

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4119
OSHA INSPECTION NO. 305036949
CSHO ID NO. T6259

v.

PUBLIC WORKS COMMISSION OF THE
CITY OF FAYETTEVILLE

ORDER

RESPONDENT.

APPEARANCES

Complainant:

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

Respondent:

James R. Nance
REID, LEWIS, DEESE, NANCE, & PERSON
Attorneys for Respondent

BEFORE

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on April 11, 2003, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Ms. Sonya M. Calloway, Assistant Attorney General, North Carolina Department of Justice. The Respondent was represented by attorney James R. Nance of Reid, Lewis, Deese, Nance, & Person. Present for the hearing for the Department of Labor, OSHA Division, was senior Safety and Health Compliance Officer, Richard Teachey. Present at the hearing for the respondent were David Holloway, Safety Specialist for PWC, Ed Neal, Senior Project Coordinator for PWC, Thomas Spain, Ed Neal's supervisor and Bradley Speight, Project Manager for Construction Dynamics Group.

Prior to presenting evidence, the Court allowed Complainant to withdraw Citation 1, Item 1b, 1c, 1e, 1f and 1g. After reviewing the record file, hearing the evidence presented at the hearing, with due consideration of the arguments and contentions of all parties, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. 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 N.C. Gen. Stat. §§ 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").

2. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

3. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about April 17, 2002, contesting a citation issued on March 21, 2002, to Respondent, Public Works Commission of The City of Fayetteville ("Respondent" or "PWC").

4. Respondent is an agency of a local government, duly organized and existing under the laws of the State of North Carolina and maintains a place of business in Fayetteville, North Carolina.

5. Respondent is a commission of the City of Fayetteville that provides services to the city and is subject to the provision of the Act (N.C. Gen Stat § 95-128) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10).

6. On March 7, 2002, Safety Compliance Officer, Richard Teachey ("SCO Teachey"), with the North Carolina Department of Labor, inspected a work site located at Sussex and McArthur Roads ("site"), in Fayetteville, North Carolina, as a result of a fatality that occurred on February 25, 2002.

7. The employee who died on February 25, 2002, was an employee of McClam & Associates ("McClam"). Respondent contracted with McClam to install sewer and water lines at the site.

8. SCO Teachey held an opening conference with David Holloway, PWC's senior safety specialist. He presented his credentials to Holloway and explained that he was doing a partial inspection to investigate the fatality that occurred as a result of a trench cave-in on February 25, 2002.

9. Respondent had two employees on site; Ed Neal, Senior Project Coordinator for PWC and David Holloway.

10. SCO Teachey took photographs of the site and interviewed all but one of McClam's employees. SCO Teachey also interviewed Respondent's employees and Bradley Speight, Project Manager for Construction Dynamics Group.

11. Construction Dynamics Group (CDG) was the "Owner's Representative". They served as a conduit for communication between McClam and PWC and they coordinated inspections of the site.

12. SCO Teachey held a closing conference with Holloway and as a result of his inspection, he recommended a citation be issued. On March 21, 2002, Complainant issued the following citations relevant to this hearing:

Citation 1 Item 1a: Serious

Citation 1, Item 1a alleges a serious violation of 29 C.F.R. 1926.20(b)(2): " The employer's safety and health program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by a competent person."

13. Site - On or about 2/25/02 the employer failed to ensure competent person inspections were being conducted.

The proposed penalty for this violation was \$6,300.00.

Citation 1 Item 1d: Serious

Citation 1, Item 1d alleges a serious violation of 29 C.F.R. 1926.651(j)(2): " Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary."

14. Site - spoil was not kept 2 feet from the edge of the excavation.

DISCUSSION

The general rule stated by the Review Board of North Carolina is that an "employer is responsible for work place safety of all employees whose activities it controls in a common undertaking." Brooks v. Kane, 3 NCOSHD 307 (1989) "The burden is on the Commissioner to prove each and every essential element of a citation. One of the elements that the Commissioner is required to prove in the multi-employer construction context involving a general contractor's liability is whether the general contractor could reasonably have been able to detect and prevent or abate the violative conditions by reason of its supervisory capacity over the jobsite." Commissioner of Labor of the State of North Carolina v. Romeo Guest Assoc., Inc., OSHANC 96-3513 (Dec. 1998). The issue is whether there was sufficient evidence to support a finding that Respondent had the degree of supervisory control to uphold the citations issued.

13. SCO Teachey determined that this was a multi-employer worksite as defined in the Field Operations Manual and that PWC was "overseeing" the work at the site as a general contractor and hired McClam as a subcontractor.

14. According to the Field Operations Manual, in a multiemployer worksite, the following employers will be cited, whether or not their own employees are exposed:

- i. The employer who actually creates the hazard (the creating employer);
- ii. The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);
- iii. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

15. "Employer means contractor or subcontractor within the meaning of the Act". 29 CFR 1926.33 (k)

16. SCO Teachey found the following language, on page 5 of 33, in the contract between PWC and McClam to be directive in his determination that PWC was a general contractor: "Each Prime Contractor shall designate a full time competent project superintendent, satisfactory to the Owner's Representative, to supervise the work and to respond to the Owner's Representative concerning the Owner's interest in the construction. The General Contractor, designated as project Expediter, if applicable and the Project Superintendent, shall be responsible for the coordination of the work with other Prime Contractors and Sub-Contractors. . . ."

17. SCO Teachey learned through employee interviews that Neal, who has been with PWC for 26 years as Senior Project Coordinator, inspected the site 2 times daily and on February 25, 2002, he left the site 15 minutes prior to the accident.

18. Neal had no authority to direct McClams' employees to do anything.

19. Complainant's position is that the site is a multi-employer worksite and PWC, as a "controlling employer", violated 29CFR 1926.20(b)(2) because Neal, who was the only PWC employee that inspected the site daily, was not a competent person because he did not have the ultimate authority to do anything about violations he observed.

20. "Competent person" is defined as " one who is capable of identifying existing and predictable hazards in the surroundings or working conditions, which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. 29 CFR 1926.33(f)

21. Respondent's position is that PWC had no actual or contractual control over McClam and the site and PWC did not exercise the level of control necessary to make this site a multi-employer worksite.

22. McClam informed SCO Teachey that it was the general contractor.

23. According to the Contract between McClam and PWC:

- a. Safety, in, on, or about the site was the sole and exclusive responsibility of the contractor. (McClam);
- b. The Contractor's method of work performance, superintendent of the Contractor's employees, sequencing of construction were the sole and exclusive responsibilities of the Contractor;
- c. Contractor was responsible for the safety of any person on the site of the work at all times during the prosecution of the work;
- d. When trenching was involved, a certified competent person had to be on site at all times during all excavation or excavation of any kind or nature;
- e. The Owner's Representative was not responsible for the Contractor's means, methods, sequence or operation of construction as well as any construction site safety program, methods, measures, techniques, sequence, etc. and;
- f. The Owner's Representative had no authority to exercise any control over any construction Contractor in connection with their work or any health or safety precautions.

24. At the time of the accident, McClam's foreman, Donnie Atkinson, was on site, digging the trench with the excavator, with a full view of the entire trench.

25. In 1998, Donnie Atkinson completed an eight-hour Excavation and Trenching Course. (Exhibit D-1)

26. The Contract also provided for the Owner's designated employee to inspect the Contractor's work areas to ascertain that safety procedures were in accordance with applicable regulations. (Exhibit 3, p. 4 of 33)

27. According to the contract, "if the contractor's personnel are observed creating a hazardous environment, corrective action must be initiated immediately to reduce the possibility of injury." (Exhibit 3, p. 4 of 33)

28. The contract further provides that "corrective action by the Owner will consist of advising the Contractor's supervisory representative, insisting on compliance with the Contract . . ." (Exhibit 3, p. 4 of 33)

29. Neal testified that he inspected the site one time in the morning and one time in the afternoon.

30. His field duties included: observing the water installation operation, water testing of water main, daily progress reporting, installation progress, daily logs kept up to compare with pay application for the month and anything involved in day to day operations.

31. Neal further testified that his daily duties were dictated by the pipe operation.

32. Safety was part of Neal's responsibilities.

33. Thomas Spain testified that Neal's responsibility with regard to safety was just observation. If Neal saw a violation, he would notify McClam and report it to Speight or CDG.

34. Speight was not on site the day of the accident.

35. Respondent had no authority to immediately stop work for safety violations.

36. The contractor had 10 days within which to respond if PWC's home office issued a stop work order as a result of a safety violation.

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 responsible for the safety and health conditions on the worksite, either by contract or through actual practice.

4. Respondent was not the controlling employer.

5. Respondent was not the general contractor at the site.

6. There was insufficient evidence presented to support a finding that Respondent had the degree of supervisory control necessary to uphold any of the citations issued.

7. Complainant failed to prove by a preponderance of the evidence that Respondent violated 29 C.F.R. 1926.20(b)(2) or 29 C.F.R. 1926.651(j)(2).

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED** that Citation 1, Item 1a and Item 1d are hereby dismissed.

This the 2nd day of June 2003.