BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

METRO UTILITY COMPANY, INC.

RESPONDENT.

DOCKET NO. OSHANC 2004-4392
OSHA INSPECTION NO. 307388314
CSHO ID NO. Q2620

ORDER

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 16th day of May, 2006 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

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Philip M. Van Hoy, Attorney At Law, of VAN HOY, REUTLINGER, ADAMS & DUNN, Charlotte, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Complainant meets its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a willful serious violation of 29 C.F.R. §1926.652(a)(1) for failing to protect employees in an excavation from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. §1926.652(c) or by sloping the sides of the excavation in accordance with the provisions of 29 C.F.R. §1926.652(b)(1)(i) to an angle of 34 degrees or less with the horizontal?

STATUTES AND REGULATIONS AT ISSUE

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".

2. N.C.G.S. § 95-138(a) which states the following with respect to a willful violation:

> Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the Commissioner a civil penalty of not more than seventy thousand dollars ($70,000) and not less than five thousand dollars ($5,000) for each willful violation.

3. 29 C.F.R. §1926.652(a)(1) which provides:

> (a)(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:
>
> (a)(1)(i) Excavations are made entirely in stable rock; or
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> (a)(1)(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

4. 29 C.F.R. §1926.652(b) which provides:

> Design of sloping and benching systems. The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows:
>
> (b)(1) Option (1) - Allowable configurations and slopes.
>
> (b)(1)(i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.
>
> (b)(1)(ii) Slopes specified in paragraph (b)(1)(i) of this section, shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in Appendix B to this subpart.

5. Appendix A to §1926 Subpart P-Soil Classification which provides in part:

> "Type C" means:
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> (i) Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPa) or less; or
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> (ii) Granular soils including gravel, sand, and loamy sand; or
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> (iii) Submerged soil or soil from which water is freely seeping; or
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> (iv) Submerged rock that is not stable, or
>
> (v) Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H:1V) or steeper.
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> "Unconfined compressive strength" means the load per unit area at which a soil will fail in compression. It can be determined by laboratory testing, or estimated in the field using a pocket penetrometer, by thumb penetration tests, and other methods.

6. Appendix B to §1926 subpart P-Sloping and Benching which provides in part:

> (4) Configurations. Configurations of sloping and benching systems shall be in accordance with Figure B-1.

TABLE B-1

MAXIMUM ALLOWABLE SLOPES

SOIL OR ROCK TYPE	MAXIMUM ALLOWABLE SLOPES (H:V)(1) FOR EXCAVATIONS LESS THAN 20 FEET DEEP(3)
STABLE ROCK	VERTICAL (90 Deg.)
TYPE A (2)	3/4:1 (53 Deg.)
TYPE B	1:1 (45 Deg.)
TYPE C	1 1/2:1 (34 Deg.)

Footnote(1) Numbers shown in parentheses next to maximum allowable slopes are angles expressed in degrees from the horizontal. Angles have been rounded off.

Footnote(2) A short-term maximum allowable slope of 1/2H:1V (63 degrees) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth. Short-term maximum allowable slopes for excavations greater than 12 feet (3.67 m) in depth shall be 3/4H:1V (53 degrees).

Footnote(3) Sloping or benching for excavations greater than 20 feet deep shall be designed by a registered professional engineer.

Having reviewed and considered the record and the briefs of the parties and the arguments of the parties, the North Carolina Occupational Safety and Health Review Comission hereby AFFIRMS the decision of the hearing examiner to the extent that it is not inconsistent with this decision, 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 Respondent, Metro Utility Company, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. The Respondent, Metro Utility Company, Inc., is a utility construction company.

6. The citations in this case arose from a fatality accident partial inspection by Safety Compliance Officer (SCO) Scott Powell at a job site located at Station 115 multi-family residential development in Mooresville, North Carolina.

7. On December 29, 2003, Metro had begun the underground installation of terra cotta pipes which were each eight inches in diameter and five feet in length.

8. On January 2, 2004 SCO Powell came to the job site in response to a call from the Iredell County EMS, because a trench cave-in had occurred, which resulted in an injury to one employee and death of another employee of Metro Utility Company, Inc.

9. When Officer Powell arrived at Station 115 on January 2, 2004, a rescue operation was in progress. Mitchell "Mitch" Williams, one of the two Metro employees caught in the trench collapse had been removed alive from the trench and had been transported to a hospital for treatment.

10. Rescue crews were in the process of recovering the body of the second Metro employee, James Fultz.

11. Officer Powell was able to go to the excavation and take measurements and photos on the day of the collapse. He did not interview Metro employees until Monday, January 5, 2004.

12. As a result of its inspection the OSHA Division cited the Respondent for various violations of the OSH Act, included among them was Citation One, Item 1, a willful serious citation for a violation of the trenching standard, 29 C.F.R. §1926.652(a)(1).

13. Respondent timely filed a notice of contest and on January 26, 2005 and on March 22, 2005 hearings were held before the Honorable Richard M. Koch in Charlotte, North Carolina.

14. On September 30, 2005, Judge Koch issued an order affirming, among others, Citation 1, Item 1 as a willful serious violation of 29 CFR 1926.652(a)(1) with a penalty of $28,000.00. One citation which is not the subject of this appeal was reduced to a nonserious violation.

15. Citation One, Item 1 alleged that each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b)(1)(i), when employees "...were required to step outside of the trench shield to check grade"; and "...when working inside the trench shield, the trench shield being used was installed 3.7 feet below the top of the trench".

16. The Respondent thereafter petitioned the Review Commission for review of Citation One, Item 1, a willful serious citation for an alleged violation of the trenching standard, 29 C.F.R. §1926.652(a)(1) and its penalty of $28,000.00.

17. The North Carolina Occupational Safety and Health Review Commission, through its written order dated and filed November 9, 2005, allowed the Respondent's Petition for Review.

18. The case was heard by the full Commission at the Commission's May 16, 2006 call meeting.

19. The Commission adopts the Hearing Examiner's findings of facts numbered 1 through 13.

20. A hazard contemplated by the trenching standard, 29 C.F.R. §1926.652(a)(1), existed in that employees were exposed to a cave-in while working outside a trench box in a trench that was 11 feet to 14.6 feet deep and was dug in Class C soil. (T I pp 36-38).

21. A hazard contemplated by the trenching standard, 29 C.F.R. §1926.652(a)(1), existed in that employees were exposed to a cave-in of the 3 feet to 6.6 feet of soil that was above the top of the trench box while standing in a trench box with 8 feet high walls in a trench that was 11 feet to 14.6 feet deep and was dug in Class C. soil. (T I pp 36-38).

22. James Fultz's name was mistakenly cited as James Phillips throughout the January 26, 2005 transcript. (Respondent's brief, p 4).

23. Mitchell Williams and James Fultz were in the trench outside the trench box and were exposed to the hazard of a cave-in at the time of the accident. These two employees would stand inside the trench box while the pipe was lowered and the trench was being dug by the track hoe. (T I pp 23-26, 159-160, 161; Complainant's exhibit # 13).

24. On the day of the accident and other days on this project, employees were exposed to a cave-in in that the employees who worked in the trench, including Mitchell Williams and James Fultz, were frequently out of the trench box while in the trench, fitting the pipe pieces together and taking measurements of the grade. (T I pp 23-26, 159-160, 161; Complainant's exhibit # 13).

25. Because of the narrow interior width of the trench box (two feet wide), the pipe fittings and the grade measurements could not be accomplished inside the trench box, so those activities were always undertaken outside the trench box. (T I pp 49, 165, 169, 190, 174; Complainant's exhibit # 13).

26. At the time of the accident and inspection, the Respondent had 187 feet of open excavation. At the site of and after the accident the trench was 11 feet deep and 3 feet wide at the top and bottom. After the collapse the trench was 8 feet wide at the top. Immediately before the accident, at the location of the trackhoe, the trench was 14.6 feet deep from the bottom of the trench to the bottom of the track on the track hoe. (T I pp 28-29, 158-159, Complainant's exhibit # 1).

27. The evidence is uncontroverted that the soil in which the trench was excavated was Class C soil and the Commission finds as a fact that the soil in which the trench was excavated was Class C soil. (T I p 170).

28. Trenches dug in Class C soil are required to have their sides sloped at a slope of 1 and 1/2 horizontal to 1 vertical (approximately 34 degrees from the horizontal). (Appendix A to §1926 Subpart P-Soil Classification, Appendix B to §1926 subpart P-Sloping and Benching).

29. The sides of the trench where the cave-in occurred were vertical (90 degrees). (T I pp 28-29).

30. The hazard of being exposed to a cave-in while working outside a trench box in a trench with vertical walls that was 11 feet to 14.6 feet deep and was dug in Class C soil created the possibility of an accident, that the trench would cave-in on the exposed employees. (TI pp 36-37).

31. The hazard of being exposed to a cave-in of the 3 feet to 6.6 feet of soil that was above the top of the trench box while standing in a trench box with 8 feet high walls in a trench that was 11 feet to 14.6 feet deep and was dug in Class C soil created the possibility of an accident, that the top 3 feet to 6.6 feet of the trench would cave-in on the exposed employees. (T I pp 36-37).

32. The substantial probable result of a cave-in that occurred while working outside the trench box as described above could be death or other serious injury as is evidenced by the fact that James Fultz was killed in the cave-in. (T I pp 37, 39).

33. The substantial probable result of a cave-in while standing in the short 8 feet high trench box in the 11 feet to 14. 6 feet deep trench as described above could be death or other serious injury. (T I p 37).

34. James Stephens had over 20 years experience in excavation work and had had competent person training in trenching. (T I p 83, T II pp 53, 80).

35. Jesse White had several years experience in excavation work and had had competent person training in trenching. (T I p 83, T II p 166).

36. With the exception of the competent person training of Messrs. Stephens and White, none of the employees on the site had received any formal training in excavation safety from the Respondent.

37. Both Mr. Williams and Mr. Fultz were in the trench outside the trench box at the time of the cave in. Mr. Fultz was killed from the cave in and Mr. Williams was injured.

38. The Commission adopts the Hearing Examiner's findings of facts numbered 30 through 31.

39. Respondent employed 12 employees at the time of the inspection and received a 60 percent credit for small size. (T II p 132; T I p 50).

40. The gravity of the violation was high. (T I pp 49-50).

41. The Respondent received no reduction for good faith because the citation was classified as willful. (T I p 50).

42. The Respondent received no reduction for history because the citation was classified as willful. (T I p 50).

43. The penalty was multiplied by a factor of 10 for a final adjusted penalty of $28,000.00 because the citation was classified as willful. (T I, p 51).

THE WILLFULNESS OF THE VIOLATION

44. The Respondent's vice-president, William (Bill) Harrington sent a proposal with his name on it to Bo of North Carolina, the general contractor, for the project at Station 115 which called for 9 manholes at an average depth of 9 vertical feet and tying into existing manholes at 13 vertical feet and was aware that the excavated depths would consistently exceed 8 feet on this project and his knowledge as an officer of Respondent is attributed to Respondent. (T I, p 45-47; Complainant's Exhibit # 5).

45. The Respondent's vice-president, William (Bill) Harrington, had over 9 years of experience in the utility construction business and had knowledge of the trenching standards before the accident and his knowledge is attributed to Respondent. (T II pp 122-123, 158-159).

46. Both of Respondent's foremen, James Stephens and Jesse White were trained as competent persons in trenching and had knowledge of the trenching standards, including 29 CFR 1926.652(a)(1), and their knowledge as foremen is attributed to Respondent. (T I pp 43-44, 181).

47. The men spent about 50 percent of their time working outside the trench box making the grade and connecting the pipes. (T I p 161).

48. Both of Respondent's supervisors, James Stephens and Jesse White knew of the violative conditions. They knew that the men were working outside the trench box in a trench with vertical walls that was 11 feet to 14.6 feet deep and was dug in Class C soil without any cave-in protection and that the men were standing in the trench box while being exposed to a 3 feet to 6.6 feet cave-in of the sides of the trench above the top of the trench box and their knowledge of the violative conditions is attributed to the Respondent. (T I pp 161, 167, 169, 170, 177, 178, 40; T II pp 174-175; Complainant's exhibit # 13).

49. The supervisors, James Stephens and Jesse White, were present when the men were standing in the 8 feet tall trench box while the trench was being dug by the track hoe and took no action to protect them from a cave-in of the 3 feet to 6.6 feet of soil above the top of the trench box by providing them with a second trench box to stack on top of the first. These two supervisors, James Stephens and Jesse White had knowledge of this violative condition in that they were present and it was in plain view and their knowledge is attributed to Respondent. (T I pp 161, 167, 168, 35, 40).

50. Michael Koury was the construction inspector for the town of Morresville at the time of the accident. On December 30, 2003, three days before the accident, Mr. Koury was present at the work site and observed one of Respondent's employees working around a manhole in a 12 feet deep trench without a trench box with one side that was on the verge of collapsing. Mr. Koury warned two of the men working around the trench and the track hoe operator that the soil was fill dirt, wet and that a section of the wall might fall into the excavation. That same day he telephoned William Harrington, Respondent's vice-president and told him that the soil was wet, was fill and was dangerous and Mr. Harrington replied that a trench box was on the way. (T II pp 13-16).

51. The Commission finds as a fact that on December 30, 2003, three days before the accident, Respondent's employees were working around a manhole in a 12 feet deep trench with one side that was on the verge of collapsing without any trench box or other protection and that Respondent's employees were notified that the soil was fill dirt, wet and that a section of the wall might fall into the excavation. The Commission also finds as a fact that William Harrington, Respondent's vice-president was notified by Mr. Koury that the soil was wet, was fill and was dangerous and that Mr. Harrington replied that a trench box was on the way. (T II pp 13-16).

52. The trench around the manhole that Respondent's men were working in on December 30, 2003 was dug in wet sandy soil which is Class C soil and wasn't close to the required benching. The side of the trench that was close to collapsing was sloped less than the other and had a slope of 1 foot horizontal to 3 feet vertical which is a slope of approximately 72 degrees which is much steeper than the required slope of 34 degrees in class C soil, 45 degrees in Class B soil and 53 degrees in Class A soil. (T II pp 25-26, 33-36; Appendix A to §1926 Subpart P-Soil Classification, Appendix B to §1926 subpart P-Sloping and Benching).

53. John McCarroll, a pipe layer for Respondent repeatedly informed supervisors James Stephens and Jesse White that the box was too narrow for the trench and that you should be able to dig inside the box with the bucket of the track hoe but no actions were taken by the supervisors to provide a larger trench box. (T I p 169).

54. Complainant has shown that Respondent had actual knowledge of the violative conditions and actual knowledge of the trenching standard at the time that it committed a violation of the standard and therefore the violation occurred subsequent to it acquiring knowledge of both the standard and the violative condition.

55. The records of the Respondent provided to the compliance officer by Mr. Harrington in response to a request for any safety programs that they had, did not indicate any specific or formal training of the Respondents' employees concerning excavation safety. (T pp 53-56; Complainant's exhibit # 6).

56. The trench box that the Respondent was using on this job at the time of the accident was too short for the depth of the trench and too narrow to allow the Respondent's employees to perform their work within its protection. (T I pp 49, 165, 169, 190, 174; Complainant's exhibit # 13).

57. When the trench started to collapse Jesse White and John McCarroll yelled for the two employees to run and both James Fultz and Mitchell Williams turned toward the box and attempted to dive toward it but were engulfed by the collapsing trench wall. (T I p 171, Complainant's exhibit # 13).

58. The Commission adopts the Hearing Examiner's finding of fact numbered 27.

59. The Respondent provided no specific excavation training itself and undertook no efforts to ascertain if the employees had received any prior training. Instead, it relied on the employees' length of service with other employers as of the date of hiring and made no inquiry into specific excavation training. The Respondent's safety handbook at the time of the accident contained no specific references to excavation. The Respondent provided an excavation training class for its employees and revised its safety handbook after the accident. (T I p 53-62, 176, 188; T II p 81-83, 158-160).

60. The Commission adopts the Hearing Examiner's findings of facts numbered 29.

61. The Commission adopts the Hearing Examiner's findings of facts numbered 18.

62. The employees climbed on the trench box to enter and exit the trench rather than using a ladder before the accident. (T I p 71-72, 150-151, 161-162).

63. The Respondent provided a ladder for the men to enter and exit the trench but on the day of the accident did not put the ladder within 25 feet of where the men were working so that they could use it but instead placed it 55 feet away at Manhole No. 16. (T I pp 67, 70-72, 126-128; Complainant's exhibit # 1, Complainant's exhibit #7).

64. The spoil pile on the edge of the trench on the side which collapsed was within two feet from the edge of the trench. (T I pp 141-145).

65. On the day of the accident both James Stephens and Jesse White operated the track hoe and placed the spoil pile within two feet of the trench thereby increasing the danger of a cave-in. (T I pp 77-81, 83, 166; Complainant's exhibit # 8, 9, 10).

66. James Stephens knew that the soil was tamped by an employee using a manually operated tamper in a 9 and 1/2 feet deep trench without any type of cave-in protection. (T II pp 111-113).

67. Jesse White, another of Respondent's supervisors, compacted the soil with a manually operated tamper in the 9 and 1/2 feet deep trench without any type of cave-in protection. (T II pp 171-172, Complainant's exhibit # 13).

68. No employee of Respondent conducted a daily inspection of the trench, the adjacent areas and the protective systems for the trench and adjacent areas, despite the fact that the Respondent had two competent persons, James Stephens and Jesse White, on the jobsite. (T I p 86, T II p 73, 109-110).

69. James Stephens one of the competent persons on site did not classify the soil in the trench on the day of the accident. (T I pp 44, 48, T II p 110).

70. William Harrington, Respondent's vice president, was responsible for the installation of the utility pipes but was not on the jobsite enough to direct the work and the crew, leaving that to Messrs. Stephens and White. (T I p 195, T II p 62-63, 84).

71. William Harrington, Respondent's vice president was present on the job site during the period of December 29, 2003 through January 2, 2004 when the excavation was open and the men were working in the excavation and he knew or should have known of the violative conditions of the men working outside the trench box in the trench that was greater than 11 feet deep and that the men were standing in the 8 feet high trench box with over three feet of unprotected trench walls above the top of the trench box in that the violative conditions were in plain view. (T I p 167).

72. The Respondent possessed a state of mind that showed an intentional disregard of the standard and/or plain indifference to the requirement of the OSH Act in that one management employee and two supervisory employees all possessed knowledge of the trenching standard but took no meaningful steps to protect the men from a cave-in. Instead they provided a woefully inadequate trench box which was too short in height for the trench and too narrow to allow the men to work in, which provided the men in the trench with a false sense of security. In the fraction of a second that a cave-in happened there was no way that the men could run back to the confines of the trench box as is evidenced by the unsuccessful attempt by the two employees who were caught in the cave-in to run back to the trench box. In addition, the men had a false sense of security when they were standing inside the trench box while the trench was being dug because they were exposed to a cave-in of the 3 feet to 6.6 feet of unprotected walls of the trench which were above the top of the 8 feet tall trench box. Three days before the fatality on December 30, 2003, Mr. Harrington, the vice president of Respondent, was warned by Michael Koury, construction inspector for the town of Morresville that the soil in the excavation in which his men were working around the manhole was wet, fill dirt and dangerous. Mr. Koury also pointed out to Respondent's men who were working in the excavation around the manhole that the sides were in danger of collapsing. Mr. McCarroll, a pipe layer for Respondent repeatedly informed supervisors James Stephens and Jesse White that the box was too narrow for the trench and that you should be able to dig inside the box with the bucket of the track hoe but no actions were taken by the supervisors to provide a larger trench box. The supervisors, James Stephens and Jesse White were present on the site when the men were checking the grade and connecting the pipe outside of the trench box in the 11 feet to 14.6 feet deep trench and they took no action to stop them or protect them. The supervisors James Stephens and Jesse White were present when the men were standing in the trench box while the trench was being dug by the track hoe and took no action to protect them from a cave-in of the 3 feet to 6.6 feet of soil above the top of the trench box by providing them with a second trench box to stack on top of the first. Both James Stephens and Jesse White had competent person training in trenching but neither one of them did a daily inspection of the jobsite for hazards and neither one of them classified the soil. (T II p 110). On the day of the accident both James Stephens and Jesse White operated the track hoe and placed the spoil pile within two feet of the trench thereby increasing the danger of a cave-in. The Respondent provided a ladder for the men to enter and exit the trench but on the day of the accident did not put the ladder within 25 feet of where the men were working so that they could use it. James Stephens knew that the soil was tamped by an employee using a manually operated tamper in a 9 and 1/2 feet deep trench without any type of cave-in protection. Jesse White, another of Respondent's supervisors, compacted the soil with a manually operated tamper in the 9 and 1/2 feet deep trench without any type of cave-in protection. Respondent's actions in totality show a total intentional disregard of the trenching standard and more than a plain indifference to the OSH Act. (T I pp 43-49).

73. Respondent showed an intentional disregard and/or plain indifference to employee safety and health as is proven by the same facts set out in findings of fact immediately above. Respondent's vice-president and both of its supervisors knew what the OSH Act required to make trenching safe for its employees. They knew that the job site needed to be inspected every morning by one of their competent person employees, knew that the competent person was required to classify the soil, knew that the trench must be sloped to a specific angle depending on the soil classification or that a trench box must be used that protected the employees the full depth of the trench, knew that the employees were not supposed to work outside the trench box, knew that the spoil pile must be placed greater than two feet from the edge of the trench and knew that a ladder must be placed so that the employees could use it to enter and exit the trench. They knew all this and nevertheless placed their employees in a 11 feet to 14.6 feet deep trench in Class C soil, the most dangerous classification of soil, while ignoring all of the safety measures that would have protected their employees. They continued to ignore safety measures even when implored by one of their employees, John McCarroll to provide a system that would allow the bucket of the track hoe to dig inside the trench box and even when warned by the construction inspector for the town of Morresville, Michael Koury, that the trench they were working in was dangerous and ready to collapse. These actions show an intentional disregard and outright plain indifference to employee safety and health. (T I pp 43-49).

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 willful serious violation of 29 C.F.R. §1926.652(a)(1) for failing to protect employees in an excavation from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. §1926.652(c) or by sloping the sides of the excavation in accordance with the provisions of 29 C.F.R. §1926.652(b)(1)(i) to an angle of 34 degrees or less with the horizontal.

4. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent's violation of the trenching standard was willful in that it was done voluntarily with an intentional disregard of and a plain indifference to the requirements of the standard and the OSH Act in that:

> a. Respondent had knowledge of the trenching standard, 29 C.F.R. §1926.652(a)(1);
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> b. Respondent had knowledge of the violative conditions, that the men were working outside the trench box in a trench that was 11 feet to 14.6 feet deep that was not properly sloped and that the men were working in an 8 feet tall trench box in a trench that was 11 feet to 14.6 feet deep;
>
> c. Respondent committed a violation of the trenching standard, 29 C.F.R. §1926.652(a)(1) subsequent to its acquiring knowledge of both the trenching standard and the violative conditions and
>
> d. Respondent possessed a state of mind that showed an intentional disregard of the standard and/or plain indifference to the requirements of the OSH Act.

5. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent's violation of the trenching standard was done with careless disregard and/or plain indifference to employee safety and health.

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 appeal to the Review Commission "the Commission shall schedule the matter for hearing, on the record, (emphasis added) except that the Commission may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Commission is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schoss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba James Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The seriousness of the violation.

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;
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> 2. employees were exposed;
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> 3. the hazard created the possibility of an accident;
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> 4. the substantial probability of an accident could be death or serious physical injury and
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> 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.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Ansco & Assocs., 114 N.C. App. at 717, 443 S.E.2d at 92 (1994); Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

There is certainly a preponderance of evidence and substantial evidence of all five elements needed to prove a serious violation. The very fact that two men were completely buried when the sides of a 14 feet deep trench collapsed while they were in an unprotected portion of the trench and that one of them died proves the first four elements required for a serious violation. Although the Respondent in his Petition for Review challenged the finding of the Hearing Examiner that "the substantially probable result of a violation of the Act would range from broken bones to death", he did not discuss it in his brief and the fact that one of the men died as a result of the trench collapse proves that element of a serious violation. The only element of a serious violation that the Respondent challenges is whether he knew or should have known of the fact that the men worked outside the trench box or that the trench box was too short for the depth of the trench. This element is also needed to prove the willful designation of the violation and is discussed below.

The willfulness of the violation.

"A violation is deemed willful when there is shown "'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another'". Associated Mechanical Contractors, Inc., 342 N.C. 825, at 833, 467 S.E.2d 398 (1996), (internal citations omitted). The North Carolina Supreme Court cited with approval as consistent with the above definition of willful, the following four elements which have been used by the Review Commission in determining whether a violation is willful:

> (1) employer knowledge of a violative condition,
>
> (2) employer knowledge of the standard,
>
> (3) a subsequent violation of the standard, and
>
> (4) the violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act.

Associated Mechanical, supra, at 834. Element numbered 4 for a willful violation requires proof of a state of mind that shows intentional disregard of the standard or plain indifference to the OSH Act. Associated Mechanical Contractors, Inc., 4 NCOSHD 699, 704 (1993), aff'd, 342 N.C. 825, 467 S.E.2d 398 (1996).

> In Intercounty Construction Co. v. OSHRC, the Fourth Circuit . . . defined willful as:
>
> > action being taken knowledgeable by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is properly described as willful, "regardless of venial motive"
>
> . . .
>
> Decisions of the First, Second, Fifth, Sixth, Eight, Ninth, Tenth and Eleventh Circuits have adopted the Commission-Intercounty definition of willful as an Act done voluntarily with either an intentional disregard of or plain indifference to the Act's requirements.

Mark A. Rothstein, Occupational Safety and Health Law §14:5 at 427-428 (2006 edition), quoting, Intercounty Construction Co. v. OSHRC, 522 F.2d 777, 779-780 (4th Cir. 1975, certiorari denied, 423 U.S. 1072, 96 S.Ct. 854, 47 L.Ed.2d82 (1976), (internal citations omitted).

A willful violation may also be proven by careless disregard of or plain indifference to employee safety and health.

> A number of early decisions of the Commission held that a willful violation required that the employer had knowledge that it was violating the Act. In John W. Eshelman & Sons, the Commission held for the first time that the Secretary need not prove that the employer knew it was violating a specific standard or the Act in general.
>
> > The Commission has found a violation to be willful when it is marked by careless disregard of a standard or employee safety. . . . Therefore, once careless disregard of employee safety has been established, the Secretary need not prove additionally that the employer knew that it was violating the Act.

Mark A. Rothstein, Occupational Safety and Health Law §14:5 at 425-426 (2006 edition), quoting John W. Eshelman & Sons, 9 OSHC 1396, 1981 OSHD ¶ 25,231 at 31,187 (1981).

The Respondent employer in its Petition for Review has challenged the Hearing Officers findings of fact numbered 10, 15b, 15c, 18, 21, 25-30 and his conclusions of law 3-5. N.C.G.S. § 95-135(i) provides:

> 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 notify the interested parties. 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.

Pursuant to that mandate the Review Commission has reviewed each of the challenged findings of fact and conclusions of law and adopted some, modified some and made some of its own findings of fact and conclusions of law. Of the above challenged findings of fact the Commission adopted the Hearing Examiner's findings of fact numbered 10, 18, 27, 29 and 30. The Commission in the Commission's findings of fact numbered 24 and 25 above, modified but adopted the substance of the challenged Hearing Examiner finding of fact 15b and 15c, respectively, so as to make them legally valid findings of fact. See, Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 776, 514 S.E.2d 91, 94 (1999), (Industrial Commission should make its own finding of fact on an issue and not just recite that "Expert A opined . . . " so the reviewing court can determine whether the "Commission actually agreed with (and found) the opinion as expressed by the expert") . The Commission in Commission's findings of fact numbered 68, 70, 56 and 59 modified but adopted the substance of the Hearing Examiner's challenged findings of fact numbered 21, 25, 26 and 28, respectively, also to make them legally valid findings of fact. The Commission has made its own conclusions of law which are supported by its findings of fact and by evidence in the record and those conclusions of law dispense with the challenge to the Hearing Examiner's conclusions of law numbered 3-5.

The Commission will give the basis and reasons for adopting or modifying each of the challenged findings of fact seriatim. In Associated Mechanical Contractors, Inc., the North Carolina Supreme Court in a trenching case gave the guidelines for a reviewing court to follow in evaluating the factual findings of a lower court:

> The proper standard of review for this question is the "whole record test" to determine the sufficiency of the evidence:
>
> > The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.
>
> Thompson v. Wake Co. Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

Associated Mechanical Contractors, Inc., 342 N.C. 825, 832, 467 S.E.2d 398 (1996).

In challenged finding of fact numbered 10, the Hearing Examiner found:

> 10. At the time of the accident, the Respondent had the following employees on site: Mitchell Williams, a truck driver and pipe layer; James Fultz, a pipe layer; Jesse White, who identified himself to the compliance officer as a foreman; James Stephens, a foreman and trackhoe operator who identified himself to the compliance officer as the employee in charge of the jobsite; and Walter Sisk, who would hook up the pipe section and help lower it into position in the trench.

The Commission adopted this finding of fact. The only objection to this finding of fact that the Respondent has made in his brief is to the statement that Jesse White identified himself to the compliance officer as a foreman and, therefore, to any conclusion that he was a foreman for purposes of imputing knowledge of the violative condition to the Respondent employer. A review of the transcript reveals that Jesse White identified himself to the Compliance Officer as a foreman for Respondent and that in his handwritten narrative that he wrote for the Compliance Office he wrote that "I told Jhon [sic-John?] to work up top" and "I put Mitch in the hole". These are statements that would be used by someone directing the work and are consistent with Jesse White's assertion that he was a foreman. John McCarroll, a former employee of Respondent testified that Jesse White supervised their work. Mitchell Williams also testified that both Jesse White or James Stephens were in charge. Jesse White and James Stephens did testify at the hearing that Jesse was not a foreman but that he was a leading man. Jesse White also testified contrary to other important assertions that he made in his narrative. William Harrington, Vice President of Respondent, also testified that Jesse White was not a foreman. Both Jesse White and James Stephens were working for the Respondent at the time of the hearing and had a vested interest in changing their testimony. William Harrington testified that he was not out to the site very much and didn't really know what was going on. Also, as Vice President Mr. Harrington had a vested interest in finding that Jesse White was not a foreman or supervisor. The Hearing Examiner was present and observed the witnesses' demeanor during the hearing and did not give great credence to their testimony at the hearing and neither do we. Even if Jesse White was a leading man who was in charge when James Stephens was absent and not a traditional foreman, he was sufficiently in charge to be deemed a supervisor for purposes of imputing knowledge of the violative condition to Respondent to prove employer knowledge for both the serious designation and the willful designation. See, Ansco & Assocs., 114 N.C. App. 711 at 717, 443 S.E.2d 89 at 92 (1994).

In challenged finding of fact numbered 15b, the Hearing Examiner found:

> 15. The compliance officers conducted interviews of the employees who were on the site at the time of the accident. From these employees the compliance officers learned the following:
>
> > b) However, on the day of the accident and other days on this project, these employees were frequently out of the trench box while in the trench, fitting the pipe pieces together and taking measurements of the grade.

This finding of fact was rewritten as Commission finding of fact numbered 24, supra, to make it a "true"finding of fact. The record is replete with competent and substantial evidence to support this finding of fact as rewritten. (See the transcript pages and exhibits referenced in Commission finding of fact numbered 24). Although Mr. Stephens testified otherwise, the Hearing Officer was present and observed his demeanor and did not assign much credibility to his testimony and neither does the Commission.

In challenged finding of fact numbered 15c, the Hearing Examiner found:

> 15. The compliance officers conducted interviews of the employees who were on the site at the time of the accident. From these employees the compliance officers learned the following:
>
> > c) Because of the narrow interior width of the trench box, the pipe fittings and the grade measurements could not be accomplished inside the trench box, so those activities were always undertaken outside the trench box.

This finding of fact was rewritten as Commission finding of fact numbered 25, supra, to make it a "true"finding of fact. The record is replete with competent and substantial evidence to support this finding of fact. (See the transcript pages and exhibits referenced in Commission finding of fact numbered 25). This substantial and competent evidence as well as common sense dictates that you cannot perform any meaningful work within the narrow confines of a two feet wide trench box. Again, there was testimony to the contrary which was not credible.

In challenged finding of fact numbered 18, the Hearing Examiner found:

> 18. The Respondent had a ladder in the trench at the time of the accident, but it was located at Manhole No. 16, which was 55 feet away from where the Respondent's employees were working.

The Commission adopted the Hearing Examiner's finding of fact numbered 18 in Commission finding of fact numbered 61. Also, in Commission finding of fact numbered 63, the Commission found the same facts. There is substantial and competent evidence in the record to support these findings. See the transcript pages and exhibits referenced in Commission finding of fact numbered 63 for this evidence. Again there was some testimony to the contrary but the Hearing Officer didn't assign much credibility to that testimony and neither does the Commission.

In challenged finding of fact numbered 21, the Hearing Examiner found:

> 21. According to the employee interviews and testimonial evidence, no employee of Respondent conducted a daily inspection of the trench, the adjacent areas and the protective systems for the trench and adjacent areas, despite the fact that the Respondent had two competent persons, Messrs. Stephens and White, on the jobsite.

The Commission rewrote this finding of fact in Commission finding of fact numbered 68, supra, so that it would be a true finding of fact. As stated, finding of fact numbered 21 stands for the proposition that the employee interviews and testimony indicated that no daily inspection was conducted and does not stand for the proposition that no daily inspection was conducted. See, Davis v. Weyerhaeuser Co., supra.; McAllister v. Wal-Mart Stores, Inc., slip op., (unpublished) 2005 COA04-1249. It has been rewritten so that it stands for the fact that "No employee of Respondent conducted a daily inspection . . .". As rewritten this finding of fact is supported by substantial and competent evidence in the record. (See the transcript pages referenced in Commission finding of fact numbered 68). The only testimony that could be taken as contradictory evidence in testimony by James Stephens that "he was looking at it all day". (TII p73). This could also be taken as an admission that he didn't do a daily inspection.

In challenged finding of fact numbered 25, the Hearing Examiner found:

> 25. In Respondent's job hierarchy, the foreman reported directly to William Harrington, Respondent's vice president, who was not always on the jobsite supervising the work. The evidence is contradictory as to whether he was on the jobsite daily, but the evidence is clear that he was not on the jobsite enough to direct the work and the crew, leaving that to Messrs. Stephens and White.

This challenged finding of fact has been rewritten as Commission finding of fact numbered 70, supra, to make it a true finding of fact. As rewritten, this finding of fact is supported by substantial and competent evidence in the record. (See the transcript pages referenced in finding of fact numbered 70).

In challenged finding of fact numbered 26, the Hearing Examiner found:

> 26. The testimony is also conflicting concerning the daily presence and usage of the trench box on the jobsite. However, it is clear from the evidence that the trench box that the Respondent was using on this job at the time of the accident was too short for the depth of the trench and too narrow to allow the Respondent's employees to perform their work within its protection.

Again this challenged finding of fact is rewritten as Commission findings of fact numbered 47, 48, 49, 50, 51, 52 and 53. The pages and exhibits referenced in these Commission findings of fact show that these findings as rewritten are supported by substantial and competent evidence. The contrary testimony by the foremen and the vice president is just not credible.

In challenged finding of fact numbered 27, the Hearing Examiner found:

> 27. The employees were required by the constraints of the trench box to leave the box to check the grade for the next pipe section and to fit the next pipe section. The only time they were within the trench box was during the excavation for the next pipe section. This procedure was repeated each time a new section of pipe was laid.

The Commission adopted this finding of fact in Commission finding of fact numbered 58, supra, and also rewrote is in Commission finding of fact numbered 25, supra. (See the transcript pages and Exhibits reference in Commission finding of fact numbered 25). This finding of fact is supported by substantial and competent evidence as is shown in the reference material. The testimony by the supervisors and the vice president to the contrary is not credible.

In challenged finding of fact numbered 28, the Hearing Examiner found:

> 28. The Respondent's employees all testified that the Respondent provided no specific excavation training itself and undertook no real efforts to ascertain if the employees had received any prior training. Instead, it relied on the employee's length of service with other employers as of the date of hiring and made no inquiry into specific excavation training. The Respondent's safety handbook at the time of the accident contained no specific references to excavation. The Respondent provided an excavation training class for its employees and revised its safety handbook after the accident.

The Commission rewrote this finding of fact in Commission finding of fact numbered 59, supra, so that it would be a true finding of fact. As written, the first sentence of Hearing Examiner finding of fact numbered 28 stands for the fact that the employees testified that Respondent provided no training and not for the fact that Respondent provided no training. The transcript pages referenced in Commission finding of fact numbered 59 show substantial and competent evidence to support this finding as rewritten. The testimony of the supervisors and the vice president actually support this finding.

In challenged finding of fact numbered 29, the Hearing Examiner found:

> 29. The conditions existent on the jobsite on the date of the accident regarding safety and compliance with the Act were the same or similar conditions that had occurred on that job for a number of other days. To the extent that Mr. Harrington was periodically present on the job and supervised the work, he knew or through the exercise of due diligence should have known of the existence of these conditions. To the extent he was not present, he delegated his authority and responsibility to supervise safety for his employees on the jobsite to the foremen, Messrs. Stephens and White. That delegation made the foremen's knowledge of conditions on the jobsite the knowledge of the Respondent.

The Commission adopted this finding of fact in Commission finding of fact numbered 60, supra. The content of it was also rewritten as Commission finding of fact numbered 70, 48, 49, 50, 51, 52 and 53, supra. The transcript pages referenced in Commission findings of fact numbered 48-53 and 70 show substantial and competent evidence to support this challenged finding and to support the additional findings of fact found by the Commission. Mr. Harrington had actual knowledge that the men were not using a trench box or any other trench protection on December 30, three days before the fatal accident when Michael Koury, construction inspector for the town of Mooresville, telephoned him and told him that his men were working without a trench box in a 12 feet deep trench that was on the verge of collapsing. This put Mr. Harrington on notice of his men's unsafe trenching practices and due diligence would require that, at the least, he contact his supervisors and tell them to use an adequate trench box or the correct sloping. Mr. Harrington was aware from the plans that the depth of the trenches was over 13 feet and he did not provide two 8 feet high trench boxes to stack or require the men to slope the sides of the trench from the top of the 8 feet high trench box. Since he was on notice that his men were not following safe trenching practices, due diligence would require that he monitor the work site to make sure that the men were following the safe practices of the trenching standards. There was no testimony from Mr. Harrington or his supervisors that he took any of the actions that due diligence would require. A few simple inquiries and orders from Mr. Harrington could have saved a worker life. Both of his foreman/supervisors, James Stephens and Jesse White knew that the men worked outside the trench box making the grade and connecting the pipe while exposed to the danger of the collapse of the walls of a 14 feet deep trench. They both knew that the workers worked inside the 8 feet tall trench box while exposed to a collapse of the 6 feet of wall above the top of the trench box. Jesse White tamped the soil in the bottom of a 9 1/2 feet deep trench without any protection from cave-in and James Stephens knew that he had done so. Mr. Harrington, vice president of Respondent had knowledge of the hazardous conditions and so did his supervisors, James Stephens and Jesse White and their knowledge is attributed to their employer, the Respondent. The testimony by the three supervisory personnel that they did not know of the hazardous conditions is just not credible and even if they did not know, they should have known of the hazardous conditions.

In challenged finding of fact numbered 30, the Hearing Examiner found:

> 30. For each alleged violation of the Act, the substantially probable result of a violation of the Act would range from broken bones to death.

The Compliance Officer testified that the substantially probable result of a violation of the trenching standard, 29 C.F.R. §1926.652(a)(1), could be broken bones and death. James Fultz was killed when the trench walls collapsed on him. Common sense would tell you that being buried in a trench by tons of dirt could break bones or kill a person.

Respondent in its brief challenges the willful designation of the citation specifically elements 1 and 4 listed above, "employer knowledge of the hazardous/violative condition" and the "violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act". Employer knowledge has already been dealt with in the discussion above about challenged Hearing Examiner finding of numbered 29. The Complainant has met her burden of proof by a preponderance of the evidence and by substantial evidence that Mr. Harrington, the vice president, Mr. Stephens and Mr. White, the foreman/supervisors all knew or at the least should have known of the hazardous/violative conditions and their knowledge is attributed to the Respondent. The Hearing Examiner assigned very little credibility to the contrary testimony of Mr. Harrington, Mr. Stephens and Mr. White that they did not know that the men worked outside the trench box in the 14 feet deep trench. The Commission has reviewed the record and likewise assigns little credibility to the testimony of the three supervisory personnel. It is uncontroverted that Mr. Stephens and Mr. White were present when the men were working in the 8 feet tall trench box in the 14 feet deep trench and had knowledge that they were exposed to the cave in of the 6 feet of dirt above the top of the trench box. That knowledge is sufficient to meet the knowledge of the violative conditions requirement for both the willful and serious designation since the citation is based on both working outside the trench box and working in the inadequate too short trench box.

The Respondent asserts that there has been no reported cases that have a finding of a willful violation when there has been an attempt to comply, no previous history of OSH citations, no previous cave ins, no lost time injuries due to excavation work and no complaints by employees about working unprotected which were ignored by the employer. The Respondent is mistaken about the absence of reported complaints that were ignored by the employer. The Respondent's supervisors James Stephens and Jesse White did receive complaints from an employee, John McCarroll that the trench box was too narrow to work in and that they needed to be able to dig inside the trench box with the bucket and his complaints were ignored.

The Respondent also states that the Complainant has failed to prove by a preponderance of the evidence that the violation was committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act. Respondent bases its argument on the assertion that the Respondent provided a trench box and made an attempt to comply with the Act. It is true that an attempts to comply with the requirements of the Act have been held by courts to negate a willful designation, however, in this case the attempt to comply was woefully inadequate. Providing an 8 feet tall 2 feet wide trench box in a 14 feet deep trench insured that the workers would have to work outside the trench box when connecting the pipe and making the grade. Having the 8 feet tall trench box in the 14 feet deep trench gave the men no protection from a cave in of the 6 feet of wall above the top of the trench box when they were in the trench box. The trench box had the negative effect of creating a false sense of security while the men were in the trench box waiting while the trench was being dug and also gave them a false sense of security that they could jump back in the trench box if there was a cave in. This inadequate attempt to comply with the trenching standard made the trench more dangerous and is proof of a state of mind that showed an intentional disregard of the standard.

The record does reflect that Respondent had no previous history of OSH citations, no previous cave ins, no lost time injuries due to excavation work. The absence of prior citations is not indicative of providing a safe workplace and neither is the absence of injuries. See, Daniel Construction Company, 2 NCOSHD 299, 304 (RB 1981), affirmed, 73 N.C. App. 426, 2 NCOSHD 311(Ct. of Appeals, 1985). The OSH administration only inspects a small percentage of the workplaces in North Carolina every year and every employer has a much greater chance of not being inspected than being inspected. Respondent was fortunate that the construction inspector for the town of Mooresville, Michael Koury intervened on December 30, 2003, when Respondent's workers were working without any cave-in protection in a 12 feet deep trench that was on the verge of collapsing. If Mr. Koury had not intervened, the Respondent could have been facing a tragedy 3 days earlier than it happened. Respondent was cited with five violations relating to trenching safety and was found in violation of all five by the Hearing Examiner. Four of them the Respondent has not appealed and they have become final. The Complainant has proven that Respondent failed to train its employees in the recognition of trenching hazards, failed to provide a ladder so the men could enter and exit the trench safely, allowed the spoil pile to be placed within two feet of the trench adding to the danger of the trench collapsing and failed to have a competent person take a daily inspection of the trench site even though it had two competent persons on site. In addition, the Respondent has been charged with a willful serious violation for failure to provide adequate trench protection. The fact that Respondent is in violation of five trenching standards is proof that Respondent possessed a state of mind that showed a plain indifference to the requirements of the Occupational Safety and Health Act.

The Respondent possessed a state of mind that showed an intentional disregard of the standard and/or plain indifference to the requirement of the OSH Act in that one management employee and two supervisory employees all possessed knowledge of the trenching standard but took no meaningful steps to protect the men from a cave-in. Instead they provided a woefully inadequate trench box which was too short in height for the trench and too narrow to allow the men to work in, which provided the men in the trench with a false sense of security. In the fraction of a second that a cave-in happened there was no way that the men could run back to the confines of the trench box as is evidenced by the unsuccessful attempt by the two employees who were caught in the cave-in to run back to the trench box. In addition, the men had a false sense of security when they were standing inside the trench box while the trench was being dug because they were exposed to a cave-in of the 3 feet to 6.6 feet of unprotected walls of the trench which were above the top of the 8 feet tall trench box. Three days before the fatality on December 30, 2003, Mr. Harrington, the vice president of Respondent, was warned by Michael Koury, construction inspector for the town of Morresville that the soil in the excavation in which his men were working around the manhole was wet, fill dirt and dangerous. Mr. Koury also pointed out to Respondent's men who were working in the excavation around the manhole that the sides were in danger of collapsing. Mr. McCarroll, a pipe layer for Respondent repeatedly informed supervisors James Stephens and Jesse White that the box was too narrow for the trench and that you should be able to dig inside the box with the bucket of the track hoe but no actions were taken by the supervisors to provide a larger trench box. The supervisors, James Stephens and Jesse White were present on the site when the men were checking the grade and connecting the pipe outside of the trench box in the 11 feet to 14.6 feet deep trench and they took no action to stop them or protect them. The supervisors James Stephens and Jesse White were present when the men were standing in the trench box while the trench was being dug by the track hoe and took no action to protect them from a cave-in of the 3 feet to 6.6 feet of soil above the top of the trench box by providing them with a second trench box to stack on top of the first. Both James Stephens and Jesse White had competent person training in trenching but neither one of them did a daily inspection of the jobsite for hazards and neither one of them classified the soil. (T II p 110). On the day of the accident both James Stephens and Jesse White operated the track hoe and placed the spoil pile within two feet of the trench thereby increasing the danger of a cave-in. The Respondent provided a ladder for the men to enter and exit the trench but on the day of the accident did not put the ladder within 25 feet of where the men were working so that they could use it. James Stephens knew that the soil was tamped by an employee using a manually operated tamper in a 9 and 1/2 feet deep trench without any type of cave-in protection. Jesse White, another of Respondent's supervisors, compacted the soil with a manually operated tamper in the 9 and 1/2 feet deep trench without any type of cave-in protection. Respondent's actions in totality prove that Respondent possessed a state of mind that showed a total intentional disregard of the trenching standard and more than a plain indifference to the OSH Act. (T I pp 43-49). These same facts show an intentional disregard and/or plain indifference to employee safety and health.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's September 30, 2005 Order in this cause is, **AFFIRMED** and Respondent is found to have committed a willful serious violation of 29 CFR 1926.652(a)(1) with a penalty of $28,000.00 for failing to protect employees in an excavation from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. §1926.652(c) or by sloping the sides of the excavation in accordance with the provisions of 29 C.F.R. §1926.652(b)(1)(i) to an angle of 34 degrees or less with the horizontal as alleged in Citation 1, Item 1; and Respondent is **FURTHER ORDERED** to pay the total contested penalty of $28,000.00 within 30 days of the date of this order.

This the 31st day of August, 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