

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
WINSTON-SALEM, NORTH CAROLINA**

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2001-4013
OSHA INSPECTION NO. T7732
CSHO ID NO. 303844609

v.

CAROLINA EXCAVATORS & UTILITIES,
INC.

ORDER

RESPONDENT.

This matter came on to be heard and was heard before the undersigned Administrative Law Judge on December 17, 2001, in Winston-Salem, North Carolina. Complainant was represented by Ralf F. Haskell, Special Deputy Attorney General, North Carolina Department of Justice. Respondent was represented by Urs Gsteiger, Horton and Gsteiger, P.L.L.C. of Winston-Salem, North Carolina.

Others attending the hearing for complainant were Thomas Charles Elder, Health Compliance Officer with the North Carolina Department of Labor, OSHA Division (OSHA); Mary Perkinson, OSHA Health Compliance Officer OSHA and Heidi Kratzer and Abigael Newton, OSHA Health Compliance Officers, present for observation. Present at the hearing for respondent were Anne Boyd Allred, President and General Manager of respondent; Keith Nolan Bowen, General Superintendent and Vice President of respondent; Jeffrey Wilson, pipe layer for respondent through Staff America; and Calvin McCoy Weatherman, Safety Tech Consultants.

AFTER REVIEWING the record file, after hearing the evidence and judging the credibility of witnesses, after hearing the arguments of counsel and after reviewing other relevant 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 Safety and Health Act of North Carolina (OSHANC).
2. Respondent is a North Carolina Corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina and maintains a place of business in Clemmons, North

Carolina. It is subject to the jurisdiction of the North Carolina Safety and Health Review Board.

3. Among other things, respondent is in the excavation business.
4. In January, 2001, respondent was excavating on property located at 5000 Country Club Road, Winston-Salem, North Carolina, in order to tap into a water main necessary to service an addition being built onto Calvary Baptist Church (hereafter referred to as the "work site").
5. On January 12, 2001, a Health Compliance Officer (HCO) drove past the work site and observed the excavation. Under a national emphasis program, she reported the excavation to her supervisor, Nelson Edwards. Mr. Edwards assigned HCOs Thomas Charles Elder and Mary Perkinson to inspect the work site.
6. At the time of the inspection, respondent employed eight individuals overall and had four of them working at the work site, including the foreman for respondent, Stanley Moon.
7. From a public right-of-way across the street, the HCOs observed and photographed the work site and observed several employees in a trench. (Plaintiff Exhibits 1 and 2)
8. The HCOs held an opening conference with Mr. Moon. The HCOs properly presented their credentials and informed Mr. Moon of the reason for and the scope of their inspection.
9. During the inspection, the HCOs took notes, photographs and measurements, and interviewed respondent's employees.
10. Prior to the date of the inspection, respondent had excavated dirt in an "L" shape trench. The stem of the "L" was dug parallel to and approximately 5 feet back from the sidewalk bordering Country Club Road. The base of the "L" was dug perpendicular to and abutting the sidewalk. (Plaintiff Exhibit 3)
11. At the time of the inspection, respondent was in the process of tapping into a 12 inch water main uncovered at the base of the "L".
12. In order to enforce the Act, Complainant issued Citations on March 8, 2001, for serious violations of 29 C.F.R. §1926.652(a)(1) (protection of employees in excavations) and 29 C.F.R. §1926.21(b)(2)(instruction of employees in excavations).

CITATION 1, ITEM 1a

29 C.F. R. §1926.652(a)(1)

(Protection of Employees in Excavations)

13. The HCOs determined from visual observation of previously disturbed soil that the sides of the excavation pit consisted of at least Class B soil. 29 C.F.R. §1926, Subpart P, Appendix A(b).
14. The depth of the excavation trench in the area at the base of the "L" was 5.4 feet. The width of the trench at the base of the "L" was 2.8 feet. The width of the trench at the top of the "L" was 6.3 feet.
15. Respondent was not using support systems, shield systems or any other protective systems to prevent dirt from caving in and sliding onto the trench. Thus, pursuant to 29 C.F.R. §§1926.652(a)(1); 652(b) and (c) and Subpart P, Appendix B, Table B-1, respondent should have sloped the sides of the trench 1 foot horizontal to every foot vertical (1:1 or 45 degrees) in the base of the "L".
16. In the base of the "L", where respondent's employee, Jeff Wilson, was working in the trench, the slope was less than 1:1. In class B soil with a trench depth of 5.4 feet and a trench base width of 2.8 feet, the top of the trench should have sloped to a width of 13.6 feet instead of the actual width, which was 6.3 feet.
17. The failure of respondent to adequately slope the side walls of the excavation created the possibility of an accident, to wit: a cave-in.
18. The substantial probable result of a cave-in would be death by being buried alive under a mound of dirt.
19. Respondent's employee was exposed to the hazard of a cave-in while he was in the excavation trench tapping into a water main.
20. Respondent knew or should have known that a 45 degree angle was the proper angle because respondent is in the business of excavating and has a duty to know the standards applicable to sloping.
21. Respondent knew or should have known of the hazard because its foreman, Stanley Moon, was at the work site during the entire day of the operation and, at the time of the inspection, he was operating a back hoe within 30 feet of the excavation.
22. Respondent stipulated that the HCOs properly calculated the amount of the proposed penalty of \$175.00 according to the Operations Manual as follows:
 - a. The severity of the violation was high due to the substantial probability of death as a result of a cave-in;
 - b. The probability factor was low because only one employee was exposed to the hazard for a limited amount of time;
 - c. The Gravity Based Penalty was determined to be \$1,750.
 - d. A maximum 60% reduction was applied for respondent's size;
 - e. A maximum 10% reduction was applied for respondent's cooperation;
 - f. Respondent received only a 10% reduction for its safety and health program because respondent failed to produce to complainant a written safety and health program; and
 - g. A maximum 10% reduction was applied for respondent's history.

23. The proposed abatement methods of sloping the walls of the excavation pit to 1:1, using a trench box or shoring or filling in the excavation, were reasonable.

CITATION 1, ITEM 1b

29 C.F.R. §1926.21(b)(2)

(Instruction of Employees in Excavations)

24. Jeffery Wilson, Kevin Bevill and other employees at the work site attended a safety meeting on "Basic OSHA Standards, Excavation Rescue (Dateline Rescue)" on December 5, 2000 and certified their attendance by signing an Employee Verification Sheet. (Defendant Exhibit 3)
25. Keith Nolan Bowen, respondent's General Superintendent and Vice President was present at the 30 minute meeting, which covered sloping and shoring requirements in general.
26. Calvin McCoy Weatherman, an employee of Safety Tech Consultants, was familiar with the Excavation Rescue training format, which includes the information that if a trench is over 5 feet in depth, an employer must use a protection system.

DISCUSSION OF RESPONDENT'S EVIDENCE AND ARGUMENTS

RELATING TO THE DEPTH OF THE TRENCH

Respondent presented evidence in support of its argument that the trench was not over 5 feet deep where respondent's employees were working.

On direct examination, respondent's pipe layer, Jeffrey Wilson, testified that he was the employee in the blue hard hat working in the base of the L-shaped trench at the time of the inspection. He testified that the 5.4 foot depth obtained by the HCOs during their measurements in the base of the "L" was obtained in a space between the water pipe and the trench wall abutting the sidewalk. He further testified that the space which the HCOs measured was only 3 or 4 inches wide and that it was so small that a man could not stand in it or even fit one foot in it. He also testified that in Plaintiff Exhibits 1 and 2, he was not standing in the trench, but was actually squatting on the water pipe at the base of the trench. He estimated that the depth of the trench where he was working and where he could actually stand was less than 4 feet deep.

However, on cross examination, Mr. Wilson conceded that he did not observe all of the measurements taken by the HCOs at the time of the inspection. Mr. Wilson agreed

with the state's attorney that the trench on both sides of and under the water pipe was over 5 feet deep.

Neither Mr. Wilson nor any of respondent's other agents or employees took any measurements of their own at or around the time of the inspection. Mr. Moon, who was present during the inspection and did observe all of the HCO's measurements was not present at the hearing.

In addition, the photographs taken by both complainant and respondent show that the area in which Mr. Wilson was working at the time of the inspection was over 5 feet deep. Defendant Exhibit 2 shows the base of the L-shaped trench. It shows two men working in the area in and around the water pipe. It shows a bent white conduit over Mr. Wilson's head ranging from the left side of the trench to the right side of the trench. Part of Mr. Wilson is directly under the conduit and part of him is between the conduit and the trench wall abutting the sidewalk. In Plaintiff Exhibit 7, the conduit is shown to the left of center of the photograph. The two by four used as a ground level is stationed immediately above the conduit. The HCO's engineering rod clearly measures the area directly behind the conduit in which Mr. Wilson was working as over 5 feet deep.

Further, even if the HCOs had only measured the space between the water pipe and the trench wall abutting the sidewalk, respondent's trench would still have been in violation of the OSHA regulations. Mr. Wilson testified that the space between the water main and the trench wall abutting the sidewalk was only 3 to 4 inches wide and that a man could not put his foot in it. However, in Defendant Exhibit 2, the man in the red shirt has both of his feet planted in the space between the water pipe and the trench wall abutting the sidewalk. Other than his right thigh, shoulder and elbow, the rest of his body is in the space in question.

Thus, it is clear from all of the evidence that respondent's employees, who were working in the base of the L-shaped trench, did work in an area which was over 5 feet in depth without adequate protection from a cave-in.

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. Complainant proved by a preponderance of the evidence that respondent committed a serious violation of 29 C.F.R. 1926.652(a)(1) and that Citation 1, Item 1a should be affirmed and respondent should pay a \$175.00 penalty.

4. Complainant failed to prove by a preponderance of the evidence that respondent committed a violation of 29 C.F.R. 1926.21(b)(2) and, thus, Citation 1, Item 1b should be dismissed.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED** as follows:

1. Citation 1, Item 1a is affirmed and respondent shall pay a \$175 penalty.
2. Citation 1, Item 1b is dismissed.
3. The \$175 in penalties shall be paid within ten (10) days of the filing date of this Order.

This the 8th day of January, 2002.

Ellen R. Gelbin
Administrative Law Judge