

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

**COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,**

COMPLAINANT,

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

v.

**THOMPSON CONTRACTING, INC.,
(and its successors,)**

ORDER

RESPONDENT.

THIS MATTER was scheduled for hearing before the undersigned on December 2, 2004 in Raleigh, North Carolina. The Complainant was represented by Daniel D. Addison, Special Deputy Attorney General, and Respondent was represented by Brian J Schoolman, of Safran Law Offices and J. Anthony Penry, of Taylor, Penry, Rash & Ryman, PLLC.

Complainant's witness was: Belvin Horres, Safety Compliance Officer II, North Carolina Department of Labor, Occupational Safety and Health Division; Respondent's witnesses were James Stafford, Director of Operations, Thompson Contracting, Grading, Paving, and Utilities, Inc., formerly referred to as Thompson Contracting, Inc. and Ray Boylston, expert witness.

ISSUES PRESENTED

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.416(a)(1) by permitting employees to work in proximity to electric power circuits without being protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means.

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

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.

After hearing and receiving the evidence, considering the arguments of counsel and reviewing post-hearing submissions, the undersigned makes the following

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina, 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) as well as the regulations adopted pursuant thereto.

2. Respondent, Thompson Contracting, Inc., is a corporation engaged in the construction industry and at all times relevant to this case was building parking lots and retaining walls on the Centennial Campus of North Carolina State University in Raleigh, North Carolina. Respondent is now referred to as Thompson Contracting, Grading, Paving, and Utilities, Inc. For the purpose of this order, it shall be referred hereafter to as "Thompson" or "Respondent."

3. On August 27, 2003, Respondent was engaged in the construction of a footing for a retaining wall at a site within the Centennial Campus.

4. 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.

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

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

7. CCP's truck driver, David Baker, maneuvered the pumper's boom with a remote control device in order to deliver the concrete to the locations where Respondent directed.

8. At a point near the completion or at the completion of the pour, while Respondent's employees were still engaged in activities associated with the construction of the footer, Baker attempted to move the pumper truck boom and contacted the overhead electric circuit wire. The electricity flowing through the wire was diverted down the boom of the pumper truck, through that truck and also the concrete truck that was parked next to the pumper truck. The electric current also traveled down the part of the boom that was still being touched by one or more of the Respondent's employees. Several of Respondent's employees at the site of the footing received shocks. These employees were apparently not injured. The current that flowed the other direction through the pumper and concrete trucks also went through the driver of the concrete truck seriously injuring him and causing his hospitalization.

9. Safety Compliance Officer II, Belvin Horres, North Carolina Department of Labor, Occupational Safety and Health Division, hereafter SCO Horres, began his investigation of the accident the same day and later cited Respondent for violation of 29 CFR 1926.416(a)(1) as well as other violations which were dismissed prior to the hearing's initiation.

10. In order to prove its basis for the citation, the Complainant must prove:

- a. the cited standard of the Act applies;
- b. the terms of the standard were not met;
- c. employees were exposed to or had access to violative conditions;
- d. the Respondent knew or could have known of the violative conditions with the exercise of reasonable diligence; and
- e. there was a possibility of an accident the probable result of which would be death or serious injury.

Piedmont Electric Membership Corporation, OSHANC No. 2002-4192 (2003).

11. With regard to item a. above, Complainant proved that Respondent employed workers to pour concrete in a footing that was proximately beneath a power line that was carrying a 115,000 volt electric circuit at the same time a pumper truck with a 105 foot boom was being used to deliver the concrete to the employees at the footing. SCO Horres concluded from his investigation, and the undersigned finds, that the pumper truck boom crossed under the power line. Respondent did not protect the employees from contact with the electric circuit. In addition, the driver of the concrete truck was also in proximity to the electric circuit as he was standing next to the pumper truck and the concrete truck.

12. With regard to item b. above, Complainant proved that Respondent did not meet the terms of the standard because the employer has the duty to exercise reasonable diligence in anticipating particular hazards to which its employees may be exposed and it should have taken specific precautions. *Automatic Sprinkler Corp. of America*, OSHRC, Docket No. 76-5089 (1980). Respondent 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, all for the purpose of preventing contact between the employees and the electric circuit.

13. With regard to item c. above, Complainant proved that employees were exposed to or had access to the violative conditions because Respondent's employees reported to the investigator, during his investigation, that they were shocked and the concrete truck driver was seriously injured by contact with the electric circuit.

14. With regard to item d. above, Complainant proved that Respondent knew or could have known of the violative conditions with the exercise of reasonable diligence because it had a supervisor at the work site on duty at the time of the accident.

15. With regard to item e. above, Complainant proved that there was a possibility of an accident the probable result of which would be death or serious physical injury because the concrete truck driver was injured seriously and Respondent's own employees were shocked when the boom came into contact with the electric circuit.

16. The electric circuit, the power line, was open, obvious and even, at times, audible to Respondent.

17. The locations of power lines at the construction site caused Respondent to redesign the overall job several times.

18. The pumper truck operator "improperly moved the boom up into or near the power line" and "could and should have simply turned the boom to the right or left and then folded up the boom." Respondent's brief, p.2.

19. Respondent had the authority and ability to direct the pumper truck operator to change and abate unsafe practices as it was in control of the worksite. Respondent's supervisor testified that Respondent could have expelled the pumper truck and its operator from the work site if the operator failed to follow Respondent's safety directives. Thus, the Respondent was a controlling employer.

20. Respondent, 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.

21. Respondent's objection to the admission of testimony from Officer Horres as to what John Barbieri said about spotters at a preconstruction meeting with Respondent is sustained. Barbieri's statement at the meeting, that a spotter was recommended, would have been hearsay but for the fact that the statement was not offered to prove the truth of the matter asserted but to show notice. However, the statement of Officer Horres reporting what Barbieri told him was offered to prove the truth of what it asserted -- that the Respondent had been informed of the need for a spotter. As such, this was hearsay and was not admissible. Similarly, the objection to Exhibit 8 is sustained, as it attempts to document the making of the statement at the meeting so it contains double hearsay as well. The statement of the Exhibit's author in the Exhibit, is offered, just as is the statement reported having been made to Officer Horres, to prove the truth of the matter asserted, that the Respondent had been informed. As such, the Exhibit is hearsay as well, as it is an attempt to admit inappropriately evidence that speaks to the need to anticipate danger.

22. Despite the ruling on the above hearsay evidence, the Respondent was aware of the danger of the overhead electric circuit and had modified its work site design specifically because of the placement of the electric circuits. This knowledge is sufficient to establish and confirm the duty of Respondent to protect its employees from an unsafe workplace. Respondent was not entitled to rely upon the concrete pumping company or its employee to protect Respondent's and any workers at the site. *See Brooks v. BCF Piping, Inc.*, 109 N.C.App. 26 (1993).

23. The duty of Respondent to prevent employees working in proximity to electric circuits from being shocked is a non-delegable duty, especially when a 105 foot boom is being operated near a high voltage electric circuit that is 36 feet above the ground, and it was not proper for Respondent to rely upon the safety practices of the concrete pumping company to protect the workers on site. *See Brooks v. BCF Piping, Inc.*

24. Respondent's contention that it should not be held liable for the citation because the concrete pumping company was a specialized contractor is not applicable, even if the Respondent was entitled to delegate its safety responsibilities. In order for the Respondent to be able to rely upon the pumping company to maintain safe conditions, the Respondent must rely reasonably. *Sasser Elec. And Mfg. Co.*, 1984 OSHARC LEXIS 97, OSHRC Docket No. 82-178, *aff'd*, No. 84-1961 (4th Cir. 1985). The reliance in this case is not reasonable because Respondent did not take reasonable steps to ensure that the pumping company had adequate safety measures to prevent accidents. There was no evidence admitted to show whether Respondent confirmed that the pumping company had a safety program, and if it did, whether the safety program addressed the operation of booms near electric circuits. Respondent did not inquire enough, if at all, to learn that the operator of the pumper had only been operating such booms by himself for a couple weeks. *See Blount International, Ltd.*, 1992 OSAHRC LEXIS 118.

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. Complainant proved by a preponderance of the evidence that Respondent violated Citation 1, Item 2 and the penalty and its adjustment was properly calculated in accordance with Complainant's *Field Operations Manual*.

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

1. Citation 1, Item 2 is affirmed as a serious violation of 29 CFR 1926.416(a)(1) and a penalty of \$2,100.00 is hereby imposed.

2. The penalty shall be paid within twenty (20) days of the filing date of this Order.

This the 29th day of April, 2005.

Reagan H. Weaver
Administrative Law Judge