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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

MONROE ROADWAYS, INC.,

RESPONDENT.

DOCKET NO. OSHANC 2001-4005
OSHA INSPECTION NO. 302936919
CSHO ID NO. H6245

ORDER

THIS MATTER was heard by the undersigned on October 16 and 17, 2002 in Charlotte, North Carolina.

The complainant was represented by Linda Kimball, Assistant Attorney General; the respondent was represented by Philip VanHoy.

At the outset of the hearing, the complainant moved to withdraw Citation 1, Item 1b, a willful serious violation of 29 CFR 1926.651 (k)(2). At the same time, the respondent moved to withdraw its notice of contest to Citation 2, Item 1, a repeat non-serious violation of 29 CFR 1926.651 (c)(2). Without objection, these motions were allowed.

After hearing and receiving the evidence and receiving the post hearing briefs of the parties, the undersigned makes the following

FINDINGS OF FACT

1. The complainant is charged by law with responsibility for compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the Act).

2. The respondent is a corporation with its principal place of business in Concord, North Carolina. It employed 136 employees as of the date of the inspection in this matter.

3. On August 9, 2000, George Hunter, then a health compliance officer for the complainant, first conducted a limited scope referral inspection of respondent's construction worksite along Johnston Road in High Point, North Carolina.

4. The respondent was installing a water main and doing other water system related work in connection with the widening of Johnston Road. Although the citations show the inspection site as College Avenue, the inspections actually occurred along Johnston Road.

5. Prior to this inspection, Mr. Hunter had repeatedly observed respondent's employees working in this area of High Point in connection with this same project and another project. Mr. Hunter lived in this area and daily observed the progress of the road and water facility construction as he traveled to and from his home.

6. On May 26, 2000, Mr. Hunter specifically observed respondent's employees working along Lexington Avenue installing a water line. He observed a spoil pile which he felt was too close to the trench opening and observed an employee of respondent in the trench, which he believed was 6 - 7 feet deep and not sloped. Since he was off-duty, he did not conduct an inspection or take measurements, but he did tell the employee to get out of the trench.

7. On July 29, 2000, Mr. Hunter observed respondent's employee working in a trench along Johnston Road which Mr. Hunter believed was not properly sloped or shored. Again, he did not conduct an inspection or take measurements because he was off-duty and did not have his credentials. He did speak about the situation the following Monday to a representative of Santerra, the general contractor, and to William Deisering, the respondent's job site foreman .

8. On August 9, 2000, Mr. Hunter conducted his limited scope referral inspection of the Johnston Road jobsite. He conducted an opening conference with Mr. Deisering, respondent's foreman, who he determined to be the "competent" person on the jobsite. The conditions on the jobsite are described in the Findings below.

9. On August 28, 2000 Mr. Hunter again passed the respondent's jobsite and observed respondent's employee Dan Allen in a trench which Mr. Hunter believed to be seven feet deep with improper sloping. Since he was again off-duty, he made a referral to the Winston-Salem office of the complainant.

10. On September 26, 2000, Mr. Hunter observed Mr. Deisering and another of respondent's employees, Charlie Driver, in an eight-foot deep trench. With his personal camera, Mr. Hunter took photographs of the trench. He also took

measurements of the trench. His inspection of this trench was combined with the August 9, 2000 inspection of the respondent.

11. The excavation observed by Mr. Hunter on August 9, 2000 was 19 feet 9 inches long, 20 feet wide at the top and 8 feet wide at the bottom. The depth was 11 feet.

12. Mr. Hunter learned through employee interviews that both Mr. Deisering and respondent's employee Tony Gaddy were working in this trench. The respondent had cut a 16-inch waterline and its employees were attempting to fix the line and divert the water with quickset concrete.

13. Two of the walls to this trench were nearly vertical; one wall was sloped but not to 34° as required by the standard. Another wall was benched at a five-foot interval. The wall adjacent to the road could not be sloped.

14. Mr. Deisering and Mr. Hunter agreed that the soil at this site was Class B on the road side of the trench and the rest of the soil in the trench was Class C soil.

15. For a trench to be properly sloped in Class B soil, the vertical change to horizontal change is 1:1. In Class C soil it is 1½:1. There was no shoring in this trench nor was a trench box in use. Benching is not permitted in Class C soil. For this trench to be properly sloped it would have needed to be 35 feet in width at the top.

16. The excavation Mr. Hunter observed on September 26, 2000 was 8 feet deep, 4 feet wide at the bottom, 35 feet in length and 14 to 25 feet wide at the top. This trench was also in Class C soil.

17. For this trench to be properly sloped, it would have needed to be 28 feet wide at the top. Again, there was no shoring and no trench box in use in this trench. Mr. Deisering was working in the trench for approximately three hours during that time.

18. On August 9, 2000, Mr. Hunter observed spoil from the excavation on the edge of the trench, with some sloughing off into the trench. There was also water in the trench on this date. He also observed this same general condition on September 26, 2000. In neither case was the spoil pile at least two feet from the side of the trench, although exact measurements were not taken.

19. On these two occasions, equipment was located at the edge of the trench and at least one employee was in the trench when Mr. Hunter was there. Both trenches were adjacent to an active roadway.

20. In each of these circumstances observed by Mr. Hunter, there existed the possibility of an accident the substantially probable result of which would be death or serious injury. Two employees were exposed on each occasion.

21. Mr. Hunter cited these circumstances as willful in Citation 1 primarily because; (a) the foreman, Mr. Deisering, was in the trench on one occasion; (b) because Mr. Carini, the respondent's president, was informed of the respondent's work habits prior to the last episode on September 26, 2000; (c) because the respondent was using a consulting firm to monitor and inspect the respondent's employees jobsite safety work habits; and (d) because of the total number of instances in which Mr. Hunter had observed Act violations.

22. Mr. Deisering told Mr. Hunter that the respondent had a project deadline for completion that required the respondent to accelerate the progress of the work.

23. The proposed penalties for the alleged willful violations were computed based on a gravity-based penalty of $7,000.00, with a multiplier of ten based on the alleged willfulness, with a high severity and a high probability. The respondent was given at 30% credit for size but no good faith or history credit, because of prior serious violations and the "willful" citations.

24. The credit calculations were consistently applied for all of the serious citations.

25. During the September 26, 2000 inspection, Mr. Hunter observed Mr. Deisering working in the trench and not wearing a hard hat, which circumstance was memorialized in a photograph introduced into evidence. This condition created the possibility of an accident the substantially probable result of which would have been serious injury.

26. There exists conflicting evidence on the extent of the trench/excavation training provided to respondent's employees. Prior to the issuance of citations, Mr. Hunter obtained the respondent's written safety manual but did not obtain its safety training records. The respondent introduced evidence of an ongoing, active safety training program in existence during the time of these jobsite incidents. The respondent also introduced evidence of an ongoing program to provide safety equipment to employees in the field as requested or needed.

27. On August 8, 2000, while Mr. Hunter was present, respondent's employee Daniel Bowen was directing traffic on a roadway with active traffic, without wearing a reflective vest and without using traffic control paddles. This condition created the possibility of an accident the substantially probable result of which would have been serious injury.

28. On both August 9, 2000 and September 26, 2000, the respondent's employee Tony Gaddy was wearing sunglasses instead of approved eye protection while performing tasks that require eye protection. This condition created the possibility of an accident the substantially probable result of which would have been serious injury.

29. On August 8, 2000, the respondent's employees were using an aluminum ladder for ingress and egress from the trench, which ladder was missing a side rail. The defective end of the ladder was sticking out of the top of the trench well above the side of the trench. There is no persuasive evidence that the configuration of this ladder would cause serious injury to an employee.

30. The evidence is unclear as to whether the respondent had a ladder inspection or training program. Mr. Hunter did not inquire of the respondent concerning this and the respondent presented evidence that it would attempt to promptly remove defective ladders from service and that employees were given rudimentary safety training concerning all aspects of its business, including ladders.

31. Mr. Hunter notified management of the respondent of the results of his observations and his August 9, 2000 inspection prior to the September 26, 2000 inspection. Management of respondent took steps to attempt to correct the safety issues raised by Mr. Hunter, which steps were ineffective in causing the employees to fully comply with the cited standards on September 26, 2000.

32. The citations in this matter were issued on January 26, 2001, four months after the last inspection.

33. After the second inspection Mr. Deisering was suspended for one week without pay. There was no indication of any other discipline for employees by Mr. Deisering or management except for undocumented oral warnings.

Based on the foregoing Findings of Fact, the undersigned makes the following

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. The respondent is subject to the provisions of the Act.

3. The complainant has proved by the greater weight of the evidence a serious violation of the standards alleged to have been violated in Citation 1, Items 1a and 2, and Citation 3, Items 1a, 1b, 2a, 2b and 3.

4. The complaint has proved by the greater weight of the evidence a non serious violation of the standards alleged to have been violated in Citation 3, Items 4a and 4b.

5. The complainant has failed to prove by the greater weight of the evidence that any cited standard violations were willful.

6. The complainant has failed to prove by the greater weight of the evidence a violation of the standard cited in Citation 3, Item 4c.

7. The respondent has failed to prove by the greater weight of the evidence the affirmative defense of isolated instance of employee misconduct.

8. The penalties as proposed were calculated in accordance with the Field Operations Manual.

DISCUSSION

This discussion is limited to and warranted by the consideration of the willful-serious citations that were proposed by former Health Compliance Officer George Hunter against the respondent.

After hearing and reviewing all the evidence and apportioning the burden of proof as required by law, it is the belief of the undersigned that the conduct of the respondent does not rise to the level of willfulness required by the Act and the decisions interpreting "willful".

The respondent's field personnel, including its foremen, were lax in adhering to the strict mandates of the standards cited. This is not surprising, given the urgencies of the work and the relative remoteness of the jobsites from the home office. It appeared from the evidence that the respondent had a safety manual and had consistently employed a safety consultant, which was active in its safety program. Moreover, it had procedures in place to train its employees in safety and monitor their effectiveness.

However, the evidence indicated that despite all these procedures there was a systemic breakdown in enforcement of safety at the job level. This is what Mr. Hunter observed. The money and effort that the respondent was putting into safety did not translate into effective daily implementation at the jobsite. This is regrettable for the respondent and some of its employees, who were exposed to unsafe conditions.

On the jobsite, the evidence indicated attempted compliance with the indicated standards in most instances. The excavations were sloped to some extent, albeit not to

the standard. Trench boxes were on the jobsites, available for use. Hard hats, reflective vests and paddles were also immediately available. It is apparent the respondent committed resources to jobsite safety, even if they were not fully utilized.

It is equally apparent that the safety problems on respondent's jobsite were not caused by an isolated instance of employee misconduct. Since the problems were systemic, as indicated above, the respondent did not take all feasible steps to prevent an accident from occurring. The employee actions were contrary to a work rule, which was not effectively enforced. Effective discipline was enforced only after the fact of inspection. The respondent knew that it had safety issues on the Johnston Road project, but its efforts to eliminate these problems fell short.

Based on this evidence, I cannot find by the greater weight that there was an intentional disregard or plain indifference to the requirements of the Act. This situation more nearly appears to be a lack of diligence in discovering and dealing with violations.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Citation One, Item 1a is affirmed as a serious violation of 29 CFR 1926.652(a)(1), with a penalty to be recalculated as indicated below.

2. Citation One, Item 1b is dismissed, based on its withdrawal by complainant.

3. Citation One, Item 2 is affirmed as a serious violation of 29 CFR 1926.651(j)(2), with a penalty to be recalculated as indicated below.

4. Citation Two, Item 1 is affirmed as a repeat non-serious violation of 29 CFR 1926.651(c)(2), based on the withdrawal of the notice of contest by respondent, with a penalty to be recalculated as indicated below.

5. Citation Three, Item 1a is affirmed as a serious violation of 29 CFR 1926.100(a) with a penalty to be recalculated as indicated below.

6. Citation Three, Item 1b is affirmed as a serious violation of 29 CFR 1926.21(b)(2), with a penalty grouped with that of Citation Three, Item 1a.

7. Citation Three, Item 2a is affirmed as a serious violation of 29 CFR 1926.201(a)(3), with a penalty to be recalculated as indicated below.

8. Citation Three, Item 2b is affirmed as a serious violation of 29 CFR 1926.201(a)(4), with a penalty grouped with that of Citation Three, Item 2a.

9. Citation Three, Item 3 is affirmed as a serious violation of 29 CFR 1926.300(c), with a penalty to be recalculated as indicated below.

10. Citation Three, Item 4a is affirmed as a non-serious violation of 29 CFR 1926.1053(b)(16), with a penalty to be recalculated as indicated below.

11. Citation Three, Item 4b is affirmed as a non-serious violation of 29 CFR 1926.1053(b)(15), with a penalty grouped with that of Citation Three, Item 4a.

12. Citation Three, Item 4c is dismissed.

13. The complainant shall recalculate the penalties based on the decision in this Order, granting respondent such other credits to which it may be entitled pursuant to the Field Operations Manual, and provide such calculations to counsel and the undersigned no later than January 20, 2003 for a supplemental order imposing such penalty amounts on the respondent.

14. All violations not previously abated shall be immediately abated.

This 2nd day of January, 2003.

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RICHARD M. KOCH
HEARING EXAMINER