BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

P F PLUMBING CONTRACTORS, INC.
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2003-4265
OSHA INSPECTION NO. 305091431
CSHO ID NO. W5928

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 14th day of September, 2004, 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 North Carolina Safety and Health Review Board.

APPEARANCES

Newton Pritchett, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Randolph M. James of Randolph M. James, P.C., Winston-Salem, North Carolina for the Respondent.

ISSUES PRESENTED

1. Is there competent and substantial evidence in the record to support the Hearing Examiner's finding that the Complainant proved by a preponderance of the evidence and substantial evidence that Respondent committed a serious violation of 29 C.F.R. §1926.652(a)(1) for the alleged failure to protect employees from a trench cave-in?

2. Is there competent and substantial evidence in the record to support the Hearing Examiner's finding that the Complainant proved by a preponderance of the evidence and substantial evidence that Respondent committed a serious violation of 29 C.F.R. §1926.651(j)(2) for the alleged failure to keep the spoil pile two feet from the edge of the trench?

3. Is there competent and substantial evidence in the record to support the Hearing Examiner's finding that the Complainant proved by a preponderance of the evidence and substantial evidence that Respondent committed a serious violation of 29 C.F.R. §1926.651(k)(1) for the alleged failure to have a competent person perform daily inspections?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".

2. 29 C.F.R. §1926.652(a)(1) which provides:

> (a)(1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(a)(1)(i) Excavations are made entirely in stable rock; or

(a)(1)(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

3. 29 C.F.R. §1926.652(b) which provides:

Design of sloping and benching systems. The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows:

(b)(1) Option (1) - Allowable configurations and slopes.

(b)(1)(i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

(b)(1)(ii) Slopes specified in paragraph (b)(1)(i) of this section, shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in Appendix B to this subpart.

4. Appendix A to §1926 Subpart P-Soil Classification which provides in part:

"Type A" means:

cohesive soils with an unconfined, compressive strength of 1.5 ton per square foot (tsf) (144 kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases, silty clay loam and sandy clay loam. Cemented soils such as caliche and hardpan are also considered Type A. However, no soil is Type A if:

(i) The soil is fissured; or

(ii) The soil is subject to vibration from heavy traffic, pile driving, or similar effects; or

(iii) The soil has been previously disturbed; or

(iv) The soil is part of a sloped, layered system where the layers dip

into the excavation on a slope of four horizontal to one vertical (4H:1V) or greater; or

(v) The material is subject to other factors that would require it to be classified as a less stable material.

"Type B" means:

(i) Cohesive soil with an unconfined compressive strength greater than 0.5 tsf (48 kPa) but less than 1.5 tsf (144 kPa); or

(ii) Granular cohesionless soils including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam and, in some cases, silty clay loam and sandy clay loam.

(iii) Previously disturbed soils except those which would otherwise be classed as Type C soil.

(iv) Soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration; or

(v) Dry rock that is not stable; or

(vi) Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H:1V), but only if the material would otherwise be classified as Type B.

"Type C" means:

(i) Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPa) or less; or

(ii) Granular soils including gravel, sand, and loamy sand; or

(iii) Submerged soil or soil from which water is freely seeping; or

(iv) Submerged rock that is not stable, or

(v) Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H:1V) or steeper.

5. Appendix B to §1926 subpart P-Sloping and Benching which provides in part:

(4) Configurations. Configurations of sloping and benching systems shall be in accordance with Figure B-1.

TABLE B-1

MAXIMUM ALLOWABLE SLOPES

SOIL OR ROCK TYPE	MAXIMUM ALLOWABLE SLOPES (H:V)(1) FOR EXCAVATIONS LESS THAN 20 FEET DEEP(3)
STABLE ROCK	VERTICAL (90 Deg.)
TYPE A (2)	3/4:1 (53 Deg.)
TYPE B	1:1 (45 Deg.)
TYPE C	1 1/2:1 (34 Deg.)

Footnote(1) Numbers shown in parentheses next to maximum allowable slopes are angles expressed in degrees from the horizontal. Angles have been rounded off.

Footnote(2) A short-term maximum allowable slope of 1/2H:1V (63 degrees) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth. Short-term maximum allowable slopes for excavations greater than 12 feet (3.67 m) in depth shall be 3/4H:1V (53 degrees).

Footnote(3) Sloping or benching for excavations greater than 20 fee deep shall be designed by a registered professional engineer.

6. 29 CFR § 1926.651 (j)(2) provides the following:

> Employees shall be protected from excavated or other material or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of the excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

7. 29 C.F.R. 1926.651(k)(1) which provides:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

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 to the extent that it is not inconsistent with this opinion 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) P F Plumbing Contractors, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. The Respondent, P F Plumbing Contractors, Inc., is a corporation engaged in the business of residential plumbing in North Carolina.

6. On February 24, 2003, Thomas Elder, Health Compliance Officer, and Barry Bailey, Safety Compliance Officer, conducted an inspection of the Respondent's trenching operation at 1701 Challock Way in High Point, North Carolina. The inspection was part of a special emphasis inspections resulting from the increased number of trenching fatalities in Guilford County and other North Carolina counties.

7. When they arrived on the jobsite, the Officers took photographs of three employees of Respondent in and around the trench. One employee, later determined to be Juan Mora Rodriguez, was wearing a blue hard hat barely visible in the trench. Another employee, later determined to be Robert Hernandez, was wearing a dark baseball cap and was standing knee-deep in the trench doing some work. The third employee, subsequently determined to be the foreman, Simon Means, was wearing a white hard hat and was standing at the edge of the trench holding a shovel.

8. The Officers conducted an opening conference with Mr. Means and then conducted an inspection of the worksite accompanied by Mr. Means.

9. As a result of this inspection, on March 19, 2003, one serious citation with three items was issued to Respondent. Citation Number One, Item 1a was for an alleged serious violation of 29 CFR 1926.652(a)(1) for

failure to protect employees from a trench cave-in with an adjusted penalty of $1050.00. Citation Number One, Item 1b was for an alleged serious violation of 29 CFR 1926.651(j)(2) for the failure to keep the spoil pile at least two feet away from the excavation with the penalty grouped with Item 1a. Citation Number One, Item 1c was for an alleged serious violation of 29 CFR 1926.651(k)(1) for the failure to have a competent person make daily inspections of excavations with the penalty grouped with 1a.

10. The Safety and Health Review Board received Respondent's Notice of Contest on April 29, 2003.

11. On or about May 2, 2003, Respondent filed its Statement of Employer/Respondent's Position in which it contested the citation in its entirety and objected to the penalty.

12. On January 20, 2004, this matter was heard before the Honorable Ellen R. Gelbin, Hearing Examiner, Winston-Salem, North Carolina.

13. On February 19, 2004, Hearing Examiner Gelbin issued an Order affirming all three items of Citation one and the penalty of $1,050.00.

14. Judge Gelbin's order was filed with the Board on February 24, 2004.

15. Respondent appealed the decision and the case was heard by the full Board at the Board's September 14, 2004 quarterly meeting.

16. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 35.

17. The Respondent knew or should have known that the spoil pile was placed within two feet of the edge of the trench because respondent's foreman, Mr. Means, was the one who placed the spoil within 2 feet of the edge of the trench.

18. The Board adopts the Hearing Examiner's findings of facts numbered 36 through 42.

19. The failure to have a competent person on site created the possibility of an accident in that a trench could cave in because of the failure to have a competent person properly classify the soil and slope the trench walls according to the classification.

20. Respondent knew or should have known that it did not have a competent person on site in that its foreman, Mr. Means, who was designated as the competent person could not properly classify the soil and the knowledge of its foreman is attributed to the Respondent.

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 has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 C.F.R. §1926.652(a)(1) as alleged in Citation 1, Item 1a, for the failure to protect employees from a trench cave-in.

4. The Complainant has proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. §1926.651(j)(2), as alleged in Citation 1, Item 1b, for the failure to keep the spoil pile two feet from the edge of the trench.

5. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 C.F.R. §1926.651(k)(1), as alleged in Citation 1, Item 1c, for the failure to have a competent person perform daily inspections.

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 review of the report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner . . . and the report, decision, or determination of the Board upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record." "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).

In order to prove a serious violation of an OSH standard the Complainant must prove by a preponderance of the evidence and by substantial evidence the following:

1. A hazard 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.

With respect to Citation 1, Item 1a, the trenching violation, the Respondent challenges items 1-4 above. He argues that there is no hazard because the trench was not over 5 feet in depth and there was no exposure because Mr. Mora was not in a part of the trench that was over 5 feet. He also argues that the compliance officer's testimony was not sufficient to prove that the conditions at the trench created a possibility of an accident or that the substantially probable result of an accident could be serious injury or death. He states that the compliance officer was an industrial hygiene inspector and did not have sufficient expertise to offer an opinion on the possibility of an accident or that a serious injury could be the substantial probable result of an accident. The compliance officer had been trained on trench and excavation safety and had attended the competent person school where he learned the proper procedure for classifying the different types of soil and he was qualified to testify as an expert on trenching. It is well established case law that the testimony of a compliance officer is substantial evidence sufficient to prove all of the above 5 elements of a serious violation. The North Carolina Supreme Court in Brooks v. McWhirter Grading Co., Inc., 2 NCOSHD 115 at 128, 303 N.C. 573 at 585, 586 (1981), held that both the possibility of an accident and the substantially probable result of an accident can be proven by the opinion evidence of the compliance officer. The compliance officer testified that the conditions in the trench created the possibility of a cave-in and that the substantially probable result of the accident could be death.

The testimony of the compliance officer, the photographs and the diagram prepared by the compliance officer indicate that a hazard existed in that the trench was over 5 feet in depth and was not properly sloped for any soil classification and did not have any of the other acceptable protective systems. The compliance officer's testimony and the photographs also indicate that one of Respondent's employees, Mr. Mora, was in the area of the trench that was over 5 feet deep and was exposed to the hazard. The Respondent makes arguments to the contrary that because you can see Mr. Mora's head in the photograph, the trench cannot be over 5 feet in depth. The ability to see Mr. Mora's head in the photographs is explained by the downward angle of the camera when the photograph was taken. In any event, the best evidence of the depth of the trench is the measurements taken

by the compliance officer which indicate that the trench is over 5 feet in depth. The hearing officer gave greater credibility to the testimony of the compliance officer as to the measurements that he took and the Board will not disturb that finding. In addition, the Respondent did not make its own measurements and photographs which it was free to do. Respondent argues that it is not required to do so and that the state has the burden of proof. Respondent is correct in both arguments, however, additional measurements of the trench by the Respondent would have provided additional evidence to contradict the evidence presented by the Complainant and would have gone to the issue of whether the State had proven one of the elements of its case by a preponderance of the evidence. Respondent was not prejudiced for his reliance on the photographs of the Complainant other than in the sense that the failure to present his own measurements and photographs resulted in less evidence to balance against the evidence of the Complainant.

A second argument that the Respondent put forth is that the pipe started at 18 inches in depth and then continued for 82 feet at a 1% grade and the depth at the street only needed to be approximately 2 and 1/2 feet deep. This would be true only if the surface of the land were level and the pipe were laid at an exact 1% grade. If the pipe was laid under land that went uphill and/or at a grade greater than 1%, then the depth at the street would be much greater. The best evidence of the depth is the measuring stick which was used and indicated a depth of 5 feet 4 inches and the testimony of the compliance officer that he measured the depth at 6 feet in the area where the rock had been removed.

With respect to Citation one, Item 1b, the spoil pile violation, the compliance officer presented evidence through testimony and photographs that the spoil pile was placed within two feet of the trench and the Respondent admits that. The Respondent disputes that it was a serious violation. However, the compliance officer again presented opinion evidence that the condition of the spoil pile increased the hazard of the trench walls collapsing and also created the hazard of soil and objects falling on the employees. Again, his opinion testimony was that the conditions created the possibility of an accident and that the weight of the soil from a trench cave-in falling on an employee could result in serious injury such as broken bones and death. Again, Mr. Mora, an employee of Respondent was in the trench and exposed to hazard of the spoil pile.

With respect to Citation 1, Item 1c, the competent person standard violation, the compliance officer presented evidence through testimony that Mr. Means, the foreman who was designated as the competent person was not able to give the correct test for determining the type of soil and was not able to give the correct slope for the different soil types. Failure to have a competent person on site creates the hazard that someone could be injured in a cave-in if the competent person does not classify the soil correctly and choose the appropriate slope for the trench. Again, the compliance officer's opinion is that the failure to have a competent person on site created the possibility of an accident the substantially probable result of which could be broken bones or death. The employees of Respondent including Mr. Mora were exposed to the hazard created by the failure to have a competent person on site.

For all three citations the Respondent knew or should have known of the conditions that created the hazards in that its foreman, Mr. Means was on the site and either observed the conditions or created the conditions and the supervisor's knowledge is attributed to his employer.

Respondent in his petition and brief challenges almost all of the findings of fact of the hearing examiner. The Board has examined each of these challenged findings and has found each to be supported by substantial evidence and by a preponderance of the evidence. The Board has adopted each of these challenged findings of fact. The Respondent has also challenged the conclusions of law of the Hearing Examiner. The Board has set forth its own conclusions of law which agree with the Hearing Examiner's conclusions of law. The Respondent also states that all of its actions with respect to the three citations were in accordance with standard and accepted industry practice, however, even if that is true and we do not accept it as true, it would not dispose of the case.

> . . . 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, at 316 (1985), 73 N.C. App. 426, 326 S.E. 2d 339 (1985).

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's February 19, 2004 Order in this cause be, and hereby is, **AFFIRMED,** to the extent that it is not inconsistent with this opinion, and Respondent is found to have committed a serious violation of 29 C.F.R. §1926.652(a)(1), as alleged in Citation One, Item 1a, with an assessed penalty of $1,050.00; a serious violation of 29 C.F.R. §1926.651(j)(2) as alleged in Citation One, Item 1b with the penalty grouped with Citation One, Item 1a, and a serious violation of 29 C.F.R. §1926.651(k)(1) as alleged in Citation One, Item 1c with the penalty grouped with Citation One, Item 1a. Respondent is further **ORDERED** to abate the violations and to pay the assessed penalty of $1,050.00 within 30 days of the filing date of this order.

This the 8th day of November, 2004.

_____
OSCAR A. KELLER, JR., CHAIRMAN

_____
RICHARD G. PEARSON, MEMBER

_____
JANICE SMITH GERALD, MEMBER