BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

SHELTON PIPELINE, INC.,
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 2001-4069
OSHA INSPECTION NO. 304543135
CSHO ID NO. K7109

ORDER

reversed by Superior Court

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 23rd day of September, 2003 in Room 124, First Floor, Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr,. Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the Safety and Health Review Board of North Carolina.

APPEARANCES

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Urs R. Gsteiger of Horton and Gsteiger, P.L.L.C., Winston-Salem, North Carolina for the Respondent.

ISSUE PRESENTED

1. Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.651(b)(3) by failing to determine the exact location of the underground pipe by safe and acceptable means when the excavation operations approached the estimated location of the underground pipe?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.651(b)(3) states:

> When excavation operations approach the estimated location of underground installations, the exact location of the installations shall be determined by safe and acceptable means.

2. 1926.651(b)(1) states:

> The estimated location of utility installations, such as sewer, telephone, fuel, electric, water lines, or any other underground installations that reasonably may be expected to be encountered during excavation work, shall be determined prior to opening an excavation.

3. 1926.650(b), in pertinent part, provides:

> Definitions applicable to this subpart.
>
> > Excavation" means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.

4. N.C. Gen. Stat. §95-129(2) provides, in pertinent part, as follows:

> Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article.

5. N.C. Gen. Stat. §87-101(3) provides, in pertinent part, as follows:

> "Excavate" or "excavation" means an operation for the purpose of the movement or removal of earth, rock, or other materials in or on the ground by use of equipment operated by means of mechanical power ... .

6. N.C. Gen. Stat. §87-101(5) provides as follows:

> "Location of underground utilities" means a strip of land not wider than the width of the underground utility plus two and one-half (2½) feet on either side of the underground utility. (Emphasis Added)

Having reviewed and considered the record, the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms the decision of the Hearing Examiner and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The employer (Respondent) Shelton Pipeline, Inc., is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. Beginning on June 4, 2001, Safety Compliance Officer Daniel Kavanaugh , employed by the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at 2775 Hope Church Road, in Winston-Salem, North Carolina.

6. This inspection was initiated as a result of a media report of a gas explosion at that location in which two employees of Shelton received 3rd degree burns over 70% of their body.

7. One of the employees, Christopher Lilly died at the hospital a few days later.

8. As a result of this inspection, the Occupational Safety and Health Division of the North Carolina department of Labor issued two citations to Respondent only one of which was contested. The contested citation is for a serious violation of 29 CFR 1926.651(b)(3) with a proposed penalty of $3,150.00.

9. Respondent submitted a timely Notice of Contest dated October 29, 2001, in which it contested only Citation Number One, Item 1.

10. On or about November 19, 2001, Respondent filed its Statement of Employer/Respondent's Position requesting formal pleadings.

11. This matter was heard by the Honorable Ellen Gelbin, Hearing Examiner, at City Hall South in Winston-Salem, North Carolina on October 24 and November 13, 2002.

12. Prior to the presentation of evidence, Complainant moved to amend the proposed penalty on Citation 1, Item 1 from $3,150.00 to $1,400.00 due to Respondent's size and the motion was granted.

13. On December 12, 2002, Hearing Examiner Gelbin issued an Order affirming the serious violation of 29 CFR 1926.651(b)(3) and penalty of $1,400.00. Said order was filed with the Board on December 18, 2002.

14. On January 14, 2003, Respondent filed its Petition for Review objecting to and excepting to the Order.

15. On February 5, 2003, the Chairman of the Safety and Health Review Board entered an Order granting Respondent's Petition for Review.

16. The issues on appeal were heard by the full Board on September 23, 2003.

17. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 22.

18. The first boring under the highway was too high and Respondent had to do a second boring under the highway. (T Vol 2, p157-158).

19. The Board adopts the Hearing Examiner's findings of facts numbered 24 through 26.

20. Promark had mis-marked the location of the Piedmont Natural Gas pipeline such that its marking was 5 feet 1 inch further south from the center line of Hope Church Road than the actual location of the gas line and 2.7 inches outside the horizontal "safety zone" as defined by N.C. Gen. Stat. §87-101(5).

21. In a 200 foot strip of land, Piedmont Natural Gas had laid the gas pipeline such that at one end the pipeline was 3 feet 6 inches deep and, at the job site, the pipeline was approximately 8 feet 5 inches deep.

22. Although required by the North Carolina Department of Transportation, Piedmont Natural Gas did not properly document or file an accurate "as built" drawing after it laid the pipeline.

23. Neither Piedmont Natural Gas, the North Carolina Department of Transportation, Promark nor Respondent had accurate drawings of where the pipeline had been laid in the vicinity of the job site.

24. The Board adopts the Hearing Examiner's findings of facts numbered 28 through 31.

25. The compliance officer initially in his narrative recommended that no citations related to the accident be issued to Respondent. (Defendant's exhibit # 1, p 16), (T Vol 1 pp 61-64).

26. The recommendation that no citation related to the accident be issued was mistakenly left in the narrative that was printed out and placed in the file and sent to the Respondent as part of the informal discovery process. (T Vol 1, pp 70-74).

27. The compliance officer used the definition of "location of underground utilities" as set out in N.C. Gen. Stat. §87-101(5) to determine the estimated location of the gas pipeline as a five feet, four inch horizontal envelope surrounding the gas pipeline. (T vol 1, p 37-39).

28. The compliance officer's initial recommendation of no citation was based on his mistaken belief that the receiving pit was between the estimated location of the gas pipeline as marked by Promark and the actual location of the gas pipeline so that he mistakenly thought that no actual penetration of the five foot four inch envelope occurred. (T Vol. 1 pp 70, 87-89).

29. Tim Childers is the Western Compliance Bureau Chief of the North Carolina Occupational Safety and Health Division of the North Carolina Department of Labor. (T Vol 2, p 122).

30. Part of Mr. Childers` duties is to supervise the work of the District Supervisors and of the Compliance Officers. (T Vol 2, p 123).

31. When an investigation involves a fatality, part of the normal procedure is for the file and the recommendations of the compliance officer to be reviewed by Mr. Childers and by those who supervise Mr. Childers. (T Vol 2, p 124, 128-131).

32. As part of that normal review process, because there was a fatality involved, Mr. Childers reviewed the file and recommendations of the compliance officer and in consultation with his supervisors and the compliance officer determined that the standard had indeed been violated when the first bore penetrated the envelope that comprised the estimated location of the pipeline. (T Vol 1, pp 86-89), (T Vol 2, pp 129-135, 147-148).

33. The compliance officer received information that the receiving pit was located on the South side opposite the estimated location of the pipeline as marked by Promark and determined after consultation with his supervisors that the first bore under the road had traveled above the actual pipe and gone through the five feet, four inch envelope that comprises the estimated location of the pipeline. (Complainant's exhibit C-4), (T Vol. 1 pp 72-73, 85-89).

34. The compliance officer changed his recommendation and recommended that a citation be issued for a violation of 29 CFR 1926.651(b)(3) based on the fact that on the first bore when the boring machine got to the point that was at the edge of the five feet, four inch envelope surrounding Promark's mark, the Respondent did not stop and dig with a hand shovel or other acceptable means to determine the exact location of the gas pipeline. (T Vol. 1 pp 37-39, 47-48, 72-73, 88-89), (Complainant's exhibit C-4).

35. Failing to find the exact location of the underground gas line created the hazard of a gas explosion resulting in serious injury and/or death.

36. The Respondent's foreman, Steve Harper, knew that Promark had been unable to mark the location of the gas pipeline the day before the accident. (T Vol 2, pp164-165)

37. The Respondent's foreman, Steve Harper, knew that the depth of pipes varied from one location to the next. (T Vol 2, pp163-164)

38. The Respondent's general superintendent, Laura Elizabeth Shelton Pierce, knew that the depth of gas lines varied from one location to the next. (T Vol 2 pp 205-206)

39. The Respondent knew or should have known through its foreman and general superintendent that the failure to find the exact location of the gas pipeline created the hazard that the boring auger could pierce the pipeline and release gas resulting in an explosion.

40. Both the estimated location of the pipeline as marked by Promark and the actual location of the pipeline were off of the highway and any digging to attempt to locate the pipe would not have required any open cutting and would not have interfered with the surface of the highway. (Complainant's Exhibit #4), (T Vol 1, pp 94-96), (T Vol 2 pp 201-202).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

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

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.651(b)(3) by failing to determine the exact location of the underground pipe by safe and acceptable means when the excavation operations approached the estimated location of the underground pipe.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

In order to prove a serious violation of an OSH standard the Complainant must prove the following:

1. A hazard covered by the cited standard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantial probability of an accident could be death or serious physical injury and

5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

The Respondent sought review of the Hearing Examiner's findings of fact numbered 18, 19, 20 and 28 which are set out below:

> 18. Although Promark estimated that the horizontal location of the gas pipeline was between the boring trench and the receiving trench, Respondent took no actions to expose or determine the exact location of the gas pipeline in the vicinity of 2775 Hope Church Road prior to beginning its boring operations.
>
> 19. If, prior to beginning its boring operations, Respondent had chosen to determine the exact location or depth of the gas pipeline, it could have easily and with minimal expense "potholed" or dug a 4 foot hole at Promark's mark.
>
> 20. If Respondent had dug a 4 foot deep hole at Promark's mark at the job site, it would not have exposed the gas pipeline. Then, Respondent could have easily called Piedmont Natural Gas to come out and find their pipeline prior to Respondent beginning its boring operations.
>
> 28. The SCO properly cited Respondent for a violation of 29 C.F.R. §1926.651(b)(3) on the basis that Respondent had not determined the "exact" location of the gas pipeline at the job site prior to its first and second bores on June 4, 2001.

These findings deal with the failure of the Respondent to mark the exact location of the underground pipeline. A review of the transcript and the exhibits shows that each of those findings of fact is supported by the testimony of the safety compliance officer and by the Complainant's exhibits. (Complainant's exhibit C-4), (T Vol. 1, pp 47-57). These findings are supported by substantial evidence and by a preponderance of the evidence.

Respondent also "disputes Conclusion of Law 3 as not supported by the evidence, as an abuse of discretion, as prejudicial and as constituting an error of law." "Respondent's Petition for Review" filed January 14, 2003, pp. 1. Conclusion of law 3 states:

> 3. The Commissioner proved by a preponderance of the evidence that Respondent violated 29 C.F.R. §1926.651(b)(3), that the violation was serious and that the penalties assessed were figured appropriately.

A review of the whole record shows that the complainant has met her burden of proving by a preponderance of the evidence each of the five elements cited above that are necessary to prove a violation of 29 C.F.R. §1926.651(b)(3). The hazard of an explosion existed if the exact location of the gas pipeline was not determined. Two employees were exposed, one of them with fatal results. The hazard created the possibility of an accident that a gas line could be ruptured and explode and the substantial probability of an accident could be death or serious physical injury. The Respondent knew or should have known through its foreman and superintendent that the failure to determine the exact location of the gas pipeline could result in a gas explosion. These elements are all supported by substantial evidence in the record. The hearing examiner or the Board has made the appropriate findings of fact determining that each of these elements has been proven. These findings of fact are supported by substantial evidence and a preponderance of the evidence. The conclusion of law that the Respondent committed a serious violation of 29 C.F.R. §1926.651(b)(3) and that the penalties were appropriate is supported by the findings of fact. There is no abuse of discretion and no error of law. The conclusion of law is not prejudicial to Respondent other than in the sense that being found in violation of an occupational safety and health standard carries with it legal consequences including the legal responsibility to pay a penalty. The penalty was calculated according to the Field Operations manual with consideration given to the appropriate statutory factors set out in N.C.G.S. § 95-138(a) and is therefore just and reasonable.

Respondent also challenges the Judge's findings of fact in its Petition for Review by stating:

> Furthermore, Respondent contends that the Administrative Law Judge ignored the testimony that Respondent's actions related to its compliance with 29 C.F.R. §1926.651(b)(3) were in accordance with standard and accepted industry practice and furthermore that Respondent was prevented from taking any other steps to determine the location of the natural gas pipeline at issue by local and state authorities, as well as by the contract documents at issue.

"Respondent's Petition for Review" filed January 14, 2003, pp. 1-2. When there is contrary evidence in the record, the Board, even if they would have found the facts differently, cannot substitute its own findings of fact. The Board's "determination on review is limited to whether the pertinent factual findings, and legal conclusions on which they are based, are supported by competent and substantial evidence, taking into account the burden of the complainant to prove its case." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). Contrary to Respondent's assertion that the Hearing Examiner ignored the Respondent's testimony that the Respondent's action in calling the "One Call" center was in accordance with standard industry practice, the Hearing Examiner devoted almost all of pages 8 and 9 of her decision to explaining the fallacies in Respondent's argument. We find the Hearing Examiner's explanation to be based on substantial evidence and without any error of law. To that we will add that, assuming arguendo, that the Respondent's actions in calling the "One Call" center complied with the accepted industry practice for finding the exact location of underground utilities, that action would still be a violation of 29 C.F.R. 1926.651(b)(3). The North Carolina Court of Appeals has spoken about the weight to be given industry practice in determining whether there has been a violation of an OSH personal protection standard:

> In order to establish that Daniel violated 29 CFR 1926.28 as charged in the citation, OSHA had to prove that under the circumstances which existed a reasonably prudent employer would have recognized that carrying heavy objects above their unprotected feet was hazardous to the employees doing the carrying and would require them to wear safety toe shoes. (citations omitted). . . But as applied by the First and Third Circuits, the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an

industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry.

Daniel Construction Company, 2 NCOSHD 311, 315-317 (1985), 73 N.C. App. 426, 326 S.E. 2d 339 (1985). The Complainant is not required to prove that the Respondent's actions were against industry practice for a violation of a specific OSH standard. Industry practice is only one of many factors to be considered in determining whether Respondent knew or should have known that a hazard existed when they failed to stop and locate the gas pipe line by hand digging with a shovel or other safe and acceptable means before boring into the five feet, four inch horizontal envelope surrounding the pipe. If in fact, the practice in the industry was to have the "One Call" center mark the location of the underground utilities on the ground with spray paint and to bore without determining how deep the pipes are buried, then that practice is an outmoded, unsafe practice which, as happened in this case, can result in the death of workers.

Respondent argues that it was forbidden to "pothole" or dig any holes in the surface of the highway by the Department of Transportation and by its contract documents and therefore, could not dig up the pipe to determine its depth. The uncontradicted evidence in the record is that both the estimated location of the pipeline as marked by Promark and the actual location of the pipeline were off of the highway and any digging to attempt to locate the pipe would not have interfered with the surface of the highway. (Complainant's Exhibit #4), (T Vol 1, pp 94-96), (T Vol 2 pp 201-202).

Respondent in its brief argues that the boring activity was not an excavation and was not covered by the cited standard, 29 C.F.R. 1926.651(b)(3). A boring hole that connects two excavations is part of the excavations and falls within the definition of "any man-made . . . cavity . . . in an earth surface, formed by earth removal. The definition does not speak in terms of "the earth surface" but refers to a "cut, cavity, trench, or depression in an earth surface" meaning that there is more than one type of earth surface. A wall or bank of soil is an earth surface. A cavity is defined as "A hollow; a hole". "The American Heritage College Dictionary" 3rd edition (1997). Therefore a bore hole in the bank of soil of a boring pit which travels underneath a road is a cavity formed by earth removal and is an excavation which is covered by the standard.

The Respondent in his brief also argues that the compliance officer in his report said that the Respondent had made a "good faith effort to have Pro-Mark properly locate/mark the underground utilities on site, prior to commencing boring and excavation activities" and that he recommended that no citations be issued against Respondent. Tim Childers, the Western Compliance Bureau Chief reviewed the file because a fatality was involved and in consultation with his supervisors and the compliance officer determined that the standard had indeed been violated when the first bore penetrated the envelope that comprised the estimated location of the pipeline. The compliance officer in his testimony explained that his initial decision to not cite the Respondent was based on a mistaken understanding of the location of the receiving pit and that he changed his initial determination and recommended that Respondent be cited based on the fact that the first boring entered the envelope comprising the estimated location of the gas pipeline triggering the requirement to stop and find the exact location of the pipeline.

Respondent in its brief relies on the decision in Secretary of Labor v. Honey Creek Contracting Co., Inc., 1998 CCH OSHD ¶ 31,516 (No. 97-0353, 1998) for the proposition that calling the one call center was all that was required to determine the exact location of the gas pipeline. A review of the case reveals that there was no discussion of the requirement of 29 C.F.R. 1926.651(b)(3) that the exact location of the pipeline be determined. There was only a finding that "The Secretary has thus not shown that Respondent failed to use a safe and acceptable means to locate the lines". Id., at 44,866. The administrative law judge in that case did not understand the requirement of the standard that "the exact location . . . be determined by safe and acceptable means". However, the Hearing Examiner in this case relied on two federal administrative law judge decisions to support the finding that the Respondent was required to find the exact location and failed to do so.

In Secretary of Labor v. Geo. Gradel Co., 1998 CCH OSHD ¶ 31,563 (No. 96-1424, 1998), the citation for a violation of 29 C.F.R. 1926.651(b)(3) was vacated because the Employer in that case had taken the necessary steps to find the exact location of the gas pipeline by hand digging with a shovel after the utility had marked the

estimated location with flags. A backhoe operator ignored instructions from the foreman to "hold tight" after they had exposed part of the gas line by hand shoveling and the foreman left to get more sewer pipe. The backhoe operator resumed digging with the backhoe and struck and pierced the gas line. The foreman had intended to do more hand digging with a shovel when he returned. Respondent in this case made no effort to find the exact location of the gas line at the site of the boring operation by hand digging with a shovel or by other safe and acceptable means.

In Specialized Grading Enterprises, Inc., 1998 CCH OSHD ¶ 31,599 (No. 97-1560, 1998), the estimated location of the gas line was marked with a yellow line and a flag pursuant to 29 C.F.R. 1926.651(b)(1). The backhoe operator called his boss and told him there was a gas line in the way and he was told to proceed but was not provided with any tools with which he could probe or dig for the gas line. The backhoe operator struck and pierced the gas line with the bucket of the backhoe. The administrative law judge found that the Employer failed to comply with 29 C.F.R. 1926.651(b)(3) by determining the exact location of the line.

Both of these cases required that the exact location of the gas line be determined by hand digging with a shovel or by probing and they support the decision of the Hearing Examiner in this case and we find them supportive of our decision. Once the Respondent bored into the five feet, four inch envelope comprising the "safety zone" that extended on both sides of the pipe (two and one-half feet on each side plus the four inch diameter of the pipe), the Respondent was required to stop boring operations and locate the gas pipe by safe and acceptable means. Hand digging with a shovel or probing with a rod, as was done in the cited cases, is one example of a safe and acceptable means for finding the exact location that Respondent could have used.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's December 12, 2002 Order in this cause be, and hereby is, **AFFIRMED** and Respondent is found to have committed a serious violation of 29 C.F.R. 1926.651(b)(3) as alleged in Citation One, Item 1 and Respondent is **ORDERED** to pay the penalty of $1,400.00 within 30 days of the date of this order.

This the 17th day of November, 2003

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OSCAR A. KELLER, JR., CHAIRMAN

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER