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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

TRI-STATE UTILITIES

RESPONDENT.

DOCKET NO. OSHANC 2003-4231
OSHA INSPECTION NO. 305729378
CSHO ID NO. D0570

ORDER

APPEARANCES:

Complainant:

Sonya Calloway
Assistant Attorney General
North Carolina Department of Justice

Respondent:

John Powell
Safety Officer, Tri-State Utilities

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 August 26, 2003, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

Ms. Sonya Calloway, Assistant Attorney General, represented the Complainant. The Respondent was not represented by an attorney. Present for the hearing for the Department of Labor, OSHA Division, was Robert Williams, Safety Compliance Officer ("SCO Williams") Present at the hearing for the respondent was John Powell, Safety Officer for Tri-State Utilities.

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. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about February 5, 2003, contesting a citation issued on January 3, 2003, to Respondent, Tri-State Utilities ("Respondent" or "Tri-State").

3. Respondent, a company that does business in the State of North Carolina with its principal office located in Chesapeake, VA 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).

4. Respondent is a utility rehabilitation company that employs about 25 employees.

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

6. On December 5, 2002, SCO Williams, with the North Carolina Department of Labor inspected Respondent's work site at the 100 block of West Foy Street in Richlands, North Carolina ("site") on the basis of a comprehensive general scheduled inspection.

7. Respondent was performing the rehabilitation of a sewer line at the site.

8. When SCO Williams arrived at the site on West Foy Street, Tri-State employees were performing confined space entry procedures. Three employees were working at the site, two of which were working underground.

9. SCO Williams observed one of Tri-State's employees standing close to the sewer hole without fall protection. He also observed highway signs to prevent vehicle traffic and several orange cones and a retrieval tripod near the sewer hole.

10. SCO Williams presented his credentials and held an opening conference with the site superintendent, Mr. Vaughn ('Superintendent Vaughn"). SCO Williams was granted permission to conduct an on site inspection and he took photographs and notes.

11. While SCO Williams was on site, he interviewed two employees, Mr. Brooks and Mr. Jones.

12. SCO Williams conducted a closing conference with Superintendent Vaughn and he recommended that 1 citation, 3 items be issued.

13. On January 3, 2003, the citation was issued as follows:

Citation 1 Item 1: Serious

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. 1926.501(b)(4)(i): " Each employee on a walking/working surfaces was not prevented from falling through holes (including skylights) more than 6 feet (1.8m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes:

(a) worksite, sewer manhole - Confined space entry attendant was required to stand within two feet of a 36 inch diameter sewer manhole, eight feet deep, without a guardrail or any type of fall protection."

The proposed penalty for this violation was $125.00.

Citation 1 Item 2a: Serious

Citation 1, Item 2a alleges a serious violation of 29 C.F.R. 1926.503(c)(3):

"Retraining was not provided when inadequacies in affected employees' knowledge or use of fall protection systems or equipment indicated that the employee has not retained a requisite understanding or skill:

(a) worksite - employee was not using any type of fall protection around 36 inch diameter open sewer manhole because they did not know it was a requirement."

The proposed penalty for this violation was $125.00.

Citation 1 Item 2b: Serious

Citation 1, Item 2b alleges a serious violation of 29 C.F.R. 1926.503(b)(1): "The employer did not verify compliance with paragraph (a) of this section by preparing a written certification record:

a) worksite - no written certification available.

Citation 1, Item 1 : 29 CFR 1926.501 (b)(4)(i)
(Walking/working surface without fall protection)

14. SCO Williams testified that Brooks was close enough to the sewer hole to present a hazard. He further testified that the photographs show that Brooks was within "stepping distance" of the sewer hole.

15. There was conflicting testimony as to the diameter of the sewer hole. John Powell testified that the actual opening size of the sewer hole was 22" in diameter, however he conceded that the hole was large enough for a man to fall through.

16. SCO Williams testified that a temporary portable guardrail system or an open air cover could have been used to prevent the hazard.

17. Powell testified that the guardrail system would provide a visual warning and it was mainly used to protect the public, but it was not designed as fall protection for employees. He also testified that with this type of work, with cable and flexible pipe being introduced into the hole, it was not feasible to have this guardrail system or even a cover because the holes were not large enough for the equipment to go through.

18. Powell testified that it was not common practice in industry to have fall protection for the confined space entry attendant. He testified that the attendant knew where the sewer hole was, he did not need another aide to help him be aware of the location of the hole.

19. A variance was not requested or pursued at the time of inspection.

20. SCO Williams determined that without fall protection, there was a possibility of an accident to one or more employees by falling into the sewer hole. He further determined that the likely substantial injury from a fall eight feet above the ground would be severe lacerations or broken bones from landing on the equipment in the sewer hole.

21. SCO Williams found that one employee, Brooks, was exposed and found the frequency of exposure to be daily, the severity to be medium, the probability to be low and assessed a Gravity based penalty of $125.00.

22. Brooks immediately abated when SCO Williams told him about the hazard.

23. Tri-State was given a 90% total adjustment for size, history, cooperation, and the safety and health programs. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Citation 1, Item 2a : 29 CFR 1926.503 (c)(3)
(Retraining)

24. SCO Williams learned through employee interviews that both Brooks and Jones were previously trained with regard to tripping hazards, ground wet hazards and slip hazards.

25. SCO Williams also learned through employee interviews that Brooks was very knowledgeable about confined space issues and hazards for entrant employees, but was unaware of how he could protect himself, other than being tied off.

26. SCO Williams determined that without retraining on all safety techniques, there was a possibility of an accident to one or more employees by falling into the sewer hole. He further determined that the likely substantial injury from a fall eight feet above the ground would be severe lacerations, contusions or broken bones from landing on the equipment in the sewer hole.

27. Respondent had very good knowledge of recognizing hazards surrounding confined space entry and knew or should have known of this potential fall hazard.

28. Respondent could have avoided this hazard by exploring and training employees on all safety techniques.

29. SCO Williams found that one employee, Brooks, was exposed and found the frequency of exposure to be daily, the severity to be medium, the probability to be low and assessed a Gravity based penalty of $125.00.

Citation 1, Item 2b: 29 CFR 1926.503 (b)(1)
(Written Certification)

30. It was undisputed that Respondent did not have a written certification for attendants during confined space entry.

31. SCO Williams determined that without a certification record, there is no proof that employees were trained in fall protection during confined space entry operations and there was a possibility of an accident to one or more employees by falling into the sewer hole. He further determined that the likely substantial injury from a fall eight feet above the ground would be severe lacerations, contusions or broken bones from landing on the equipment in the sewer hole.

32. Respondent's employee was too close to the sewer hole without fall protection and they knew or should have known of this potential fall hazard and could have had a written certification that showed how the employees were trained in fall protection during confined space entry operation.

33. SCO Williams found that one employee, Brooks, was exposed and found the frequency of exposure to be daily, the severity to be medium, the probability to be low and assessed a Gravity based penalty of $125.00.

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. This Court has jurisdiction of this cause and the parties are properly before the Court.

3. The respondent is subject to the provisions of the Act and is an employer within the meaning of N.C.G.S. § 95-127(9).

4. Complainant proved by a preponderance of the evidence that respondent violated 29 C.F.R. 1926.501(b)(4)(i), in that one of its employees was working near a sewer hole 8 feet deep and was not protected from falling by the use of personal fall arrest systems, covers, or guardrail systems erected around the sewer hole.

5. Complainant proved by a preponderance of the evidence that respondent violated 29 C.F.R. 1926.503(c)(3), in that retraining was not provided to explore and train employees on all safety techniques to employees performing confined space entry procedures.

6. Complainant proved by a preponderance of the evidence that respondent violated 29 CFR 1926.503 (b)(1) in that there was no written certification record.

7. All penalty calculations were properly done pursuant to the Field Operations Manual.

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

a. Citation 1, Item 1 is hereby AFFIRMED as a serious violation of 29 CFR 1926.501(b)(4)(i) with a penalty of $125.00.

b. Citation 1, Item 2a is hereby AFFIRMED as a serious violation of 29 CFR 1926. 503(c)(3) with a penalty of $125.00.

c. Citation 1, Item 2b is hereby AFFIRMED as a serious violation of 29 CFR 1926.503(b)(1).

This the 25th day of September 2003.

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Monique M. Peebles
Administrative Law Judge Presiding