

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

P F PLUMBING CONTRACTORS, INC.,

RESPONDENT.

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

ORDER

THIS MATTER was heard on January 20, 2004, in Winston-Salem, North Carolina. Complainant was represented by Newton Pritchett, Assistant Attorney General. Respondent was represented by attorney, Randolph James of Winston-Salem, North Carolina.

Present at the hearing for complainant were Ralf Haskall, Special Deputy Attorney General and Thomas Elder, Health Compliance Officer (HCO) with the North Carolina Department of Labor, Occupational Safety and Health Division. Present at the hearing for respondent were Paul Freer, President; Chris Nelson, Senior Vice President; Simon Means, Supervisor/Foreman; Juan Ramirez, plumber's helper; and Calvin Weatherman, consultant with Safety Tech.

ISSUES PRESENTED

Did complainant meet its burden of proving by a preponderance of the evidence that respondent violated 29 C.F.R. §1926.652(a)(1) by allowing one or more of its employees to be working in an open trench 5 feet deep or more without adequate cave-in protection?

Did complainant meet its burden of proving by a preponderance of the evidence that respondent violated 29 C.F.R. §1926.651(j)(2) by allowing excavated or other materials to be deposited within 2 feet of their open trench without using retaining devices sufficient to prevent the material or equipment from falling or rolling into the excavation?

Did complainant meet its burden of proving by a preponderance of the evidence that respondent violated 29 C.F.R. §1926.651(k)(1) by failing to have a competent person inspect their open trench for evidence of a hazardous situation?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 C.F.R. §1926.652(a)(1) provides, in pertinent part, as follows:

(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:

(i) Excavations are made entirely of stable rock; or

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

29 C.F.R. §1926.652(b)(1)(i) and (ii) and Subpart P, Appendix B, Table B-1 provides, in pertinent part,

that if an employer does not know the soil classification of the trench in which its employees are working or knows that the classification is Type C soil, it must slope the trench 1½ feet horizontal to every foot vertical (1½:1 or 34 degrees).

29 C.F.R. §1926.651(j)(2) provides as follows:

Employees shall be protected from excavated or other materials 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 (.61m) from the edge of 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.

29 C.F.R. §1926.651(k)(1) provides as follows:

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. (Emphasis added)

29 C.F.R. §1926.650(b) provides, in pertinent part, as follows:

Competent person means 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.

FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the Act).

2. Respondent is a corporation engaged in the residential plumbing business, which conducts business in, and under the laws, of the State of North Carolina.

3. On February 25, 2003, Thomas Elder, Health Compliance Officer and Barry Bailey, Safety Compliance Officer (Officers) with the North Carolina Department of Labor, Occupational Safety and Health Division, arrived at 1701 Challock Way in High Point, North Carolina (the job site) to conduct a partial inspection of respondent's trenching operation. The inspection was ordered by the Officers' supervisor as part of a Guilford County special inspections emphasis which resulted from an increased number of trenching fatalities in Guilford County and other North Carolina counties. N.C. Gen. Stat. §95-136.1(b)(3).

4. When they arrived on the job site, the Officers observed and took photographs of three of respondent's employees. One employee was wearing a blue hard hat and was apparently standing in an open trench which appeared to be deeper than 5 feet. There were two other men on the job site within a few feet of the man in the trench, to wit: one man with a white hard hat standing outside and on the edge of the trench holding a shovel and one man with a dark baseball cap standing approximately knee deep in the trench performing some type of work. (Complainant's Exhibits #1-3)

5. The Compliance Officers conducted an opening conference with the man in the white hard hat, who identified himself as Simon Means, the supervisor of the project.

6. Mr. Means requested permission to call his supervisor to come out and "take care of the situation." The Officers allowed him time to call his supervisor and then began the inspection. During the inspection process, respondent's Water and Sewer Supervisor, Chris Smith, arrived on site, accompanied the Officers and had every opportunity to take his own photographs and measurements and conduct his own interviews.

7. The Officers determined that respondent had three employees at the site. Mr. Means, the supervisor and the person respondent had designated as the "competent person;" Mr. Robert Hernandez, who the Officers had seen wearing a dark baseball cap and standing knee-deep in the trench; and Mr. Juan Ramirez, who the Officers had seen wearing a blue hard hat and apparently standing in the trench which appeared to be over 5 feet deep.

8. The Officers took measurements of the trench, which was located in a new residential subdivision. The purpose of the trench was to lay a sewer line from one of the homes under construction to a sewer tie-in at the street. The trench was 71 feet long and was parallel to the street. Respondent dug the trench so that it sloped downward on a minimum of a 1 percent grade from the house to the street in order to allow gravity to drain the sewage entering the pipe from the house. The width of the base of the trench was no less than 24 inches, which the Officers estimated based upon their measurement of the 24 inch-wide track hoe bucket, which had excavated the dirt out the trench. The width of the top of the trench, which was its widest at the point closest to the road, measured 5 feet 2 inches. With the exception of the final few feet, the last 14 feet of the trench closest to the road was over 5 feet deep and, at times, was over 6 feet deep. The last few feet of the trench was approximately 4 feet deep, thus creating a dirt "shelf" upon which Mr. Hernandez was standing. (Complainant's Exhibits #2, 3 and 6)

9. Based upon their own observations, their photographs, their interviews with respondent's employees and the condition of the trench, the Officers determined that, when they arrived on the job site, Mr. Ramirez had been finalizing the grade at the bottom of the deepest portion of the trench and Mr. Hernandez had been standing on the dirt shelf at the end of the trench closest to the road using a probe to locate a buried electrical line. Based upon the footprints in the deepest portion and along the bottom of the trench, the Officers determined that prior to their arrival, Mr. Ramirez or other of respondent's employees, had been in the deepest portion of the trench grading the bottom.

10. While its employees were standing in the trench, which was 5 feet deep or more, respondent did not provide any system designed to prevent a cave-in.

11. The Officers noted that the track hoe was parked within a few feet of the end of the trench (Complainant's Exhibits 1 and 3) and that the trench was near an occasionally traveled street, conditions which could have produced vibrations affecting the trench walls.

12. The Officers also noted that the spoil pile of rock and dirt removed by the track hoe from the trench had been deposited within 2 feet from the edge of the trench. (Complainant's Exhibits #1-3, 5, 7, 10, 12)

13. Mr. Means was respondent's superintendent on the project, was designated by respondent as the "competent person," and was the track hoe operator who dug the trench. Upon questioning by the Officers, Mr. Means was not able to accurately classify the soil at the job site nor state the proper degree of slope for a trench consisting of Class C Soil.

14. Pursuant to 29 C.F.R. §1926.652(b)(1)(i) and (ii) and Subpart P, Appendix B, Table B-1, if an employer does not know the soil classification of the trench in which its employees are working or knows that the classification is Type C soil, it must slope the trench 1 1/2 feet horizontal to every foot vertical (1 1/2:1 or 34 degrees).

15. The Officers calculated that the slope of the trench was not in accordance with 29 C.F.R. §1926.652(b)(1)(i) and (ii) and Subpart P, Appendix B, Table B-1, regardless of whether the soil was classified as Class A, Class B or Class C. (Complainant's Exhibit #11) For example, if the trench had been dug in Class A soil, the most stable soil next to stable rock, respondent would have had to slope the trench such that the width at the top was no less than 11 feet wide, over 5 feet wider than the actual width of the trench at the time of the inspection.

16. At the hearing, respondents alleged that the Officers did not properly measure the trench and that the trench was not over 5 feet deep. While it is true that the photographs are not helpful in determining the measurements of the trench, HCO Elder testified credibly to the measurements he took. Respondent was not able to impeach the credibility of HCO Elder's testimony. Further, although it had every opportunity to take its own measurements and photographs of the trench at the time of the inspection, respondent failed to present any evidence which contradicted the HCO's testimony regarding his personal observations. Finally, respondent suspended Mr. Means for two days as a result of allowing Mr. Ramirez "in a ditch more than 5 feet deep without any provisions in relation to trench depth." (Respondent Exhibit #1) It would not have disciplined Mr. Means if he had not violated the OSHA regulations.

17. While arguing that the ditch was not 5 feet deep or deeper, respondent contended that the reason Mr. Ramirez' body was so deep in the trench when the Officers arrived was because he was "kneeling down in the trench to keep sheltered from the cold." This argument is unpersuasive. Complainant's Exhibits #2 and #3, which were taken within the same minute in time, show that Mr. Ramirez turned from facing away from the street to facing the street. It is unlikely that he would have done this on his knees. Even if Mr. Ramirez was "kneeling" in a more shallow portion of the trench at the time the investigators arrived, respondent would nevertheless be in violation of 29 C.F.R. §1926.652(a)(1)(ii). For excavations which are less than 5 feet in depth, respondent is still required to have a competent person examine the ground to ensure that the trench provides no indication of a potential cave-in. Mr. Means should have recognized that the occasional traffic from the street, the vibration or weight of the track hoe at the end of the trench or the weight of the spoil pile lining the side of the trench could have caused the trench to cave in. He should have recognized that an employee kneeling in a trench even 4 feet in depth was a "hazard increasing occurrence" within the meaning of 29 C.F.R. §1926.651(k)(1) and that the employee could be seriously injured or killed if the trench walls caved in. After viewing Complainant's Exhibits 1-3, the undersigned has no doubt in her mind that if the trench had caved-in while Mr. Ramirez was "on his knees," he would have been buried under tons of dirt and would have died or suffered grievous bodily injury.

18. Respondent is in the business of residential plumbing. Generally, the trenches it excavates are usually between 3 feet 6 inches and 4 feet deep. They have an excellent safety and health program and have received several commendations from North Carolina OSHA in the past. (Respondent Exhibits #2 and 3) The reason this trench was deeper than usual is because Mr. Means had to extract a large rock from an area of the trench close to the street. In order to remove the rock, Mr. Means operated the back hoe to dig up to 2 feet deeper than usual. It took him 5 hours to remove the rock. After he removed the rock, the trench went from being approximately 4 feet deep along its natural line, to being approximately 5-6 feet deep where the rock was removed, to being approximately 4 feet deep for the last few feet of the end of the trench nearest to the track hoe (the shelf on which Mr. Hernandez was standing). After removing the rock, Mr. Mean's plan was to fill in the hole back up with loose dirt to the usual level of the trench, or approximately 4 feet deep. Respondent seemed to argue at the hearing that, since its trenches are usually not 5 feet deep or deeper and since they did not expect this trench to be unusual, they did not slope the trench walls in accordance with 29 C.F.R. §§1926.651 and 652. However, there is no prohibition against digging trenches 5 feet deep or deeper without sloping the trench walls. The prohibition is against placing employees in the trench without proper sloping or other protection from cave-ins. Thus, pursuant to 29 C.F.R. §1926.651(k)(1), when Mr. Means personally removed the rock, he knew or should have known that he had created a "hazard increasing occurrence" by digging the trench 5 feet deep or deeper. Thus, he should have inspected the trench, recognized its potential for danger and kept respondent's employees out of the excavation until he had the chance to bring the depth of the trench where he had removed the rock back up to 4 feet deep.

19. After the Officers issued the citations, respondent issued a Corrective Action Report on March 10, 2003, suspending Mr. Means for two days. The grounds for the suspension were "OSHA documented Juan Ramirez in a Ditch more than 5 feet deep without any provisions in relation to trench depth." Mr. Means signed a typed statement stating, in part, that he was "aware from regular reminders from my supervisors and routine safety classes, I did not use my best judgement (sic) and disregarded Company Policy and OSHA regulations." (Respondent Exhibit #1) Respondents seemed to argue at the hearing that if Mr. Ramirez was standing in a trench 5 feet deep or more, that respondent was not responsible for the violation because Mr. Means' conduct was an "isolated incident of employee misconduct." Isolated employee misconduct of supervisory employees can be shown where the supervisor's actions or omissions are beyond the scope of his delegated authority. Brooks v. Floyd S. Pike Electrical Contractors, Inc., OSHANC 86-1304 (1987); Brooks v. Bitting Electric, Inc., OSHANC 90-1838 (1992). Mr. Means' conduct was within his delegated authority and so respondent's defense must fail.

20. At the closing conference with Mr. Means and Mr. Smith on the same day as the inspection, the HCO determined that citations would be issued for the following violations of the Act:

a. Citation 1, Item 1a - Serious - 29 C.F.R. §1926.652(a)(1): failing to provide adequate sloping, benching, shielding or other type of protection in a trench over 5 feet deep;

b. Citation 1, Item 1b - Serious - 29 C.F.R. §1926.651(j)(2): failing to place and keep excavated or other materials or equipment at least 2 feet from the edge of excavations and/or failing to place and keep retaining devices sufficient to prevent materials or equipment from falling into the excavation; and

c. Citation 1, Item 1c - 29 C.F.R. §1926.651(k)(1): failing to ensure that a competent person conducted regular and frequent inspections of the trenching operations.

Citation 1, Item 1a - 29 CFR §1926.652(a)(1)

(Inadequate Trench Protection)

21. The trench on the job site was in violation of 29 C.F.R. §1926.652(a)(1) in that it was over 5 feet deep for over 14 feet in length without adequate protection from cave-ins, and thus, constituted a hazard.

22. The violation was serious in that there existed the possibility of an accident: to wit, a cave-in.

23. The likelihood of a cave-in was substantially increased by the vibrations made by occasional traffic on the street, by vibrations from and the weight of the track hoe located at the end of the trench closest to the street, and by the weight of the spoil pile within 2 feet of the trench.

24. The substantial probable result of such an accident would be serious permanent injury or death.

25. Respondent's employee, Mr. Juan Ramirez, was exposed to the hazard at the time the Officers arrived on the job site. Respondent's employees who finalized the grade in the final 14 feet of the trench closest to the road, were also exposed to the hazard.

26. Respondent's foreman, Mr. Means, knew of the hazard in that he was present on the job site when the Officers arrived and was within a few feet of Mr. Ramirez and looking directly at Mr. Ramirez, who was deep in the trench.

27. The \$1,050.00 penalty imposed for the violation cited in Citation 1, Item 1a was properly calculated in accordance with the North Carolina Operations Manual as follows:

a. the severity of the violations was properly determined to be high;

b. the probability assessment was properly deemed to be medium;

c. the gravity based penalty was properly calculated to be \$3,500;

d. the adjustment factor for size was properly calculated to be 40%;

e. the adjustment factor of 20% for respondent's cooperation, their toolbox meetings, and their safety programs was properly applied;

f. the adjustment factor of 10% for no history of prior violations was properly applied; and

g. the total reduction of 70% to the \$3,500.00 gravity based penalty to reduce the penalty to \$1,050.00 was properly applied.

28. Respondent could have avoided or abated this violation by providing adequate cave-in protection when the trench became 5 feet deep, by keeping the spoil piles further back from the trench, and by keeping Mr. Ramirez from entering the trench in such a manner that most of his body was inside the trench and subject to being buried in a cave-in.

Citation 1, Item 1b - 29 CFR §1926.651(j)(2)

(Failure to Keep Excavated Materials Further Than 2 Feet From Trench)

29. The spoil pile created by respondent's foreman, Mr. Means, was placed within 2 feet of the edge of the trench in violation of 29 CFR §1926.651(j)(2).

30. The location of the spoil pile created the possibility of an accident, to wit: clumps of dirt falling on employees in the trench or the weight of the spoil pile causing a trench cave-in.

31. The substantial probable result of such an accident is abrasions and contusions to the head, cuts requiring stitches, a fractured skull, serious permanent injury or death.

32. Mr. Ramirez was exposed to this hazard during the period the Officers observed him in the trench. Other of respondent's employees who graded the last 14 feet of the bottom of the trench were also exposed to the hazard.

33. Had the HCO determined the penalty as if this were the sole violation, he would have calculated it as shown in paragraph 27, above.

34. This violation was properly grouped with Citation 1, Item 1a, with no additional penalty assessed.

35. The hazard could have been abated by Mr. Means recognizing the danger posed by depositing the spoil pile so close to the edge of the excavation that he was digging and by depositing the spoil pile further than 2 feet from the edge of the trench.

Citation 1, Item 1c - 29 CFR §1926.651(k)(1)

(Failure to Ensure a Competent Person Inspected for Hazards)

36. Mr. Means was not a competent person pursuant to 29 CFR §1926.650.

37. Respondent did not have on the job site a competent person within the meaning of 29 CFR §1926.650.

38. As a result of not having a competent person on the job site, Mr. Ramirez and other employees who assisted in the final grade of the last 14 feet of the trench closest to the road, were exposed to the hazard of a potential cave-in.

39. The substantial probable result of such an accident is serious permanent injury or death.

40. The hazard could have been abated by respondent ensuring on a regular basis that Mr. Means retained the knowledge and skills of a competent person and, if not, by providing him with the training necessary to keep him qualified as a competent person.

41. Had the HCO determined the penalty as if this were the sole violation, he would have calculated it as shown in paragraph 27, above.

42. This violation was properly grouped with Citation 1, Item 1a with no additional penalty assessed.

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 a plumber on the job site.

4. Respondent should have known that trenching operations are dangerous and constitute a frequent hazard on construction sites.

5. Complainant proved by a preponderance of the evidence that respondent violated the sections of the Act as set forth in the Findings of Fact above, that the violations were serious as designated in all of the Items in Citation 1 and that the proposed penalty assessed for Citation 1, Item 1a was figured appropriately.

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** as follows:

1. Citation 1, Items 1a-c are hereby **AFFIRMED** and the penalty is hereby imposed in the amount of \$1,050.00;

2. The penalty shall be paid within ten (10) days of the filing date of this Order; and

3. Respondent shall ensure that it has a competent person on the job site at all times and that it protects its employees from potential cave-ins by strictly complying with the Act.

This the 19th day of February, 2004.