U.S. 25 (1970). I do not believe an employer who settled a civil penalty, and expressly denied any admission of guilt, should be precluded from contesting a safety violation in a related workers' compensation action. For these reasons, I respectfully dissent.

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