BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CITY OF CHARLOTTE

RESPONDENT.

DOCKET NO. OSHANC 2000-3903
OSHA INSPECTION NO. 303399802
CSHO ID NO. T9034

ORDER

THIS MATTER was heard by the undersigned on October 4, 2000, in Concord, North Carolina. Complainant was represented by Daniel S. Johnson, Assistant Attorney General. Respondent was represented by Jonathan M. Crotty and Kristi Kessler of the law firm Parker, Poe, Adams & Bernstein, L.L.P.

Also present for the hearing were North Carolina Occupational Safety and Health employees Paul Sullivan, Scott Stewart and Kenny Caviness; and City of Charlotte employees Judith Starrett, Guy Peters and David Bird.

Prior to presenting evidence, complainant moved to withdraw Citation 1, Item 1a alleging a violation of 29 C.F.R. 1926.21(b)(2). Complainant also moved that the $1,050.00 penalty proposed for Citation 1, Item 1a apply instead to Citation 1, Item 1b, alleging a violation of 29 C.F.R. 1926.651(k)(2). Respondent did not object and the motions were **GRANTED**.

Also, prior to presenting evidence, complainant moved to amend the name of the designated respondent from "City of Charlotte Engineering & Property Management" to "City of Charlotte" to reflect that the Engineering and Property Management division is a business unit within the City of Charlotte but is not a separately incorporated entity. Respondent did not object and the motion was **GRANTED.**

ISSUES PRESENTED

1. Did complainant meet its burden of proving by a preponderance of the evidence that respondent could reasonably have known by reason of its supervisory capacity that the excavation in which the general contractor's employees were working had improperly sloped walls, among other things?

2. Did complainant meet its burden of proving by a preponderance of the evidence that respondent committed a serious violation of 29 C.F.R. §1926.651(k)(2) when its inspector failed to remove the general contractor's employees out of an unsafe excavation until necessary precautions had been taken to ensure their safety?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 C.F.R. §1926.10 provides, in pertinent part, as follows:
This subpart contains the general rules... for construction, alteration, and/or repair, including painting and decorating...[which requires]... that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of contract work in surroundings or under working conditions which are ...hazardous, or dangerous to his health or safety... .
2. 29 C.F.R. §1926.16 provides, in pertinent part, as follows:
(a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a job site basis rather than individually. ... In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

(b) By contracting for full performance of a contract...the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

(c) .... Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

(d) Where joint responsibility exists, both the prime contractor and his subcontractor...regardless of tier, shall be considered subject to the enforcement provisions of the Act.

3. 29 C.F.R. §1926.20 provides, in pertinent part, as follows:
(b)(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

(b)(2) Such programs shall provide for frequent and regular inspections of the job sites, materials and equipment to be made by competent persons designated by the employers.

4. 29 C.F.R. §1926.32(j) provides, in pertinent part, as follows:

"Employee" means every laborer...under the Act regardless of the contractual relationship which may be alleged to exist between the laborer...and the contractor or subcontractor who engaged him.
5. 29 C.F.R. §1926.32(k) provides as follows:
"Employer" means contractor or subcontractor within the meaning of the Act and of this part.
6. 29 C.F.R. §1926.650(b) provides, in pertinent part, as follows:
Competent person means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are...hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.
7. 29 C.F.R. §1926.651(k)(2) provides, in pertinent part, as follows:
Where a competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems...or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.
8. N.C. Gen. Stat. §95-127(18) provides as follows:
A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

After reviewing the record file, hearing the evidence and arguments of counsel, and after considering the parties' briefs and the applicable legal authorities, the undersigned makes the following:

FINDINGS OF FACT .

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et. seq., the Occupational and Safety and Health Act of North Carolina (the Act).

2. Respondent is an incorporated city within the state of North Carolina. The Engineering and Property Management Division of the City of Charlotte is one of many business units which provides a wide variety of public works activities which include, but are not limited to, planning and designing storm water improvements and supervising the improvements performed by private contractors.

3. Guy Peters, a licensed professional engineer, is a supervisor of the storm water improvement projects for respondent. David Bird is an inspector for the storm water division.

4. Dakota Contracting Company (hereafter "Dakota") is a licensed general contractor in North Carolina.

5. In December, 1999, respondent's storm water services division contracted with Dakota to make improvements to storm water structures located at 2400 Kendall Drive (hereafter, "the project site"). The contract contained provisions for Dakota to excavate for the placement of pipe collars to depths of up to 15 feet. (Respondent's Exhibit 1)

6. On February 2, 2000, Safety Compliance Officer Scott Stewart observed from a public right-of-way that there were human beings in an excavation located at the project site. The excavation appeared to be more than 5 feet deep but less than 20 feet deep and did not appear to comply with the sloping requirements or the alternative safety measures contained in 29 C.F.R. §§1926.652 and Subpart P, Appendix B.

7. After he and his assistant, Sandy Mann, took photographs, the SCO initiated an opening conference with Lamar Haney, the Dakota foreman. (Complainant's Exhibits 1-6)

8. The SCO determined that Mr. Haney was a competent person.

9. During the initial conference with Dakota's foreman Haney, the SCO learned that respondent had a representative on site. Thereafter, David Bird, an inspector with respondent's storm water division, emerged from the building on site. The SCO initiated an opening conference with Mr. Bird by explaining why he was on site, presenting his credentials, providing a business card and detailing the scope and purpose of the inspection.

10. During the initial conference, the SCO attempted to qualify Mr. Bird as a "competent person" within the meaning of the Act. Mr. Bird seemed tentative in response to the SCO's questions. He answered the SCO's questions as if he were not sure that he knew the right answer. However, Mr. Bird's answers were correct in that the soil at the project site was Class C soil and the proper slope for an excavation such as the one on the project site was1½ to1. Mr. Bird also identified fissures along the excavation wall where dirt had spalled off.

11. The excavation in which Dakota's employees were working was 10 feet deep. The floor of the pit east to west was 13 feet wide. Proper sloping on each side would have

created a 39 foot opening at the top of the pit. [(13 foot wide floor x 1½ feet of slope) x 2 slopes of the pit] The opening at the top of the pit east to west was only 24 feet. The opening of the pit from east to west was 14 feet too small and thus, unsafely sloped. The floor of the pit north to south was 15 feet wide. Proper sloping on each side would have created a 45 foot opening at the top of the pit. The opening of the top of the pit going north to south was only 30 feet - 15 feet short of the proper configuration, thus unsafely sloped. One wall of the excavation pit was nearly vertical. (Complainant's Exhibit 7)

12. Other conditions on the work site which contributed to the instability of the sides of the excavation were as follows:

a. Dakota employees were operating a gas powered generator in the pit. The vibrations from this machine were more than likely weakening the walls of the excavation pit;

b. Dakota employees were operating a track hoe near the edge of the excavation walls. The sheer weight of and vibrations caused by this machine were more than likely weakening the walls of the excavation pit;

c. running water from the an existing underground pipe was accumulating in the pit, thus more than likely weakening the excavation wall;

d. the excavation walls evidenced small fissures where dirt had spalled off, thus the walls of the pit were more than likely weakening; and

e. Dakota employees had placed only one ladder in the excavation pit and propped it on wet, uneven soil. The placement of only one ladder in the pit on unstable soil created a hazard to Dakota employees.

13. Respondent did not create the hazard which is the subject of the citation.

14. The hazardous excavation created a possibility of a cave-in.

15. The substantial probable injuries of a cave-in would be cuts, scrapes, bruises, contusions, broken bones and death.

16. After the SCO informed the Dakota's foreman that the excavation was not properly sloped, Dakota's foreman did not move to correct the hazard. After an undefined period of time, the SCO informed respondent's representative, Mr. Bird, that the excavation was not properly sloped, Mr. Bird told Dakota's foreman to get his men out of the excavation and properly slope the pit. Thereafter, Dakota's foreman

directed his employees out of the pit and pulled back the slopes to conform with the Act.

17. The SCO continued his opening conference with a telephone interview of Guy Peters, Maintenance Team Leader for the Engineering and Property Management division of the City of Charlotte and Ralph Gumpert, Safety Officer for the Engineering and Property Management division of the City of Charlotte. The SCO obtained respondent's safety records and a job description of the inspector on site. (Complainant's Exhibit 9)

18. Mr. Bird's job description includes, "ensuring compliance with contract specifications as well as city, state and federal regulations."

19. Neither Mr. Bird nor any of respondent's representatives performed any construction work on the site.

20. Neither Mr. Bird nor any of respondent's representatives: (1) directed the daily means, method, procedures or techniques of Dakota's work; (2) scheduled supplies, chose suppliers or had any direct contact with Dakota's employees; or (3) advised Dakota on trenching options.

21. Mr. Bird's only activities at the project site were to ensure the timeliness of Dakota's work and to ensure the work's compliance with NCDOT's standard specifications and the Standard Special Provisions in the contract.

22. Complainant offered no evidence of any authority Mr. Bird had to discipline Dakota's employees working on the project site or any incidents prior to the SCO's inspection in which Mr. Bird did discipline or direct Dakota's employees on the project site.

23. Complainant offered no evidence as to how long the excavation had been present on the project site.

24. Complainant offered no evidence as to the amount of knowledge of the excavation Mr. Bird had prior to the SCO's inspection.

25. Mr. Bird did not notice anything unsafe about the project site prior to the SCO's inspection.

26. Prior to the SCO's inspection, Mr. Bird was aware that Dakota was excavating on the project site and that Dakota's employees were working in pits which looked substantially similar to the pit in complainant's photographs.

27. The contract language did compel Dakota to comply with NCDOT's Standard Specifications for Roads and Structures and other Standard Special Provisions set forth by respondent in the contract. (Complainant's Exhibit 13, page 10 *et seq.*)

28. The contract required Dakota to have a competent person on site daily and the contract compelled Dakota to comply with OSHA 1926, Subpart P (Trenching and Shoring), among other things. (Exhibit 13, pp. 11, 14)

29. Respondent reserved the right to terminate the contract without cause upon 10 days written notice. (Exhibit 13, p. 14) The Charlotte City Counsel is the body authorized to terminate such a contract.

30. Complainant offered no evidence of any occasions prior to the SCO's inspection where Mr. Bird or any of respondent's representatives took any action whatsoever to correct Dakota's work site in relation to safety hazards.

31. For several minutes after Mr. Bird approached the excavation to speak with the SCO, Dakota's employees were in plain sight in the pit and Mr. Bird did nothing to remove them from the hazard.

32. The SCO cited Dakota for violations of the Act pertaining to exposing employees to the hazards of an improperly sloped excavation pit.

33. Respondent was subject to a contract with Dakota in which respondent reserved the following rights, among others:

a. the right to inspect Dakota's work from time to time and to reject portions of the work if not done in a satisfactory manner, with satisfactory materials or in a timely fashion in accordance with the respondent's standards;

b. the right to schedule Dakota's work, although not the actual sequence of its work;

c. the right to compel Dakota to comply with NCDOT Standard Specifications and all safety, health and other laws, ordinances, rules and regulations applicable to the project; and

d. the right to terminate the contract if Dakota did not comply with its terms and conditions.

34. Respondent trained its employees to inspect subcontractor's work in progress and to recognize hazards on the job sites to keep its inspectors personally safe. Mr. Bird

was trained to recognize hazards on the job sites. Specifically, he attended a trench safety training seminar on June 10, 1998. (Complainant's Exhibit 10)

35. Respondent did not perform regular and frequent inspections of the job site with the purpose of ensuring compliance with the OSHA Act. If one of respondent's inspectors detected a hazard, they would bring it to the attention of the foreman in accordance with the written policy.

36. Respondent's policy with regard to health and safety hazards is contained in its "Maintenance Team Trench Safety Policy dated June 2, 1999, in pertinent part, as follows:

BACKGROUND

The Maintenance Team often has to use various trenching techniques in performing its work. Since safety is the most important aspect of the Maintenance Team's work, communicating effectively with our contractors is vitally important to ensure safe trenching operations. (Emphasis Added)

DISCUSSION

The Maintenance Team will not be trench safety experts in the field. Our contractors are required by contract to comply with OSHA requirements and provide a competent person on site to supervise excavations at all times (*see* current, NCDOT Standard Specifications for Roads and Structures, Section 1505, EXCAVATION, TRENCHING & BACKFILLING FOR UTILITIES). The competent person is required to perform daily inspections before work begins and periodically during the work day to identify existing and predictable hazards. The competent person is both obligated and authorized to take prompt, corrective measures to eliminate hazards on the work site. (Emphasis Added)

Maintenance Team staff's role is to make sure the contractor maintains safe working conditions. One way that is accomplished is by following proper communication procedures with the contractor The following policy/procedure statement outlines the responsibility of the staff in dealing with trench safety issues. (Emphasis Added)

POLICY/PROCEDURE STATEMENT

1. When a City representative has inspected and determined trenching operations are unsafe, he should first discuss the situation with the foreman on site. The main points of the conversation and results should be logged into the City representative's daily diary. (Emphasis Added)

2. If the foreman takes no action to make the work site safe, the City representative should put the request to make the work site safe in writing via a ["Speedy Note" or "Read and Reply" note]. If possible the City representative should have the foreman initial and date the notice. The notice should also include language letting the contractor know that all work from this point forward will be unauthorized work and that the contractor will not be paid for unauthorized work. Do not instruct the contractor on how to make the site safe as it is his responsibility to make those calls through his competent person. (Emphasis Added)

3. If the foreman takes no action, the City is to leave the site and call the contractor's superintendent to discuss the situation and set a time for inspection. (Emphasis Added)

4. If the superintendent does not take action to make the site safe, the City representative should call the Storm Water Services Construction Manager, one of the Team Leaders or the Engineering and Property Management's Safety Officer...[who will] ...call the contractor's superintendent or owner to discuss the issue. If the contractor will not commit to making the site safe, the Construction Manager, one of the Team Leaders or the Engineering and Property Management's Safety Officer will call OSHA. (Emphasis Added)

37. Prior to the inspection by the SCO, respondent was not aware of any prior OSHA violations committed by Dakota or any other reason why it should have concern about Dakota's ability to conduct a trenching operation.

38. The SCO held a closing conference on February 14, 2000. Present for the closing conference were Mr. Gumpert, Mr. Peters, Assistant City Attorney Judith Starrett and respondent's attorney, Mr. Crotty.

39. Based upon his observations, his photographs and the information received from respondent and Dakota at the opening and closing conferences, and in order to enforce the Act, the SCO issued Citation 1, Item 1b on March 20, 2000, alleging a serious violation of 29 C.F.R. §1926.651(k)(2) as follows:

Where a competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems...or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.
(a) for the job site located at 2400 Kendall Drive, Charlotte, NC, where the City of Charlotte Engineering & Property Management Department, Storm Water Services Division failed to take actions necessary to protect employees of Dakota Contracting

Company from unsafe conditions in an excavation including, but not limited to, unprotected and improperly sloped walls.

40. The violation cited in Citation 1, Item 1b was serious in that there existed a possibility of an accident, to wit: an excavation cave-in injuring Dakota employees.

41. The substantial probable result of such an accident would be lacerations, abrasions, contusions, fractures, internal injuries, and, in some cases, death.

42. Four of Dakota's employees were exposed to the hazard of the improperly sloped and otherwise hazardous excavation pit.

43. None of respondent's employees were exposed to the hazard of the improperly sloped

or otherwise hazardous excavation pit.

44. Respondent stipulated that if liability were found, the $1,050 penalty imposed for the violation cited in Citation 1, Item 1b was properly calculated.

DISCUSSION

Positions of the Parties

Complainant argues that the citations against respondent should be upheld for three reasons: (1) the City of Charlotte had contractual control over the specifications of Dakota's work; (2) the city of Charlotte had a policy of actively enforcing safety standards and (3) the inspector for the City of Charlotte demonstrated his ability to abate safety hazards on the project site after the SCO informed him of the violations. CH2M Hill Central, Inc., No. 89-1712 (April 21, 1997); Cauldwell-Wingate Corp., 6 BNA OSHC 1916, 1978 CCH OSHD p. 22, 729 (No. 14260, 1978); Gary W. Bastian, Commissioner, Department of Labor and Industry v. Carlton County Highway Department, 555 N.W. 2d 312 (1996); 1996 OSHD (CCH) p. 31, 188.

Complainant also argues that because the excavation was an inherently dangerous activity, respondent could not delegate its safety responsibilities to Dakota and thus, is responsible for the violations. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); O'Carroll v. Roberts Industrial Contractors, Inc., 119 N.C. App. 140; 457 S.E.2d 752 (1995); Youngblood v. North State Ford Truck Sales, 321 N.C. 380; 364 S.E.2d 433 (1988)

Respondent argues that because the City of Charlotte is not licensed as a general contractor, it can not be held responsible under North Carolina's Multi-Employer Worksite Doctrine for violations of the Act caused by other employers and to which other employers' employees are exposed. Commissioner of Labor of the Sate of North Carolina v. Romeo Guest Assoc., Inc., OSHANC Docket 96-3513 (December 1998); Anning-Johnson Co. v. wU.S. Occupational Safety and Health Review Comm'n, 516 F.2d 1081 (7th Cir. 1975); Grossman Steel & Aluminum Corp., 1975-1976 CCH OSHD ¶ 20,691; IBP, Inc. v. Herman, 144 F.3d 861, 330 U.S. App. D.C. 218 (1998).

City of Charlotte bases its argument on the definition of general contractor contained in N.C. Gen. Stat. §87-1, which defines a general contractor as:

[A]ny person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more.

Respondent argues that it is not a general contractor because it did not "undertake to bid upon or to construct for a fixed price, commission, fee or wage" the excavation in this case. It was "conducting the project" under the statutory authority of the General Assembly. Respondent also argues that it was not "managing" the trenching project "on its own behalf or for any person, firm, or corporation". It was "conducting the project" for the public benefit. Respondent further argues that the City did not own the land. Finally, respondent argues that the City was not "managing" the project for any "person, firm or corporation that was not licensed as a general contractor," pursuant to the general contractor statute because Dakota was licensed as a general contractor.

Respondent contends that it was a principal which retained an independent contractor. Respondent contends that North Carolina has never applied the multi-employer work site doctrine to find a principal liable for the safety hazards created by an independent contractor where only the independent contractor's employees were exposed to the hazard. Respondent contends that for the North Carolina Safety and Health Review Board to find it liable as a matter of law where the City had "little to no supervisory authority over the work project" requires a change in underlying

statutory authority. To find otherwise, argues respondent, would be to "result in an almost unlimited expansion of a principal's responsibility for safety to any person who in any way comes into contact with a capital project funded by it."

Finally, respondent argues that, in this case, it did not meet the standards for finding a principal liable for the safety violations of an Independent contractor. On this basis, the undersigned agrees with respondent and dismisses the citation.

Underlying North Carolina Statutory Authority

The purpose of North Carolina OSH Act is to "assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions." N.C. Gen. Stat. §95-126(b)(2). The purpose of the Act is enforced, in part: (a) "[b]y encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at the place of employment, and by stimulating employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions; and (b) [b]y providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions. N.C. Gen. Stat. §95-126(b)(2)(a) and (b).

The term "employer" is defined by the statute to mean "a person engaged in a business who has employees, including any state or political subdivision of a state... ." N.C. Gen. Stat. §95-127(10)

The term "employee" is defined by the statute to mean, "an employee of an employer who is employed in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer. N.C. Gen. Stat. §95-127(9)

Furthermore, the statute provides that the duty of each employer is to "comply with occupational safety and health standards or regulations promulgated pursuant to this Article." N.C. Gen. Stat. §95-129(2).

North Carolina Safety and Health Review Board Decisions

Based upon sections 126, 127 and 129 of the Act, the North Carolina Safety and Health Review Board held that one employer may be held liable for the safety violations of another employer which affect only the latter employer's employees. Commissioner of Labor of the Sate of North Carolina v. Romeo Guest Assoc., Inc., OSHANC Docket 96-3513 (December 1998) In Romeo Guest, the Review Board was persuaded by the rationale of several federal decisions. Anning-Johnson Co. v. wU.S. Occupational Safety and Health Review Comm'n, 516 F.2d 1081 (7th Cir. 1975) and Brennan v. OSHRC (Underhill Construction Co.), 1974-1975 OSHD ¶19,401, at p. 23,164-23, 165, 512 F.2d 1032 (2nd Cir. 1975).

Federal and Foreign State OSHA Decisions

Under Anning-Johnson Co., the Occupational Safety and Health Review Commission determined that a general contractor could be held liable for hazards to which employees of subcontractors were exposed relying on the reasoning in Underhill Construction Co., 1975-1975 OSHD ¶ 19,401, 512 F.2d 1032 (2nd Cir. 1975). The North Carolina Review Board held thus that, "a general contractor's duty under N.C. Gen. Stat. §95-129(2) to comply with 'occupational safety and health standards' runs to employees of subcontractors on the jobsite." Commissioner of Labor of the Sate of North Carolina v. Romeo Guest Associates, Inc., OSHANC 96-3513 (1998), p.6. The Board held as follows:

However, that duty is a reasonable duty and although the general contractor is responsible for assuring that the contractors fulfill their obligations for employee safety that affect the whole construction site, the general contractor is only liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." [Cite Omitted] In addition, the general contractor cannot "anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others." [Cite Omitted] It is only responsible for those hazards that it could reasonable (sic) have detected because of its supervisory capacity. The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor's employees and reasonable efforts to inspect the jobsite to detect violations that its subcontractors may create. (Emphasis Original)

Romeo Guest Associates, Inc., OSHANC 96-3513 (1998), p.7. (citing Grossman Steel & Aluminum Corp., ¶ 20,791 (RC 1976))

The North Carolina Safety and Health Review Board held that one of the elements which the Commissioner must prove in the multi-employer context involving general contractor's liability is "whether the general contractor could reasonably have been able to detect and or prevent or abate the violative conditions by reason of its supervisory capacity over the jobsite." Romeo Guest Associates, Inc., OSHANC 96-3513 (1998), p.7.

While it is true that Romeo-Guest involved a licensed general contractor, the fact that respondent in this case, City of Charlotte, is not a licensed general contractor, is not dispositive. However, whether the City of Charlotte had "little or no supervisory responsibility over the work project" as respondent contends, begs the ultimate issue in this case.

The Occupational Safety and Health Review Commission held recently that an employer could be held liable for hazards posed to another employer's workers even though the cited employer was not a general contractor. CH2M Hill Central, Inc., No. 89-1712 (April 21, 1997); 1997 OSAHRC Lexis 34, 17 OSHC (BNA) 1961; 1997 OSHD (CCH) p. 31, 303 (hereafter, "CH2M"). The decision did not turn on a statutory definition of the term "general contractor." The decision turned on the following three factors:

1. The breadth of responsibility which has accompanied inclusion or exclusion from the construction standards;

2. The specific authority over trade contractors on which inclusion or exclusion has been predicated, and

3. The specific safety-related responsibility and authority which has been identified as relevant in our decisions.

1997 OSAHRC Lexis 34 at [*24-25]

In CH2M, the Milwaukee Metropolitan Sewerage District (hereafter "MMSD") was a quasi-public regional agency responsible for sewage treatment and solid waste disposal for a 400 square mile area of Milwaukee and surrounding communities. In order to fulfill its public responsibility to eliminate the injection of untreated waste into the public water supply, MMSD contracted with three general contractors for the construction of the three major portions of the tunnels, shafts, and sewer systems designed to collect and transfer storm run-off and sewage to two wastewater treatment plants. MMSD also contracted with CH2M to provide certain engineering and other services in connection with the project. Id. at [*3-5]

The various documents containing the contract provisions between MMSD and CH2M did not include the actual performance of any construction work by CH2M or its employees. Under the contract provisions, CH2M was to provide planning, engineering, and construction management services. Construction management included scheduling design and construction work and projecting completion dates, providing engineers to determine geologic, foundation, and/or construction conditions and providing engineers to interpret plans and specifications, evaluate requests to deviate from them, and make periodic inspections to determine if the contractors' work was in accordance with the contract specifications. Id. at [*7-8]

The Review Commission noted that the contract required the contractors to be solely responsible for all construction means, methods, techniques, and procedures, and to provide adequate safety precautions. CH2M did not have the authority to stop work in

the event of defects or noncomformance. Such authority was reserved for MMSD. Id. at [*12-14] However, based upon the extent of the construction management type duties reserved by CH2M, the Review Board held that the contract itself, "contemplated that CH2M would have a substantial range of involvement in the project as a whole." Id., at [*8]

In holding CH2M responsible for the safety violations of a general contractor, it reviewed its prior decisions applying the construction standards to non-trade contractors. In Bechtel Pwr. Corp., 4 BNA OSHC 1005, 1975-1976 CCH OSHD P 20,503 (No. 5064, 1976) aff'd *per curiam* 548 F.2d 248 (8th Cir. 1977), the Review Board held that employers may be held subject to the OSHA laws if by their contracts they retain the "overall supervisory authority normally exercised by construction managers at a construction site or have demonstrated control over particular hazardous conditions." Thus, although an employer may not be a general contractor or even a construction manager, if an employer's work is "directly and vitally related" to the construction project, it may be held liable for hazardous conditions affecting employees of the actual contractors. 4 BNA OSHC at 1006-1007, 1975-76

In Bechtel, respondent's duties were to administer and coordinate the construction on behalf of the owner and to conduct daily inspections to "ensure conformity to the design specifications." Respondent was also responsible for coordinating the safety program and providing two inspectors to check the site for safety hazards. The inspectors had authority to stop the work in the presence of a "serious hazard," until it was corrected. However, neither Bechtel nor its inspectors had any

right to "direct action or to dictate that a particular means or method of construction be employed." The Commission's decision not to hold the employer liable noted that Bechtel's only authority in the presence of a hazard was to attempt to persuade the contractors to abate the condition. Id. 4 BNA OSHC at 1006, 1975-76 CCH OSHD at p. 24,498

In Bertrand Goldberg Assocs., 4 BNA OSHC 1587, 1976-77 CCH OSHD P 20,995 (No. 1165, 1976), an architect was held liable for the exposure of the contractor's employees to safety hazards even though he retained only the responsibility for inspecting the project for compliance with specifications, had no authority over means and methods. The factor upon which the decision rested was that the architect had the ability to stop the work for safety violations. "The labels used to describe the various contractors are not controlling as the record shows that respondent had the ability to effect abatement and held a position akin to that of a general contractor. Id. at 1589, 1976-77 CCH OSHD at p. 25,221

In further analyzing its test of whether an employer's involvement in a construction project is "directly and vitally related" to the construction project, the Review Commission in CH2M discussed Skidmore, Owings & Merrill, 5 BNA OSHC 1962, 1977-1978 CCH OSHD P 22, 101 (No. 2165, 1977)(hereafter, "SOM") In SOM, the cited employer was an architectural and engineering firm which contracted with the owner regarding its construction of the Sears Tower in Chicago. SOM was the "conduit for the owner, having authority to instruct the trade contractors to correct nonconforming work only if that work was unacceptable to the owner." SOM was specifically prohibited from directing or supervising "construction means, methods, techniques, procedures or safety methods." The general contractor of the project was expressly vested with "establishing, maintaining, and supervising contractor safety programs." The Review Commission held that in order to be liable under the OSHA laws, "an employer must perform actual construction work or exercise substantial supervision over actual construction." (Emphasis Added) 5 BNA OSHC at 1764, 1977-78 CCH OSHD at p. 26, 627. The Review Commission dismissed the citation against SOM determining that its limited functions were not equivalent to those of a construction manager. Cf, Cauldwell-Wingate Corp., 6 BNA OSHC 1916, 1978 CCH OSHD p. 22, 729 (No. 14260, 1978).

In Cauldwell, the Commission found the employer liable for the citations because it had general managerial responsibility for inspecting conformity of the work, implementing change orders, and certifying contractor's work for payment. Even though it did not have any express contractual responsibility for safety, the Commission held that it had "contractual authority" to effectuate abatement of hazardous conditions. The Commission noted that Cauldwell-Wingate's responsibilities were "considerably more extensive" than those of the architect in SOM and "went far beyond a mere ability to check the site and report back to the owner." Cauldwell-Wingate Corp., 6 BNA OSHC at 1621, 1978 CCH OSHD p. 27, 436 (quoting SOM, 5 BNA OSHC at 1764, 1977-1978 CCH OSHD at p. 26, 627)

Thus, the Review Commission set a precedent for finding employers liable for safety violations if they have "overall supervisory authority" over a construction project even if they do not have the power to direct the means and methods of the daily work. An employer does not have to be a general contractor if they have construction management type responsibilities. The Review Commission has also upheld a citation against an employer who exercised *de facto* authority in effectuating safe work practices at a site. Kulka Constr. Management Corp., 15 BNA OSHC 1870, 1991-93 CCH OSHD p. 29, 829 (No. 88-1167, 1992)

In Kulka, although the employer's contract did not have any contractual authority to evaluate the substances of safety programs, it did in fact review the programs and the owner relied on Kulka to maintain safe working conditions. 15 BNA OSHC at 1872-

73, 1991-93 CCH OSHD at p. 40,685-96. Thus, although they were mere overseers and had no authority to tell the contractors what to do, the Commission held as follows:

The judge placed an undue emphasis on McKee's testimony that he could not personally enforce any instructions he gave to a subcontractor. There is no evidence to show that contractors routinely or customarily would ignore requests from McKee for the correction of safety hazards from which we could conclude that Kulka could not effectively exercise the authority that [the owner] intended it to have.

Id. at 1873, 1991-93 CCH OSHD at p. 40, 685.

Thus, it is not the formal or contractual title of the employer, nor the mere content of a contract, nor the disavowal of authority to direct the means, method or operation of a construction project which determines whether an employer should be cited for a violation affecting a contractor's employees. The determinative factor is how much supervisory control the employer has over the contractor and the actual construction and whether that control extends to having the ability to abate safety hazards.

The United States Circuit Court of Appeals for the 7th Circuit reversed the Review Commission in the CH2M case, disagreeing with the Review Commission's analysis of the facts. CH2M v. Herman,192 F.3d 711 (1999) However, the 7th Circuit affirmed the underlying principle set forth by the Review Commission in many prior cases, including in Bechtel, Bertrand, and Kulka cases cited above, that an employer may be held liable in some cases even when that employer is not a "contractor" or "subcontractor" as those terms are normally used in the construction industry and even when the employer's own employees are not exposed to the hazards described in the citations. Id. at 719-720. The 7th Circuit also affirmed that the general test for when an employer should be held liable is when it "engages in substantial supervision over the work site or safety programs of the construction site". Id. Thus, whether an architect, an engineer or any other type of professional who does not do the manual labor necessary to actually construct an object should be held liable for safety hazards on the construction site to which their own employees are not exposed is a "fact specific inquiry that appears to turn on the responsibilities assumed by the firms in question." Id.

In the CH2M case, the Secretary of Labor argued that CH2M should be held liable for the explosion in the sewage tunnel because it issued a contract modification with regard to the disocvery of methane gas in the tunnel and because the parties "perceived" CH2M as the organization exercising authority over safety procedures, "as evidenced by Healy's deferral to the firm with regard to its safety procedures in relation to the contract modifications for methane gas." Id. at 721 The perception

stemmed from CH2M's supervision of the critical safety hazards by having its own employees enter the tunnels, its authority to issue contract modifications related to safety and the fact that the contractor on site looked to CH2M for an explanation of the contract modification. Based upon those facts, the Secretary of Labor concluded that CH2M could have required the contractor to comply with the contract modifications, even though it did not occur prior to the explosion. Id. at 721-722

The 7th Circuit rejected the Secretary of Labor's argument, noting that it only "presents half of the picture." The Court held that there was not substantial evidence in the record to support a finding that CH2M exercised substantial supervision over the work site or safety programs of the construction site because:

i. the principle on the project, MMSD, retained ultimate authority to determine the methods of construction and CH2M could not act on its own;

ii. the principle on the project, MMSD, retained the ultimate authority to approve of CH2M's proposed contract modifications regarding safety and health issues; and

iii. even though the subcontractor Healy turned to CH2M for advice on safety issues, CH2M was more of an "intermediary" between Healy and MMSD than a *de facto* director of safety.

Thus, the 7th Circuit Court of Appeals held that CH2M as a "professional employer" was not liable for the citation at issue because it: (1) did not have either contractual or actual substantial control over the safety program at the construction site; (2) and its work was not "inextricably intertwined" with the actual physical labor of the construction; and (3) it did not have the authority to stop work until the problems were resolved.

Relying on the same principles expounded by the Review Commission and affirmed by the 7th's Circuit in CH2M, the Minnesota Court of Appeals held that a county, the principal on a highway construction project, can be cited for safety violations of the general contractor on the project if the county exercises "a level of supervisory authority over the worksite that would create a reasonable expectation that it would prevent or abate the hazard that resulted in the citation." Gary W. Bastian, Commissioner, Department of Labor and Industry v. Carlton County Highway Department, 555 N.W. 2d 312 (1996); 1996 Minn. App. LEXIS 1270; 1996 OSHD (CCH) p. 31, 188;

In Bastian, the Carlton County Highway Department, as the principal, contracted with a general contractor to improve a portion of a county highway. The general contractor hired several subcontractors for the work. The county provided a daily project

representative, an assistant highway engineer who visited the site 2-3 times a week and a county highway engineer who visited the site periodically. The primary job of these county employees was to ensure compliance of the contractors with the project specifications. The county highway engineer also had the authority to stop work in the event the contractor failed to correct a hazardous condition. Id. 555 N.W.2d at 314

The OSHA laws which the Minnesota Court of Appeals relied on for citing the principals for the violations of the contractors mirrors North Carolina's general statutes §§ 127-(10)(definition of employer) and 95-129(2)(purpose of the Act). Id. at 315 Minnesota set forth its standard that a principal may be held liable for OSHA violations that do not involve exposure of its own employees to a hazard if (1) the principal created or controlled the hazard; or (2) the Commissioner presents evidence that the principal exercised a level of supervisory authority over a worksite that created a reasonable expectation that it would prevent or abate the hazard resulting in the violation. The principal must affirmatively prove that the principal had the kind of supervisory authority typically exercised by the general contractor or controlling employer on a worksite. Id. at 317

In Bastian, the Commissioner did not contend that the County created the hazard or controlled the hazard for which it received a citation. The Commissioner contended that the county had the requisite level of supervisory authority over the multi-employer worksite to be liable for the violation. The Court held that, despite the county's contractual authority to stop the work under unsafe conditions, the Commissioner had not proven the principal's "actual involvement in directing activities on the project." The Court held that the evidence was not sufficient simply because the county employees "talked to the general contractor's foreman about the inadequate placement of warning signs for motorists and the improper installation of erosion control devices on the project." The Court called these instances "minimal" and held that the general contractor coordinated the subcontractor's activities, not the county. The Court held as follows:

While the county had a representative on the construction site every day, he did not direct the day to day activities of the project; rather, his activities were dependent upon 'what the [general] contractor [was] doing that particular day'

Id., at 317 Thus, while the Court held that county principals may be held liable under the multi employer doctrine, the evidence was insufficient to support a finding that Carlton County had the degree of supervisory control over the work site necessary to uphold the citations. Noteworthy is that the Court refused to hold the county liable even after considering the long list of factors outlined below by the dissenting Judge, who believed that the County did have a sufficient amount of supervisory authority:

(1) the county had specific contractual authority to "suspend the work either wholly or in part, due to the failure of the contractor to correct conditions unsafe for the workmen or the general public"; (2) the county exercised direct control over the contractor with respect to contractual requirements involving erosion at the construction site and proper signage for traffic control; (3) the county knew of four previous power line strikes at the site within an eight day period and was asked by Minnesota Power to call a meeting with the general contractor, Minnesota Power and county representatives, but no meeting was scheduled; and (4) immediately after the accident in issue, the county convened a meeting with the contractor and

Minnesota Power to identify the areas on the worksite that would pose a hazard with regard to overhead power lines and to discuss ways of abating the hazard.(Emphasis Added)

Id. at 318 Thus, by rejecting the reasoning of the dissenting Judge, the Bastian Court held that even a showing of control by the principal over safety issues at the site after an accident occurred, was not sufficient to uphold the citations.

The United States Court of Appeals for the District of Columbia Circuit held that an employer's authority to cancel a contract was not, in itself, sufficient control over a project to hold the employer liable for hazards posed to contractor's employees. IBP, Inc. v. Herman, 144 F.3d 861, 330 U.S. App. D.C. 218 (1998). In IBP, the employer owned the plant where the hazard existed, was aware that the sanitation employees were exposed to unsafe conditions and had the ability to cancel the contract based upon the continued unsafe conditions. However, the evidence showed that when the employer tried to direct the sanitation employees to correct or steer clear of the hazards, the employees ignored the employer and, in some instances, told the employer that it could not tell them what to do. The employer never tried to discipline the sanitation employees. As seen in the cases discussed above, it was not the content of the contract or the right to control which appeared dispositive of the issues, but rather the "indicia of control" held by the employer. 144 F.3d at 863

The IBP court cited to the Review Commission decision in Harvey Workover, Inc., 7 O.S.H. Ca. (BNA) 1687 (1979) for the proposition that there is no distinction between a construction worksite and a general industry worksite and that the "safety of all employees can best be achieved if each employer at a multi-employer worksite has the duties to (1) abate hazardous conditions under its control and (2) prevent its employees from creating hazards. IBP, 144 F.3d at 865, 330 U.S. App. D.C. at 222 (quoting Workover at 1689) The IBP court concluded that the contract language giving the employer the right to cancel a contract is not sufficient control over a project to subsume the power to discipline the sanitation employees. Even the labor secretary agreed that there was no evidence that the employer had any authority to

suspend the sanitation employees from work. To the contrary, the sanitation workers believed that the employer had no authority to direct them in their work. Thus, the Court concluded, "[t]o require [the employer] to cancel its contract with [the sanitation employer], potentially bringing its plant operations to a halt, is to employ a howitzer to hit a small target." IBP at 866, 330 U.S. App. D.C. at 223. The IBP Court held that the valid citation against the sanitation employer and that employer's ability to control its own employees' safety infractions was sufficient to ensure the safety of the employees in the future.

Application of Doctrine to the City of Charlotte

Did complainant in this case meet its burden of proving by a preponderance of the evidence that respondent could reasonably have known by reason of its supervisory capacity that the excavation in which the general contractors employees were working was unsafe and, if so, did complainant prove that respondent failed to remove the general contractor's employees out of the pit until necessary precautions had been taken to ensure their safety?

Respondent did not create the hazardous excavation. Respondent did not exercise the level of supervisory control over the worksite which would justify its being held liable for the unsafe excavation in this instance.

Neither Mr. Bird nor any of respondent's representatives performed any construction work on the site. Neither Mr. Bird nor any of respondent's representatives: (1) directed the daily means, method, procedures or techniques of Dakota's work; (2) scheduled supplies, chose suppliers or had any direct contact with Dakota's employees; or (3) advised Dakota on trenching options. In fact, Mr. Bird's only activities at the project site were to ensure the timeliness of Dakota's work and to ensure the work's compliance with NCDOT's standard specifications and the Standard Special Provisions in the contract. Mr. Bird's activities were dependent upon what the general contractor was doing that particular day. Respondent did not perform regular and frequent inspections of the job site with the purpose of ensuring compliance with the OSHA Act. There was no evidence that Mr. Bird had the authority to discipline Dakota's employees working on the project site. There was no evidence of any incidents prior to the SCO's inspection in which Mr. Bird disciplined or directed Dakota's employees on the project site or detected a hazardous condition. There was no evidence that Mr. Bird had knowledge of the unsafe excavation in question. Prior to the inspection by the SCO, respondent was not aware of any prior OSHA violations committed by Dakota or any other reason why it should have concern about Dakota's ability to conduct a trenching operation.

While respondent's written policy outlined numerous steps respondent could take in order to make Dakota's work place safe, the majority of the steps were simply to attempt to persuade Dakota's management to abate the condition. The only way respondent could actually stop Dakota's workers from being exposed to the hazard was to call an OSHA inspector. It is not enough that respondent had the authority to stop payment on any work done by Dakota for so long as the unsafe condition existed.

For these reasons, respondent did not have the extent of supervisory capacity over the job site necessary to be held responsible for the unsafe excavation in which the general contractor's employees were working.

Complainant argues that respondent had supervisory control over the project site as evidenced by what happened after the SCO cited Dakota for its violation. The SCO asked Dakota's foreman, Mr. Haney, to remove his employees from the excavation and pull back the slope of the walls. Mr. Haney hemmed and hawed and kicked the dirt, but did not move immediately to remove his employees from the danger. After the SCO told Mr. Bird that the excavation was unsafe and that he was citing Dakota for a safety violation, Mr. Bird told Dakota to get his employees out of the pit and to properly slope the walls. After Mr. Bird's direction, Mr. Haney then told his employees to get out of the pit and he proceeded to pull back the walls. Based upon Mr. Bird's action in directing Mr. Haney and based upon Mr. Haney's response in making the pit safe for his employees, complainant argues that respondent did have the level of supervisory control over Dakota that would trigger liability and that respondent's citation was properly based upon the several minutes that Mr. Bird allowed Dakota's employees to work in the unsafe pit while he was talking with the SCO after the inspection

The evidence presented by complainant regarding the events which took place after the SCO's inspection does not rise to the level required to hold an employer liable under the Act. The number of minutes that Mr. Bird observed Dakota's employees in the pit after the inspection was minimal. Mr. Bird did not know until the SCO informed him that the excavation was unsafe. Although Mr. Haney did remove his employees and fix the pit as Mr. Bird requested, there is no evidence that Mr. Bird had the authority to tell Mr. Haney what to do, that Mr. Bird had on previous occasions directed Mr. Haney in the area of safety, or that Mr. Haney would have taken steps to make the pit safe had the SCO not just cited it for safety violations and had been standing at Mr. Haney's elbow. While the SCO testified that Mr. Haney hesitated to make the repairs after the SCO informed him that the excavation was unsafe, it is entirely unclear as to how long the SCO allowed Mr. Haney to take action before turning to Mr. Bird for assistance. Again, if it was a matter of seconds or minutes, then the evidence is insufficient to prove that Mr. Bird had the requisite supervisory authority over the general contractor in this case.

Non-Delegable Duties Arising from Inherently Dangerous Activities

Complainant argues that under Woodson and its progeny, the citations against respondent should be upheld because respondent had a non-delegable duty to ensure the safety of Dakota's employees because trenching is an inherently dangerous activity.

Generally, North Carolina Courts recognize that one party who contracts with an independent contractor is not liable for injuries sustained by the contractor's employees unless the employer has retained the right to control the method and manner in which the independent contractor performs his employment or if the party negligently hires or retains the independent contractor. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991)

As in the OSHA cases discussed above, merely taking steps to ensure that an independent contractor fulfills his contract is insufficient to make the hiring party liable for the injuries to the employees of the independent contractor. Hooper v. Pizzagalli Construction Co., 112 N.C. App. 400, 436 S.E.2d 145 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 516 (1994); see also, O'Carroll v. Roberts Industrial Contractors, Inc., 119 N.C. App. 140; 457 S.E.2d 752 (1995)

In Woodson, however, the North Carolina Supreme Court held that "one who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others. Woodson, 329 N.C at 352, 407 S.E.2d at 235. Inherently dangerous activity is defined as follows:

[W]ork to be done from which mischievous consequences will arise unless preventative measures are adopted, and that which has "a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which later might take place on a job involving no inherent danger."

Hooper, 112 N.C. App 400, 405, 436 S.E.2d 145, 149. However, the Supreme Court also noted that a non-delegable duty would arise only when "the trenching done by an independent contractor becomes inherently dangerous and the owner knows of 'the dangerous propensities of the particular trenching in question.'" Woodson, 329 N.C. at 358, 407 S.E.2d at 238 (in which the Supreme Court held that the dangers involved in trenching should be determined on case by case basis)

Since none of Dakota's employees were injured by the excavation and since this claim does not involve a negligence action against respondent, it is questionable whether

the Woodson line of cases is even applicable to this decision. However, we need not reach those issues since respondent did not have the requisite level of control over the project or the requisite knowledge of an inherently dangerous activity to trigger a Woodson analysis.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Respondent was not a controlling employer with supervisory capacity over the job site.

4. The Complainant has failed to prove by a preponderance of the evidence that respondent violated the section of the Act as set forth in the Findings of Fact above.

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** that Citation 1, Item 1b is hereby **DISMISSED.**

This the 20th day of November, 2000.

_____
Ellen R. Gelbin
Administrative Law Judge