

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

COMMISSIONER OF LABOR
OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2001-4006
OSHA INSPECTION NO. 304253529
CSHO ID NO. A6706

v.

GLK CONSTRUCTION, INC.,

ORDER

RESPONDENT.

APPEARANCES

Complainant:

Sonya M. Calloway
Assistant Attorney General
North Carolina Department of Justice

Respondent:

Not present

BEFORE

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE coming on for hearing and being heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina on March 8, 2002, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was present and represented by Ms. Sonya M. Calloway, Assistant Attorney General, North Carolina Department of Justice. The Respondent was not present.

Respondent was duly served with Notice of Hearing of this proceeding on February 18, 2002 in accordance with the Review Board Rules of Procedure.

Based upon the evidence presented by Complainant at the hearing, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of the Act (N.C.G.S. § 95-133).
3. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
4. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).
5. Respondent was a subcontractor on a project to install storm water pipes for the construction of a new building in downtown Wilmington, North Carolina at 24 N. 3rd Street. The project included the excavation of an existing storm pipe located under the sidewalk at 24 N. 3rd Street and the trenching of the area around said pipe for the installation of a new pipe.
6. On January 25, 2001 Fleda Anderson and Jeff Pennington, Health Compliance Officers with the North Carolina Department of Labor conducted an unprogrammed partial inspection at the site while responding to a complaint at a nearby site.
7. During said inspection Officer Anderson observed two of Respondent's employees trenching the area around a storm pipe located under the sidewalk of 24 N. 3rd Street. In doing so, the employees were standing outside of a trench box. During the inspection, Officer Anderson took photographs and interviewed employees.
8. Officer Anderson conducted an opening conference with Mr. Gardener Kealon, owner of Respondent GLK Construction Co., Inc
9. On February 16, 2001, as a result of the inspection, Complainant issued to Respondent Citation Number One, Item 1a alleging a serious violation of 29 CFR 1926.652 (a) (1); Item 1b alleging a serious violation of 29 CFR 1926.21

(b) (2); Item 1c alleging a serious violation of 29 CFR 1926.651(i)(3); Item 1d alleging a serious violation of 29 CFR 1926.651 (j)(1); and Item 1e alleging a serious violation of 29 CFR 1926.651 (k)(1). Although grouped together, each item of said citation carried a proposed penalty of \$350.00.

10. Respondent timely filed its Notice of Contest. This Board has jurisdiction over the subject matter and the parties to the action.

CITATION NUMBER ONE, ITEM 1a

11. Citation Number One, Item 1a alleges a serious violation of 29 CFR 1926.652 (a) (1) in that each employee in the excavation was not protected from cave-ins by an adequate protective system in accordance with 29 CFR 1926.652 (b) or 29 CFR 1926.652 (c). An adequate protective system such as sloping, shoring or boxing was not in place to protect the employees while working outside of the trench box.

CITATION NUMBER ONE, ITEM 1b

12. Citation Number One, Item 1b alleges a serious violation of 29 CFR 1926.21 (b) (2) in that Respondent failed to instruct each of its employees in the recognition and avoidance of unsafe conditions and regulations applicable to his work environment, to control or eliminate any hazard or other exposure to illness or injury by specifically failing to train each employee on the hazards of working outside of a trench box during trenching and excavation without adequate protective systems in place.

CITATION NUMBER ONE, ITEM 1c

13. Citation Number One, Item 1c alleges a serious violation of 29 CFR 1926.651 (i) (3) in that the sidewalk above the excavation had been undermined and a support system or another method of support was not provided to protect Respondent's employees from the possible collapse of said sidewalk.

CITATION NUMBER ONE, ITEM 1d

14. Citation Number One, Item 1d alleges a serious violation of 29 CFR 1926.651 (j) (1) in that Respondent failed to provide adequate protection to Respondent's employees from loose concrete or soil that could pose a hazard by falling or rolling from the excavation face.

CITATION NUMBER ONE, ITEM 1e

15. Citation Number One, Item 1e alleges a serious violation of 29 CFR 1926.651 (k) (1) in that Respondent failed to conduct daily inspections by a competent person of the excavation and adjacent areas and protective systems.
16. Evidence presented by the Complainant showed that the excavation in question was located next to a moderately traveled highway, 3rd Street. Said excavation was eleven feet deep and was located directly under the sidewalk of 3rd Street. Portions of the sidewalk were hanging by rebar above the heads of the workers who were outside of the trench box.
17. Gardener Kealon informed Officer Anderson that he instructed his employees that at least one employee at a time could work outside of the trench box.
18. There was no boxing or shoring. However there was an attempt at some sloping. The soil alongside of the excavation was Type C soil which in conjunction with the depth of the trench at eleven feet, required a slope of at least sixteen and a half feet on each side of the excavation, in order to adequately protect the employees from hazards such as cave-ins. Due to the closeness of 3rd Street, such slope was not possible.
19. Gardener Kealon informed Officer Anderson that at most, weekly inspections were conducted and there was no competent person in place. Officer Anderson defined competent person to Gardener Kealon to ensure that he understood what a competent person is.
20. An accident could have occurred as a result of each of the alleged violations.
21. Should an accident have occurred as a result of any of the alleged violations, the substantially probable injury would have been death or serious injury.
22. Respondent was aware of each of the conditions alleged in the above items or with reasonable diligence could have been aware of them.
23. Respondent could have corrected the hazard(s) alleged in Item 1a by having its employees stay in the trench box or by using some other method of protective system such as shoring or benching.
24. Respondent could have corrected the hazard(s) alleged in Item 1b by training each of its employees to stay in the trench box.
25. Respondent could have corrected the hazard(s) alleged in Item 1c by ensuring that the undermined sidewalk was supported or shored up.
26. Respondent could have corrected the hazard(s) alleged in Item 1d by scaling back to remove loose concrete or soil or by providing a protective barricade.
27. Respondent could have corrected the hazard(s) alleged in Item 1e by conducting daily inspections by a competent person.
28. Officer Anderson testified that the violations were classified as "high" severity and "medium" probability in accordance with the North Carolina Field Operations Manual. After reviewing the evidence, the Court finds that the proposed adjusted penalty of \$350.00 was properly calculated.

CONCLUSIONS OF LAW

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

1. The Court has jurisdiction of this cause and the parties are properly before this Court.
2. Respondent is subject to the provisions of OSHANC (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
3. Respondent violated 29 CFR 1926.652 (a) (1) in that each employee in the excavation was not protected from cave-ins by an adequate protective system in accordance with 29 CFR 1926.652 (b) or 29 CFR 1926.652 (c). An adequate protective system such as sloping, shoring or boxing was not in place to protect the employees while working outside of the trench box.
4. Respondent violated 29 CFR 1926.21 (b) (2) in that Respondent failed to instruct each of its employees in the recognition and avoidance of unsafe conditions and regulations applicable to his work environment, to control or eliminate any hazard or other exposure to illness or injury by specifically failing to train each employee on the hazards of working outside of a trench box during trenching and excavation without adequate protective systems in place.
5. Respondent violated 29 CFR 1926.651 (i) (3) in that the sidewalk above the excavation had been undermined and a support system or another method of support was not provided to protect Respondent's employees from the possible collapse of said sidewalk.
6. Respondent violated 29 CFR 1926.651 (j) (1) in that Respondent failed to provide adequate protection to Respondent's employees from loose concrete or soil that could pose a hazard by falling or rolling from the excavation face.
7. Respondent violated 29 CFR 1926.651 (k) (1) in that Respondent failed to conduct daily inspections by a competent person of the excavation and adjacent areas and protective systems.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED ADJUDGED AND DECREED that

1. Citation Number One, Item 1a charging a serious violation of 29 CFR 1926.652 (a) (1); Item 1b charging a serious violation of 29 CFR 1926.21 (b) (2); Item 1c charging a serious violation of 29 CFR 1926.651 (i) (3); Item 1d charging a serious violation of 29 CFR 1926.651 (j) (1); and Item 1e charging a serious violation of 29 CFR 1926.651 (k) (1) are affirmed together with a grouped penalty of \$350.00.

This the 15th day of March, 2002.

Carroll D. Tuttle
Administrative Law Judge Presiding