

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 200-3947
OSHA INSPECTION NO. 125251322
CSHO ID NO. K0050

v.

L&D COMMUNICATIONS,
and its successors,

ORDER

RESPONDENT.

Administrative Law Judge: Ellen R. Gelbin

THIS MATTER was heard by the undersigned on February 7, 2002, in Greensboro, North Carolina. Complainant was represented by Susan R. Lundberg, Office of the North Carolina Attorney General (AG); Respondent was represented by Kenneth R. Keller, of the law firm Carruthers & Roth, Greensboro, North Carolina.

Also, present at the hearing for complainant were Linda Kimbell (AG); Nathan D. Crisp, Walter Kissick, and H. Carl Collins, with the North Carolina Department of Labor, OSHA Division; witness Edward Link, Jr.; and Michelle Link, observer. Also present at the hearing for respondent were James Anderson and Laurie Dumont, owners of L&D Communications.

After reviewing the record file, the appropriate legal authorities and after hearing the evidence and arguments of counsel, the undersigned makes the following:

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 in the business of directional boring for the placement of telecommunications cables under ground, including under roads and highways. Respondent's owners, James Anderson and Laurie Dumont, maintain a home and office in Greensboro, North Carolina. For seven months prior to November, 1999, respondent was performing its work in Greensboro, North Carolina, as a sub contractor for P&H. Respondents are subject to the provisions of the Act.

3. On November 12, 1999, respondent was performing a directional bore along Creek Ridge Road in Greensboro, North Carolina. Creek Ridge Road passes over I-85 approximately $\frac{1}{4}$ to $\frac{1}{2}$ a mile south of where I-40 and I-85 merge in Greensboro (Creek Ridge Road Overpass).

4. In order to continue boring underground and along Creek Ridge Road, it was necessary for respondent to perform a directional bore down the south western (or right side) embankment of Creek Ridge Road overpass to I-85, under the south, then the north bound lanes of I-85, and then up the north eastern (or left side) embankment of Creek Ridge Road overpass, back to Creek Ridge Road.

5. James Anderson, owner of L&D Communications, was on site on November 12, 1999 and was responsible for supervising respondent's three employees, to wit: Rodney Hinson, Jeremiah Cobbs, and Wayne Harrellson.

6. Mr. Anderson is the operator of respondent's directional boring machine. The head of the boring rod can change pitch or direction underground. A transmitter in the head of the boring rod sends a signal indicating the location, pitch and direction of the bore head. An above-ground receiver receives the signal and provides a read-out as to the location, pitch and direction of the underground bore. The receiver instantly sends the information to the remote, which is located on the directional boring machine where Mr. Anderson can read it. The conduit rods which the machine imbeds underground are 10 feet long and, thus, Mr. Anderson can determine at 10 foot increments whether he needs to change the direction or pitch of the boring head. The receiver can receive a signal from the transmitter up to 80 feet away.

7. In the upright position, the receiver reads the pitch of the bore head . When laid on its side, the receiver reads the direction of the bore head. Thus, if Mr. Anderson needs both readings, someone needs to be with the receiver to change its position. On November, 12, 1999, Rodney Hinson was assigned to change the position of the receiver during the boring operations.

8. Prior to beginning the directional bore down the south western embankment of Creek Ridge overpass to I-85, Mr. Anderson drove up and down I-85 and determined that "work zone" signs were present, warning motorists of a seven mile work zone. Speed limit signs were posted reducing the work zone speed to 50 mph. Other than the general work zone and speed reduction signs, none of the three lanes of travel south or the three lanes of travel north were regulated by or blocked by traffic control devices.

9. Prior to beginning the directional bore, Mr. Anderson walked with employees Rodney Hinson and Jeremiah Cobbs several times across the three southbound lanes of I-85 and to the median and back in order to identify the proper placement of the

underground conduit. Prior to crossing I-85, Mr. Anderson waited until the traffic was clear and then cautiously crossed the lanes of travel. He cautioned his employees to watch for traffic and to be careful.

10. Mr. Anderson parked his boring machine on the shoulder of Creek Ridge Road on the south western (right) side of the overpass at the top of the embankment. From this position, he bore approximately 50 feet down the south western embankment of Creek Ridge Road overpass and leveled out his boring head in the 50 to 60 feet of level ground leading up the south bound lanes of I-85.

11. Once he had the bore directed toward I-85, he dismounted his directional boring machine. He and Mr. Hinson, once again, carefully walked across and back over the southbound lanes of the highway in order to check the pitch of the bore head.

12. It was Mr. Cobbs' job to prepare "pullers" so that once the bore head broke through on the north eastern (left) side of Creek Ridge Overpass, Mr. Anderson could use the directional boring machine to "pull" the cable product back through the conduits that he had just imbedded. Before Mr. Anderson began his directional bore under I-85, Mr. Cobbs asked him for more pullers. Thus, at the time of the accident, Mr. Anderson assumed that Mr. Cobbs was working on the north eastern side of the Creek Ridge Overpass preparing pullers.

13. From Mr. Anderson's vantage point on the boring machine, he could not see the place in the median where he and Mr. Hinson had placed the receiver. The receiver was on its side, assisting him in determining the direction of the bore head. He used a two -way radio to signal Mr. Hinson that he was going to start the operation. He advised Mr. Hinson to use caution when crossing the highway to monitor the receiver in the median.

14. Mr. Hinson radioed Mr. Anderson that he was safely in the median and Mr. Anderson put two boring rods in the ground. This covered approximately 20 feet under highway I-85. Mr. Anderson radioed Mr. Hinson to "set it up" or to check the pitch of the bore head to ensure that it was not going to come up through the highway and into traffic. All Mr. Hinson had to do was set the receiver upright. The receiver was well within range to obtain the pitch reading.

15. Mr. Hinson radioed Mr. Anderson that he "needed to check it." Mr. Anderson believed Mr. Hinson meant to reposition the receiver to obtain the pitch. Mr. Hinson called on the radio that the road was all clear and that he was going to check the reading. Mr. Anderson does not know why Mr. Hinson picked up the receiver and walked into the northbound lanes of I-85. Mr. Anderson told him "not to be in the road with traffic."

16. Mr. Hinson lives in South Carolina and was not present for the hearing. The SCO interviewed Mr. Hinson on February 10, 2000. The SCO's notes regarding his interview with Mr. Hinson read, in pertinent part, "[h]e waited for the traffic to clear sufficiently for him to retrieve the receiver and then went to the area between the 1st and 2nd (middle lanes of I-85)".

17. At the time Mr. Hinson was working in the 1st and 2nd lanes of north bound I-85, it was approximately 2:30 p.m. on a Friday afternoon and there was heavy traffic going approximately 50 mph. There were no traffic control devices (cones, barrels, flashers or truck-mounted attenuators) on the highway to block traffic from where he was working, to channel traffic away from where he was working, or to warn motorists well in advance, "ROAD WORK AHEAD," , "ROAD WORK 1 MILE," and "LANE CLOSED ½ MILE."

18. At the same time Mr. Hinson was working in the 1st and 2nd lanes of northbound I-85, Joseph M. Collins and Edward R. Link, Jr. were traveling north on I-85 toward Creek Ridge Road overpass. Mr. Link noted the traffic to be heavy, but noted only general "work zone" and speed reduction signs in the several miles prior to the accident.

19. Mr. Hinson gave a statement to the police at the scene of the accident. The officer reported Mr. Hinson's statement, in pertinent part, as follows:

... I spoke with Rodney Hinson, co-worker of the victim. He was one of the individuals that ran across the highway. Mr. Hinson stated that he and Mr. Cobbs were remote drilling sitting down white dots across the highway. Mr. Hinson stated that he and Mr. Cobbs saw that the first lane (sic) were clear so they went out into the first lane. He stated that Mr. Cobbs was about 20 feet ahead of him. Mr. Hinson stated that Mr. Cobbs had the orange flag and was to wave the cars into the other two lanes. Mr. Hinson stated that while he was looking down at one of the white dots in the first lane, he looked up and saw the tractor trailer coming in the left lane and all of a sudden a van came from behind the tractor trailer into the second lane. Mr. Hinson stated that he started to run to get out of the way. Mr. Hinson stated the van swerved to miss him and hit Mr. Cobbs... .

20. When the SCO interviewed Mr. Hinson in February, 2000, he made the following statement:

He was using the receiver to determine the pitch of the head... . when he observed traffic coming down the middle lane of the 3 lane highway. He darted towards the embankment and just as he got there, he observed Jeremiah lying in the 3rd lane (the

lane adjacent to the median). ... He indicated that both he and Jeremiah had both been wearing reflective vest and that Jeremiah had a flag to alert traffic.

21. After the accident, Mr. Cobbs' body was found in the left-most lane of north bound I-85 nearest the median. Mr. Cobb's glasses, his orange flag and the directional bore receiver were all found in the center lane of the north bound I-85.

22. Immediately after the accident, Mr. Hinson radioed Mr. Anderson that Mr. Cobbs had been struck by a motorist. Mr. Hinson informed Mr. Anderson that Mr. Cobbs had been in the road with him and was acting as a flag man while Mr. Hinson was in the roadway. Mr. Anderson immediately obtained a "men at work" sign in the lane of travel where Mr. Cobbs' body lay.

23. Respondent never made an oral or written report of the fatality to the nearest Area office of the Occupational Safety and Health Administration.

24. After hearing about the event on the radio and seeing it in the newspaper the following day, safety compliance officer (SCO) Walter Kissick conducted an inspection of P&H. He was not aware at that time that the deceased was respondent's employee.

25. The SCO opened an inspection in this case with respondent on February 10, 2000. The delay in opening the inspection was neither the SCO's nor Mr. Anderson's fault, but due to circumstances beyond their control.

26. At the time of the November 12, 1999 accident, Mr. Hinson had worked for Mr. Anderson for approximately 3½ years and Mr. Cobbs had worked for Mr. Anderson for approximately 2½ years. Mr. Anderson had provided verbal on-the-job training to both employees over the years, but tendered no evidence on the content of his training other than the general safety admonitions such as "be careful" and "not to be in the road with traffic." These were not sufficient to address the specific hazards on this job site.

27. Mr. Anderson had no knowledge or awareness of the Act relating to employees working on or near public roads, including those set forth in the ANSI Manual on Uniform Traffic Control Devices (MUTCD). Thus, Mr. Anderson did not train his employees regarding the Act or the MUTCD standards.

28. Mr. Anderson is the owner of respondent company and was Mr. Cobbs' sole supervisor. Mr. Anderson testified that one of Mr. Cobbs' responsibilities for respondent was as a flag man. However, respondent provided no evidence of the

content of the training it provided to Mr. Cobbs as a flag man, with the exception of general safety admonitions such as "be careful."

29. Mr. Anderson himself was not aware of the Act or of the ANSI standards and, thus, was not aware of the flag man standards provided in 6E-5 of MUTCD. Thus, respondent failed to properly train Mr. Cobb to station himself 200 to 300 yards in advance of the work force; to stand either on the shoulder of the road or in a barricaded lane of travel; to never stand in a moving traffic lane; and to be clearly visible to traffic at all times.

30. Mr. Anderson was Mr. Hinson's sole supervisor. Mr. Anderson testified that one of Mr. Hinson's responsibilities was to place and monitor the receiver. He made no mention of Mr. Hinson's responsibility to "[sit] down white dots across the highway." Respondent provided no evidence of the content of the training it provided to Mr. Hinson, with the exception of the general safety admonitions to be careful and "not to be in the road with traffic."

31. Mr. Anderson himself was not aware of the Act or the ANSI standards in sections 6A-4 (responsibility), 6A-5 (general requirements) or 6B-F (traffic control devices). Thus, respondent failed to properly train Mr. Hinson in accordance with the Act and the applicable ANSI standards.

32. Based upon his investigation, and in order to enforce the Act, the SCO issued citations on April 3, 2000.

Citation 1, Item 1a

29 CFR 1926.200(g)(2)

(Traffic Control Devices)

33. A hazard existed at the time of the accident, to wit: employees being hit by oncoming traffic, in violation of 29 CFR 1926.200(g)(2), because there was heavy traffic flow; the speed limit was 50 mph, and the only traffic control devices were general "work zone" and speed reduction signs for approximately 7 miles in advance of the site.

34. Two of respondent's employees were exposed to the hazard, to wit: Mr. Hinson and Mr. Cobbs.

35. The hazard created a possibility that an accident would occur, to wit: employees being hit by oncoming traffic.

36. The substantial probable result of such an accident would be death or serious bodily injury.
37. The SCO properly found the severity level to be high due to the risk of death or serious bodily injury.
38. The SCO properly found the probability to be medium due to the heavy traffic, going at speed of approximately 50 miles an hour, with only general "work zone" and speed reduction signs used for approximately 7 miles prior to the respondent's work site.
39. The SCO properly found that respondent knew or reasonably should have known about the hazard because Mr. Anderson, the respondent's owner and the supervisor at the job site, crossed the highway to the median and back on several occasions with Mr. Hinson and Mr. Cobbs. He knew that Mr. Hinson was going to be working in or adjacent to I-85 when he instructed Mr. Hinson to check the receiver in the median.
40. The SCO properly calculated the gravity based penalty for Citation 1, Item 1a to be \$3,400.
41. The SCO properly gave respondent a 60% reduction for size.
42. The SCO properly gave no reduction for good faith (safety & health program) because respondent did not demonstrate the presence of a safety and health program.
43. The SCO should have given a 10% reduction for good faith (cooperation). Even though the SCO thought that Mr. Anderson should have contacted him sooner than he did after the funeral of Mr. Cobbs, Mr. Anderson's delays in contacting the SCO were not due to a deliberate attempt to avoid cooperating with the SCO.
44. The SCO should have given a 10% reduction for history, since respondent had no prior accidents in the history of its business.
45. The adjustment factors should have been 80%.
46. The total recommended penalty should have been \$700.00.
47. Respondent did not meet its burden of proving the affirmative defense of "isolated incident of employee misconduct," for the following reasons:
 - a. Respondent did not take all feasible steps to avoid the occurrence of the hazard or to abate the hazard, to wit:

1. by being aware of the requirements of the Act and the ANSI Manual on Uniform Traffic Control Devices;
2. by having safety and health guidelines which it effectively communicated to employees and which it enforced,
3. by requesting that P&H obtain permission from the North Carolina Department of Transportation to erect appropriate traffic control devices in accordance with MUTCD (i.e. "ROAD WORK AHEAD," "ROAD WORK 1 MILE," and "LANE CLOSED ½ MILE.") along I-85 if its employees needed to work in or adjacent to I-85;
4. by delaying the boring operations until the traffic lightened and, thus, the nature of the hazard changed; and
5. by supervising employees who were working in or adjacent to I-85 to a) ensure compliance with applicable safety rules; b) to prevent its employees from working in active traffic lanes without proper traffic control devices; and c) to otherwise assist its employees to work in and around I-85 in a safe and cautious manner.

b. Respondent did not prove by a preponderance of the evidence that the actions of Mr. Hinson and Mr. Cobbs were a departure from a uniformly and effectively communicated work rule of which the employer had neither actual nor constructive knowledge in that respondent:

1. did not have work rules designed to prevent the violations other than general safety admonitions such as "be careful" and "not to be in the road with traffic." These were not sufficient to address the specific hazards on this job site.
2. did not effectively communicate to its employees, the requirements of the Act and the MUTCD standards which applied to the work site;
3. did not take steps to discover violations of the works rules; and
4. did not effectively enforce applicable safety rules when violations had been discovered.

c. Respondent failed to prove that its employees' negligence or carelessness was so extraordinary that it could not conceivably be considered ordinary conduct on the job and must be considered intentionally dangerous. While it is true that Mr. Anderson did not know why Mr. Henson and Mr. Cobbs had entered the roadway, Mr. Henson told the investigating police officer at the scene that he and Mr. Cobb were "sitting down white dots across the highway" and that Mr. Cobbs was acting as his flag man. These appear to be tasks which come within respondent employees' job descriptions. While it is true that most people would not attempt to cross or work in active lanes of a busy interstate highway, it is not inconceivable that Mr. Hinson and Mr. Cobbs

thought they could do it safely, having crossed the highway with Mr. Anderson many times before.

Citation 1, Item 1b

29 CFR 1926.21(b)(2)

(Training)

48. A hazard existed in violation of 29 CFR 1926.21(b)(2), to wit: employees being hit by oncoming traffic, because respondent did not have a safety and health program at the time of the accident and did not effectively communicate to its employees the recognition and avoidance of unsafe conditions and the requirements of the Act and MUTCD.

49. By failing to adequately train its employees on when and how to work safely in or adjacent to a public road, two of respondent's employees were exposed to the hazard.

50. The hazard created a possibility that an accident would occur, to wit: employees being hit by oncoming traffic.

51. The substantial probable result of such an accident would be death or serious bodily injury.

52. The SCO properly found the severity level to be high due to the risk of death or serious bodily injury.

53. The SCO properly found the probability to be medium due to the heavy traffic, going at speed of approximately 50 miles an hour, without proper traffic control devices (i.e. "ROAD WORK AHEAD," "ROAD WORK 1 MILE," and "LANE CLOSED ½ MILE.") in advance of the work site.

54. The SCO properly found that respondent knew or with reasonable diligence should have known about the hazard.

55. Respondent did not take all steps feasible to avoid or abate the occurrence of the hazard, for example, effectively communicating to its employees the recognition and avoidance of unsafe conditions and the requirements of the Act and MUTCD; and by directly supervising employees working on or adjacent to public roads.

56. The SCO properly did not recommend a penalty because the violation was grouped under Citation 1, Item 1a.

Citation 2, Item 1

29 CFR 1904.8

(Reporting Fatalities)

57. Respondent violated 29 CFR 1904.8 because it did not file an oral or written report of an employment accident resulting in a fatality within 8 hours after the occurrence to the nearest Area Office of the Occupational Safety and Health Administration.

58. The SCO properly determined that the gravity based penalty for Citation 2, Item 1 was \$5,000 in accordance with the Operations Manual of the North Carolina Department of Labor, Division of Occupational Safety and Health, Chapter VI, B, 13, b. 2.

59. The adjustment factors should have been 80%, as calculated for Citation 1, Item 1a.

60. The adjusted penalty should have been \$1,000.00.

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. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant proved by a preponderance of the evidence that respondent violated 29 CFR 1926.200(g)(2) and, thus, Citation 1, Item 1a should be affirmed with a penalty of \$700.

4. Complainant proved by a preponderance of the evidence that respondent violated 29 CFR 1926.21(b)(2) and, thus, Citation 1, Item 1b should be affirmed with no additional penalty

5. Complainant proved by a preponderance of evidence that respondent violated 29 CFR 1904.8 and, thus, Citation 2, Item 1 should be affirmed with a penalty of \$1,000.

6. Respondent failed to prove by a preponderance of the evidence that Mr. Hinson and Mr. Cobbs engaged in an isolated incident of employee misconduct.

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

1. Citation 1, Item 1a is hereby **AFFIRMED** with a penalty of \$700;
2. Citation 1, Item 1b is hereby **AFFIRMED**.
3. Citation 2, Item 1 is hereby **AFFIRMED** with a penalty of \$1,000.
4. The penalties of \$1,700 shall be paid within ten (10) days of the filing date of this Order.
5. Since respondent is no longer working on any North Carolina projects, the hazard has been abated.

This the 7th day of March, 2002.

Ellen R. Gelbin
Administrative Law Judge