BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

THOMPSON CONTRACTING, INC. and its successors,

RESPONDENT.

DOCKET NO. OSHANC 2003-4323
OSHA INSPECTION NO. 306923400
CSHO ID NO. R6552

ORDER

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 15th day of November, 2005 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 Occupational Safety and Health Review Commission.

APPEARANCES

Daniel D.Addison, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

J. Anthony Penry of Taylor, Penry, Rash and Rieman, PLLC, Raleigh, North Carolina and Brian J. Schoolman of Safran Law Offices, Raleigh, 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 CFR 1926.416(a)(1) for the alleged failure to prevent employees from working in such proximity to an electric power circuit that the employee could contact the electric power circuit in the course of work?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.416(a)(1) provides as follows:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Having reviewed and considered the record, the briefs and the arguments of the parties, the North Carolina Occupational Safety and Health Review Commission 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) Thompson Contracting, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. The Respondent, Thompson Contracting, Inc., is a North Carolina construction company.

6. On August 27, 2003, Belvin Horres, a safety compliance officer with the North Carolina Department of Labor conducted an inspection of Respondent's worksite at the Centennial Campus of North Carolina State University in Raleigh, North Carolina as a result of a referral due to an accident at the worksite.

7. On that same date, August 27, 2003, Respondent was engaged in the construction of a footing for a retaining wall at a site within the Centennial Campus at North Carolina State University in Raleigh, North Carolina.

8. Respondent hired a subcontractor, Carolina Concrete Pumping, Inc., hereafter CCP, to pump concrete into the trench for the footing.

9. CCP brought its 105-foot boom truck to the site for the purpose of pumping the concrete to the desired locations for Respondent.

10. Thompson also hired Thomas Concrete to provide concrete which was delivered in a concrete truck.

11. The concrete truck driver backed the concrete truck up to the pumping truck and dumped concrete into a bin on the pumping truck.

12. The pumping truck drew wet concrete up from the bin, and pumped it through a flexible hose into the footings, with the hose being held and guided by Thompson employees.

13. The trench for the retaining wall footer crossed underneath a power line that was 36 feet above the ground and was carrying 115,000 volts of electric current.

14. The boom of the pumping truck was controlled by a remote control devise operated by the driver of the boom truck, Mr. Danny Baker.

15. Mr. Baker had positioned the boom of the pumping truck so that it came out of the pumper truck and passed directly under the electric lines and then at one of the joints in the boom it bent back again and passed directly under the electric lines a second time.

16. The concrete was being poured out of the end of the hose on the boom at a place in the ditch to the right of, as you were looking at the ditch from the truck, and not directly under, the electric lines.

17. Toward the end of the concrete pour, Mr. Baker moved the boom of the pumping truck so that it contacted the overhead power lines causing the electric current to travel down the boom to the pumping truck and to the employees of Thompson who were moving the pump hose and distributing the concrete. (T pp 46-59, Complainant's Exhibits 1, 2, 5, 6, 7a, 7b, and 7c).

18. The current that passed down the boom to the pumping truck passed to the concrete truck blowing out a tire on the driver's side rear of the concrete truck and also passed through the driver of the concrete truck, Mr. Stevens, who was holding onto the handle of the chute of the concrete truck. (T pp 47-51, Complainant's Exhibits 1, 2, 5, 6, 7a, 7b, and 7c).

19. The current that passed through Mr. Stevens exited through his feet burning holes in his socks and causing severe burns to his feet requiring hospitalization. (T pp 47-51, Complainant's Exhibits 1, 2, 5, 6, 7a, 7b, and 7c).

20. The employees of Thompson who were moving the chute and distributing the concrete in the trench received a shock but did not receive any injuries requiring hospitalization.

21. As a result of the inspection, the Department of Labor issued four citation items against Thompson:

a. Citation 1, Item 1 alleged a serious violation of 29 CFR 1926.20(b)(1) with a proposed penalty of $2,100.00 as follows:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part:
>
> > a) site-employee lack of recognition of a hazard survey of the work site allowed the boom of a Schwing 1200/32XL concrete pumper, mounted on a rubber tired wheeled vehicle to come in contact with power lines energized with 115kv, 36.5 feet from the ground.

b. Citation 1, Item 2 alleged a serious violation of 29 CFR 1926.416(a)(1) with a proposed penalty of $2,100.00 as follows:

> Employees were permitted to work in close proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means:
>
> > a) employees of a sub contractor allowed the boom of a Schwing 1200/32XL concrete pumper, mounted on a rubber tired wheeled vehicle to come in contact with power lines energized with 115kv, 36.5 feet from the ground, and was not protected against contact with electricity.

c. Citation 1, Item 3a alleged a serious violation of 29 CFR 1926.20(b)(1) with a proposed penalty of $2,100.00 as follows:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part:
>
> > a) site-employee lack of recognition of a hazard survey of the work site allowed the boom of a Schwing 1200/32XL concrete pumper, mounted on a rubber tired wheeled vehicle to come in contact with power lines energized with 115kv, 36.5 feet from the ground.

d. Citation 1, Item 3b alleged a serious violation of 29 CFR 1926.20(b)(2) with the penalty grouped with Item 3a as follows:

> 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:
>
> > a) site-supervisors of the company did not perform a hazard survey that would have revealed the operator of a Schwing 1200/32XL concrete pumper did not have adequate clearance of power lines, energized with 115KV, to operate safely.

22. Citation 1, Item 1 and Citation 1, Item 3a are identical.

23. Respondent's letter dated November 10, 2003 was filed as its Notice of Contest with the Commission on November 12, 2003.

24. On or about December 23, 2003, Respondent's attorney filed a Notice of Appearance and Request for Permission to File Statement of Employer's Position in which it contested both the Citation and the penalties and admitted that the 20 day time period for completion of the Statement of Position form had expired.

25. On December 2, 2004, a hearing was held before the Honorable Reagan H. Weaver, Hearing Examiner, in Raleigh, North Carolina.

26. At the Hearing before the Hearing Examiner Mr. Penry, counsel for Respondent, moved to dismiss Citation 1, Item 1 and Citation 1, Item 3. (T p 5).

27. The only item that was contested at the hearing was Citation 1, Item 2 which alleged a serious violation of 29 CFR 1926.416(a)(1) with a proposed penalty of $2,100.00. (T p 5, Citation and Notification of Penalty No. 306923400, page 7).

28. On April 29, 2005, Hearing Examiner Weaver issued an order affirming the violation of 29 CFR 1926.416(a)(1) and the $2,100.00 penalty as alleged in Citation 1, Item 2.

29. In the order, in finding of fact numbered 9, the Hearing Examiner stated that the violations other than the violation of 29 CFR 1926.416(a)(1) had been dismissed prior to the hearing's initiation but did not include an order granting the Respondent's Motion to Dismiss those violations in the order portion of his decision.

30. In finding of fact numbered 21, the Hearing Examiner excluded as hearsay the testimony of Compliance Officer Horres as to what John Barbieri, project manager for Shelco, Inc., the general contractor, said to Respondent's employees about the use of spotters at a preconstruction meeting and the Hearing Examiner also excluded as double hearsay Complainant's Exhibit number 8 which was a report by John Barbieri of the preconstruction meeting in which was written "Thompson was advised that a spotter would be prudent while operating under the high voltage lines to warn the operator if they were getting too close."

31. Respondent appealed the decision and the case was heard by the full Commission at the Commission's November 15, 2005 quarterly meeting.

32. The Commission adopts the Hearing Examiner's findings of facts numbered 1 through 6.

33. CCP's truck driver, Danny Baker, maneuvered the pumper's boom with a remote control device in order to deliver the concrete to the locations where Respondent directed. (T pp 35-40, 108).

34. The Commission adopts the Hearing Examiner's finding of fact numbered 8.

35. A hazard covered by the cited standard, 29 CFR 1926.416(a)(1), existed in that employees of Respondent and John Stevens, an employee of Thomas Concrete, a subcontractor of Respondent, were working in proximity to the hose of the boom truck or the chute of the concrete truck such that they were exposed to the electrical power circuit when the boom of the pumping truck touched the power lines or came close enough that the current jumped to the boom resulting in an electric shock to Respondent's employees and severe electrical burn injuries to Mr. Stevens.

36. Employees were exposed in that Respondent's employees, Robert Goodrun and Daryl Sutton, all received electrical shocks when the pumping truck boom touched the power lines or came close enough for the current to arc from the power line to the boom. (T pp 52-55, 71).

37. Employees were exposed in that John Stevens, an employee of Thomas Concrete, a subcontractor of Respondent, received severe electrical burns when the pumping truck boom touched the power lines or came close enough for the current to arc from the power line to the boom. (T pp 49-51, 71).

38. The hazard of the employees of Respondent and Respondent's subcontractors working is close proximity to the hose of the boom and the chute of the concrete truck and pumping truck while the boom crossed underneath the power line charged with 115,000 volts created the possibility of an accident in that the employees could receive an electric shock, severe electrical burns or could be electrocuted if the boom touched the power lines or came close enough for the current to arc from the power line to the boom. (T pp 70, 43-59).

39. The substantial probable result of an accident could be electrical burns requiring hospitalization which is a serious injury and death. (T p 70, 50).

40. The Respondent knew or should have known of the dangers of operating equipment such as a concrete pumping truck boom underneath 115,000 volt power lines in that Respondent's supervisor, Shannon Haney was on site and knew that the power lines were there and knew or should have known that it was dangerous to operate a 105 feet long boom underneath a 115,000 volt power line 36 feet off the ground and the knowledge of its supervisor is attributed to the Respondent. (T pp 69, 32, 90, 119-123).

41. The Commission adopts the Hearing Examiner's findings of fact numbered 16-18.

42. Respondent had the authority and ability to direct the pump truck operator to change and abate unsafe practices and could have expelled the pump truck and its operator from the work site if the operator failed to follow Respondent's safety directives as it was in control of the worksite for the pouring of the footers. (T pp 122-124).

43. The Commission adopts the Hearing Examiner's findings of fact numbered 20.

44. The Respondent could have protected its employees from contact with the electric circuit of the power line by other means such as having the pumping truck operator reposition his truck and/or reposition the boom of the truck so that it did not pass underneath the power line. (T pp 61, 68).

45. The Respondent could also have protected his employees by using a spotter to make sure that the boom was kept a safe distance from the power lines. (T pp 61-68).

46. Respondent was aware that the use of a spotter would be prudent while operating equipment under the high voltage line in that Respondent's representative, Wayne Lindamood, was present during a Subcontractor's Meeting held June 10, 2003 by Shelco, Inc., the General Contractor, in which Respondent was advised that the use of a "spotter would be prudent while operating under the high voltage line to warn the operator if they were getting too close". (Plaintiff's [sic - Complainant's?] exhibit 8). (T pp 64-68).

47. Respondent did not inquire into the safety record of Carolina Pumping Truck Company. (T pp 130-133).

48. Respondent did not inquire into the experience and/or background of Danny Baker, the driver and operator of the pumping truck for CCP. (T pp 132-134).

49. Respondent employed 75 employees at the time of the inspection. (T p 73).

50. The gravity of the violation was high. (T p 71-72).

51. The Respondent exhibited good faith in the inspection and received a 20 percent reduction in the penalty. (T p 73).

52. Respondent had a favorable OSH violation history and received a 10 percent reduction for history. (T p 73).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission 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 Commission has jurisdiction of this cause and the parties are properly before this Commission.

3. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 CFR 1926.416(a)(1) as alleged in Citation 1, Item 2, for the failure to prevent employees from working in such proximity to an electric power circuit that the employee could contact the electric power circuit in the course of work.

4. The Commission has applied the 4 statutory criteria of N.C.G.S. 95- 138(b) and finds the assessed penalty of $2,100.00 to be appropriate.

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 Commission may adopt, modify or vacate the report of the hearing examiner . . . and the report, decision, or determination of the Commission 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 covered by the cited standard 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.

The Respondent in its petition for review and in its brief challenges portions of two of the Hearing Examiner's findings of fact as errors of fact and challenges three of the Hearing Examiner's findings of fact as errors of law. The Respondent does not challenge any of the five elements needed to prove a serious violation except for the argument in its brief "that the employees of Thompson were not working in proximity of the power lines, given that the lowest line was approximately 36 feet above the ground, while Thompson's employees were working at or below ground level" which can be looked on as a challenge to element numbered 1, that a hazard covered by the cited standard applied. (Respondent's Brief, p 8). Respondent relies almost entirely on a "specialty subcontractor" defense set forth in a divided federal Review Commission case, Sasser Electric & Manufacturing Company, 1984-1985 CCH OSHD 34,682 (RC 1984). In Sasser, the divided panel held that:

> [W]while an employer has a duty to his own employees even when it relies upon a specialist to perform part of the work, the duty is of a different nature than when the employer performs the work itself. . . . when some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely.

Sasser Electric & Manufacturing Company, 1984-1985 CCH OSHD 34,682 at 34, 685 (RC 1984).

The North Carolina Court of Appeals has spoken to the duty that an employer owes to its employees under the NCOSH Act and has held that the duty to comply with the safety standards is nondelegable:

> "When an employer is under a statutory duty and then entrusts its performance to his agent, he becomes responsible for the failure of that agent to comply with the law." Lebanon Lumber Co., 1971-1973 OSHD CCH § 15,111, at p. 20,179, aff'd, 1971-1973 OSHD CCH § 15,530 (1973). "The effectiveness of this particular safety standard would be nullified and the manifest intent of the Act defeated if an employer could delegate a duty clearly enjoined upon him to another." Id.

Brook v. BCF Piping, Inc., 109 N.C. App. 26, 33, 426 S.E.2d 282 (1993).

The court then gave the public policy reasons behind not allowing an employer to delegate its responsibility to comply with a particular safety standard:

> The NCOSH Act and public policy dictate that BCF be held responsible for its failure to make working conditions safe for its employees. BCF, with total disregard for NCOSH Act, delegated such a serious task as checking the grounding wire which would expose its employees to a hazardous condition to a third party. If an employer is allowed to "contract" away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished.
>
> We are not seeking by this decision to impose strict liability on employers as BCF suggests. Instead, we are enforcing the regulations as stated pursuant to the NCOSH Act. Its primary purpose is to keep conditions in the workplace safe for workers. This purpose cannot possibly be accomplished where employers are allowed to delegate to a third party a specific duty promulgated under the Act that is designed to protect the safety of workers. Where an employer, on a regular basis, is not aware of the reputation of the electrician who grounds equipment emitting dangerous currents of electricity, this Court cannot ignore such blatant disregard for the safety of employees.

Brook v. BCF Piping, Inc., 109 N.C. App. 26, 34, 426 S.E.2d 282 (1993).

Contrary to Respondent's counsel's assertion at the hearing before the Commission, Sasser, supra, is not the law in North Carolina. Federal case law is not binding on the Review Commission but is often looked to by the Review Commission and the North Carolina appellate courts for guidance because of the similarities between the state and federal OSH Act. Brooks, Commissioner of Labor v. McWhirter Grading Company, 303 N.C. 573, 281 SE2d 24, 29 (1981); Commissioner of Labor v. ABF Freight Systems, Inc., 7 NCOSHD ___, OSHANC 97-3580 (RB 1999); Brooks v. Southern Bell Telephone and Telegraph Company, 2 NCOSHD 283 (RB 1981); Brooks v. Baker Cammack Hosiery Mills, 2 NCOSHD 94 (RB 1977); Brooks v. McDevitt & Street Company, 2 NCOSHD 1032 (RB 1987). The Court of Appeals in BCF Piping, supra, did just that and cited with approval the federal OSH Review Commission decision of Lebanon Lumber Co, supra. which involved a boom of a crane coming in contact with high voltage power lines and the electrocution of an employee, a fact situation very similar to the case sub judice and which held that an employer may not delegate a statutory duty to an agent. The Commission has looked at the majority opinion in Sasser, supra, relied on by Respondent and declines to follow it. The Commission finds that the dissent's reasoning in Sasser, supra, declining to apply the "specialty contractor" defense of the majority agrees with the NCOSH Acts purpose to "assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions". N.C.G.S. §95-126(b)(2). The dissent stated:

> Possibly in some circumstances an employer that hires an outside specialist might be justified in placing a reasonable degree of reliance in that specialist to do the work safely. However, the hiring of an outside specialist does not relieve an employer of the duty to exercise reasonable diligence to discover and correct hazards to which its own employees may be exposed, particularly when the specialist performs a mechanical function, and does not direct or control the operation.

> It is well settled that an employer cannot contract away its responsibility for compliance with OSHA obligations. E.g., Anning-Johnson Co., 76 OSAHRC 54/A2, 4 BNA OSHC 1193, 1198 n.13, 1975-76 CCH OSHD ¶ 20,690, p. 24,783 n.13 (No. 3694, 1976); PBR, Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981); Central of Georgia R. Co. v. OSAHRC, 576 F.2d 620 (5th Cir. 1978); Dun-Par Engineered Form Co. v. Marshall, 676 F.2d 1333 (10th Cir. 1982). In this case, the majority would say that Sasser surrendered its safety responsibilities to a crane operator, even though Sasser assigned its own employees to give directions and work as an integral part of the operation.
>
> To permit this abdication of concern for one's own employees is inconsistent with the consensus of Commission and court cases, which is that employers are responsible for making reasonable efforts to discover and correct hazards to which their employees are exposed (even when working with outside specialists). E.g., Anning-Johnson Co., supra; DeTrae Enterprises, Inc. v. Secretary of Labor, 645 F.2d 103 (2d Cir. 1981); Central of Georgia R. Co. v. OSAHRC, supra; Zemon Concrete Corp. v. OSAHRC, 683 F.2d 176 (7th Cir. 1982); Bratton Corp. v. OSAHRC, 590 F.2d 273 (8th Cir. 1979); Beatty Equipment Leasing, Inc. v. Secretary of Labor, 577 F.2d 534 (9th Cir. 1978); Dun-Par Engineered Form Co. v. Marshall, supra. Although most of those cases involved construction sites, the same principles have been applied to non-construction sites. E.g., Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1979 CCH OSHD ¶ 23,830 (No. 76-1408, 1979); Central of Georgia R. Co. v. OSAHRC, supra.

Sasser Electric & Manufacturing Company, 1984-1985 CCH OSHD 34,682 at 34, 686-34,687 (RC 1984) (dissent by Commissioner Cleary). We find this reasoning persuasive and adopt it.

As the dissent in Sasser, supra, stated, there may be a case where an employer may reasonably rely on the expertise of an independent contractor but this case sub judice is not one. BCF Piping, supra, is the law in North Carolina, not the majority opinion in Sasser, and the Respondent "may defend against the citation on the ground that he neither knew, nor with the exercise of reasonable diligence, could have known that the condition was hazardous". Brook v. BCF Piping, Inc., 109 N.C. App. 26, 31-32, 426 S.E.2d 282 (1993) refering to a federal Review Commission decision with approval, 4 G Plumbing & Heating, Inc., 1978 OSHD CCH ¶ 22,658 (1978) (holding that the plumbing contractor was not liable because he did not know of an open ground in a receptacle (a non-obvious hazard) installed by the electrical contractor and that reasonable diligence did not require the plumbing contractor to test the receptacles with a meter). Unlike the open ground receptacle in 4 G Plumbing, the high voltage power lines were in plain view and Respondent was aware of the dangers of working equipment around the power lines. Respondent had actual knowledge of the dangers and had used spotters and other safety measures on previous occasions on this jobsite to protect its employees when working under the power lines. The dangers of the use of a 105 feet long metal boom underneath a 36 feet high power line is obvious to anyone under any reasonable standard. Respondent is indeed lucky that none of its employees were seriously injured or killed and that the driver of the concrete truck although seriously injured, was not electrocuted. In this fact situation before the Commission, there is no need for the Commission to create a new defense for the employer, the employer may rely on N.C.G.S. § 95-127(18) and defend against the serious citation by showing that he "did not know, and could not , with the exercise of reasonable diligence, know of the presence of the violation". N.C.G.S. § 95-127(18), Brook v. BCF Piping, Inc., supra. The facts of this case show that the Respondent had actual knowledge of the hazardous conditions of the high voltage power line and even if Respondent did not know of the dangers, he should have known of it by any reasonable standard.

Even if Sasser were followed, Respondent's reliance on the operator of the concrete pumping truck was not reasonable in that Respondent did not inquire into the experience and record of the driver. See, BCF Piping, supra, at 34 (employer did not exercise reasonable diligence in having an electrician wire a plug to an electric welder where the employer did not inquire about the reputation of the electrician who grounded the equipment). If the Respondent had made an inquiry, he would have found that the driver/operator was a new employee with just a few weeks experience in the operation of the boom on the concrete pumping truck.

As was mentioned in the beginning paragraphs of the discussion section, Respondent in its Petition for Review makes factual challenges to portions of two of the Hearing Examiner's findings of fact. Respondent challenges the portion of finding of fact numbered 12 that states that Thompson:

> could have reasonably asked the pumper truck driver to park farther away, or not to operate the pumper's boom in the manner chosen, or to use a spotter to make sure that he, the pumper truck driver, did not get too close to the electric circuit while operating the boom.

The Commission has looked at the whole record of the proceedings and finds substantial evidence that the Respondent could have reasonably asked the truck driver to park the truck and or operate the boom so that the boom would not be able to come in contact with the electric lines. The compliance officer's testimony was that Respondent could have done so. (T p 61, 79-80, 90). The compliance officer's testimony was that the company could have also used a spotter to make sure that the boom did not come in contact with the power lines. (T pp 61-68, 75-80, 95, Complainant's Exhibit No. 8). James Stafford, Director of Operations for Thompson Contracting (Respondent) testified that Thompson had used spotters in the past when they had excavator's digging under power lines because the boom of the excavator was constantly moving up and down. (T p 118). Mr. Stafford also agreed that Respondent had control over the building of the retaining wall, had control over his own employees, could stop them if they were doing anything unsafe and could have told the pump truck operator to park the truck in another place if it was parked in an unsafe spot. (T pp 122-125). He also agreed that it would have been possible and a good idea to use a spotter for the pumping truck operator. (T p126-127). Mr. Stafford testified that Respondent did not instruct the pumping truck operator on where to park the truck or position the boom. (T pp 105-106). This testimony does not contradict the testimony of the compliance officer or support the proposition that Respondent could not have reasonably asked the pump truck operator to park the truck in a different place or operate the boom in a different manner but is an admission that the Respondent did not comply with the regulation at issue. A compliance officer's opinion testimony is sufficient to prove all of the elements of a serious violation. See, Brooks v. McWhirter Grading Co., Inc., 303 N.C. 573 at 585, 586, 2 NCOSHD 115 at 128 (1981). There is testimony by Raymond Boylston, who was tendered by Respondent as an expert in OSHA rules and compliance, that the citation at issue was improper and unjustified. (T p 147). He also made other legal conclusions about the relative responsibilities of Respondent and the pumping truck company under the OSH Act. Most of Mr. Boylston's testimony were legal conclusions that is the province of the Hearing Examiner and the Commission to make. The Hearing Examiner heard the testimony of all parties and gave greater credence to the testimony of the compliance officer over the testimony of Mr. Boylston. The Hearing Examiner was present and observed the demeanor of the respective witnesses and the Commission and the courts gives deference to credibility determinations by the trial judge. The preponderance of the evidence and substantial evidence overwhelmingly supports the Hearing Examiner's finding of fact numbered 12.

In making its determination that the Respondent could have used a spotter, the Commission has relied on the alleged hearsay testimony of the compliance officer that Mr. Barbieri, the project manager for Shelco had told the compliance officer that Respondent had been advised at a safety meeting of the need to use a spotter while operating under the power lines. (T pp 64-68, Plaintiff's [sic-Complainant's?] Exhibit No. 8). The Commission has also relied on the memo from Mr. Barbieri to Respondent sent before the accident that stated:

> Thompson was advised that a spotter would be prudent while operating under the high voltage lines to warn the operator if they were getting too close.

(Plaintiff's [sic-Complainant's?] Exhibit No. 8). Generally, in hearings before our hearing examiners and the Commission, hearsay testimony is admissible as probative value and weight is given according to its degree of reliability. Review Commission Rule of Procedure .0513; Brooks v. Rebarco, Inc., 3 NCOSH 11at 17 (RB 1988); J.A.M. Builders, Inc. v. Herman, 233 F.3d 1350 (11th Cir. 2000). The 11th Circuit in the J.A.M. Builders case, supra, stated the following about the admissibility of hearsay in a federal OSH proceeding:

> "Hearsay is admissible in administrative hearings and may constitute substantial evidence if found reliable and credible." Williams v. U.S.Dep't of Transp., 781 F.2d1573, 1578 n.7 (11th Cir. 1986). We have identified several factors that demonstrate hearsay's probative value and reliability for purposes of its admissibility in an administrative proceeding: whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been

> recognized by courts as inherently reliable. See,U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264, 270 (5th Cir. 1979)4 (citing Richardson v. Perales, 402 U.S. 389, 402-06, 91 S.Ct. 1420, 1428-30, 28 L.Ed.2d 842 (1971)).

Id., at 9. The Commission finds this reasoning persuasive and adopts it. These factors should give guidance to Hearing Examiners in the future in ruling on hearsay testimony of the compliance officers. These four factors are neither inclusive nor exclusive, all four are not required and there may be other factors that are indicative of reliability and credibility. The out of court declarant in this case was the project manager for the general contractor and he had no immediate interest in the citations against the Respondent. The memo that contained the information was sent to the Respondent and was allegedly in the possession of Respondent and Respondent's representative was at the meeting where the statement was made. Respondent could have subpoenaed Mr. Barbieri and the information was not inconsistent on its face. Testimony by a project manager with no interest in the case and a memo prepared just after a meeting reporting the results of a safety meeting are recognized by courts as inherently reliable. In addition, the prudence of using a spotter was corroborated by other testimony throughout the record. The Commission, in the interest of justice, through its power pursuant to Commission Rule .0513 admits into evidence both the compliance officer's testimony as to what Mr. Barbieri said about the use of spotters and the memo containing the language that indicated that Respondent had been advised of the need for spotters under power lines. Any doubt about the credibility of the evidence goes to the weight the Commission gives the evidence.

Respondent also challenges the portion of finding of fact numbered 20 that states that Thompson:

> when using its own equipment under power lines on other occasions, has used spotters and has communication devices that a spotter could use to communicate with the operator of the equipment.

Again, the Commission has reviewed the entire record and has concluded that the preponderance of the evidence and substantial evidence overwhelmingly supports the challenged portion of finding of fact numbered 20. (T p 62, 87, 118, 127). In fact, Respondent's Director of Operations, Mr. Stafford, agreed on cross examination to the challenged facts in finding of fact numbered 20. (T p 127).

Respondent also challenges findings of fact numbered 22, 23, and 24 as errors of law. Respondent is correct that these findings which are denoted as findings of fact are actually conclusions of law, however they are not erroneous. All three of these challenged conclusions of law have been dealt with in the discussion on the specialty subcontractor defense, supra, and the Commission has found that there is no error of law with respect to those three challenged conclusions of law.

As was mentioned at the beginning of the Discussion section, Respondent makes an arguable challenge to element numbered 1 of the 5 elements needed to prove a serious violation when he states in his brief the following:

> The evidence in the record shows that the employees of Thompson were not working in proximity of the power lines, given that the lowest line was approximately 36 feet above the ground, while Thompson's employees were working at or below ground level.

Respondent's brief, p 8. There is a practical question of whether an employee who is over 36 feet from an energized power line is in "such proximity to any part of an electric power circuit" within the meaning of the regulation. In the 11 Circuit case, J.A.M.Builders, supra, the employer was cited with a willful serious violation of the same regulation, 29 CFR 1926.416(a)(1). In that case the employer had been advised of the dangers of passing 16 to 20 feet long rebar to the third floor of a building in construction next to an approximately 30 feet high 7,620 volt power line. The fact situation in the case sub judice, is very similar in that the power lines were 36 feet high but the current was 115,000 volts which is 15 times greater than the current carried by the power lines in J.A.M. Builders and was much more dangerous. The handling of 16 to 20 feet long rebar in a 3 story building next to a 30 feet high power line was considered by the 11 Circuit to be "in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work" within the meaning of 29 CFR 1926.416(a)(1). We find this 11th Circuit case to be sufficiently similar to our case

and will apply it to our case. Once the boom of the pumping truck came in contact with the power line or came close enough for the current to arc to the boom, they became part of the electric power circuit just as the rebar that came into contact with the energized wire in J.A.M. Builders became part of the circuit. The employees who contact the energized boom or concrete truck energized by the boom and are shocked by the electric current have come into contact with the power circuit in the course of their work.

In addition, 29 CFR 1926.416(a)(3) speaks in terms of ascertaining before beginning work "whether any part of an energized electric power circuit . . . is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit". When 29 CFR 1926.416(a)(3) is read together with 29 CFR 1926.416(a)(1), it makes logical sense that 29 CFR 1926.416(a)(1) which prohibits an employer from allowing "an employee to work in such proximity to any part of an electric circuit that the employee could contact the electric power circuit in the course of work" would include contact by an employee with a tool or machine that contacted the power circuit. If an employer had to ascertain whether a tool or machine would come into contact with a power circuit before beginning work, it would also be required to prohibit an employee from contacting an energized power circuit with a tool or machine during work.

Although not at issue in this case, the fact situation of this case is sufficiently similar to the fact situation of J.A.M. Builders so that the Respondent could have been charged with a willful serious violation of 29 CFR 1926.416(a)(1) just as J.A.M. Builders was in the federal case. Respondent had been warned of the dangers of working around the high voltage power line (15 times stronger than the voltage line in J.A.M. Builders) and the need to use a spotter and they ignored that warning and trusted the safety of their employees to an inexperienced boom truck operator.

In addition to Respondent's own employees being exposed to contact with the energized power line, the employees of two of Respondent's subcontractors were also exposed to the hazard. The driver/operator of the pump truck and the driver of the concrete truck who was seriously injured were also exposed to the hazard. Respondent's relationship to his subcontractors and his duty to the safety of the employees of his subcontractors is the same as that of a general contractor to the employees of subcontractors. In this case Respondent is a first tier subcontractor and Carolina Concrete and Thomas Concrete are 2nd tier subcontractors. Respondent's duty to the driver of the concrete truck and the driver/operator of the pumping truck is the duty enumerated in Weekley Homes, 169 N.C. App. 17, 609 S.E.2d 407 (2005), cert. denied and appeal dismissed, 359 N.C. 629, 616 S.E.2d 227 (2005), OSHANC 96-3513, Slip Op. and Romeo Guest, OSHANC 99-3806, Slip Op. In Weekley, supra, the North Carolina Court of Appeals held:

> We hold that a general contractor's duty under N.C. Gen. Stat. § 95-129(2), requiring that "[e]ach employer shall comply with occupational safety and health standards or regulations," extends to employees of subcontractors on job sites. However, as stated in Romeo Guest, the duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site. Romeo Guest, OSHANC 96-3513, Slip Op.

Weekley, supra, at 28. The overwhelming evidence is that the Respondent knew about the high voltage wires and should have inspected the site prior to the concrete pour and could have detected the use of the 105 feet long boom underneath the power lines and could have taken steps to ensure that all the employees working on the concrete pour were not permitted to work in such proximity to the power lines so that they would come in contact with the energized lines in the course of their work. The overwhelming evidence is that Respondent could have used any of several methods such as directing the pumping truck operator to park his truck so that the boom of the truck did not pass under the power line, using a spotter to warn the operator if he came too close or foregoing the use of the boom and the pumping truck. Requiring a subcontractor to inspect a jobsite that is under its control to detect violations of its subcontractors that it could reasonably be expected to detect is certainly a reasonable duty.

The North Carolina Supreme Court and Court of Appeals is often chastising litigants before it for not following the courts' Rules of Procedure. They are also chastising administrative courts for not writing their orders in the

appropriate format so the appellate courts can make a reasoned review of the record below. In 1981, the North Carolina Supreme Court had the following to say about an OSH decision handed down by the then Safety and Health Review Board:

> As noted by the Court of Appeals, the Board's decision is "inexpertly written,' containing 'discussions, arguments, contentions, evidence and conclusions, all of which are intermixed and thrown together in somewhat random fashion." 49 N.C. App. At 356, 271 S.E.2d at 571-572.

Brooks v. McWhirter, 303 N.C. 573, 2 NCOSHD 115, at 126 (1981). N.C.G.S 95-135 provides in pertinent part "The report of the hearing examiner, and the report, decision, or determination of the Commission 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." emphasis added. The format that would best comply with the statute and the North Carolina Supreme Court's admonition would be to have a separate section with the findings of fact enumerated, a separate section with the conclusions of law enumerated and a separate discussion section which gives the legal reasons for the conclusions of law. Including the discussion in with the findings of fact or including the discussion in the conclusions of law mixes the legal arguments with the findings of fact or the conclusions of law and goes against the admonition of the N. C. Supreme Court in McWhirter, supra and makes it difficult for the Commission and the appellate courts to determine exactly what is the legal basis of a hearing examiner's decision.

In our decision, we have made finding of fact with respect to the fact that 4 citations were originally issued and that the Respondent made a motion in court to dismiss 3 of those items. (Commission finding of fact numbered 20, 21, 25, 26, 28). However, the dismissal of those 3 items was never ruled on in the order portion of the Hearing Examiner's decision, the Hearing Examiner just stated in finding of fact numbered 9 that the other violations had been dismissed prior to the hearing. It is well settled law that the Commissioner, absent any wrongdoing on her part, may withdraw a citation at any stage of the proceeding. Commission Rule .0401. However, once a Notice of Contest has been filed with the Commission and the Commission has jurisdiction of a case, there must be some order by the Commission granting a motion to withdraw or granting a notice of dismissal. This is the method that is used by the federal OSH Review Commission and is the practice that the Commission has adopted from the federal practice. The Commission in its order will treat the withdrawal of those citations by the Complainant and/or the motion to dismiss made by the Respondent as motions and will issue an appropriate order.

The Commission has reviewed the 4 statutory criteria of N.C.G.S. 95-138(b), the size of the business, the gravity of the violation, the good faith of the employer and the record of previous violations and has found the assessed penalty of $2,100.00 to be appropriate.

ORDER

For the reason stated herein, the Review Comission hereby **ORDERS** that the Hearing Examiner's April 29, 2005 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 CFR 1926.416(a)(1), as alleged in Citation 1, Item 2, with an assessed penalty of $2,100.00

Respondent is further **ORDERED** to abate the violations and to pay the assessed penalty of $2,100.00 within 30 days of the filing date of this order.

The Review Commission further **ORDERS** that Citation 1, Item 1 alleging a serious violation of 29 CFR 1926.20(b)(1), Citation 1, Item 3a alleging a serious violation of 29 CFR 1926.20(b)(1), Citation 1, Item 3b alleging a serious violation of 29 CFR 1926.20(b)(2) are hereby **DISMISSED**.

This the 21st day of March, 2006.

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OSCAR A. KELLER, JR., CHAIRMAN

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER