

BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

MAINLINE CONTRACTING, INC.,

RESPONDENT.

DOCKET NO. OSHANC 2005-4474
OSHA INSPECTION NO. 308220748
CSHO ID NO. E0808

ORDER

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 31st day of August, 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

Larissa Ellerbee, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Jay Wilkerson, Attorney At Law, of Conner Gwyn Schenck PLLC, Raleigh, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.651(b)(4) by not protecting, supporting or removing underground installations, as necessary to safeguard employees, while an excavation was open?

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. 29 CFR 1926.650(b), in pertinent part, provides:

Definitions applicable to this subpart.

"Excavation" means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.

3. 29 CFR 1926.651(b)(4) provides as follows:

While the excavation is open, underground installations shall be protected, supported or removed as necessary to safeguard employees. (emphasis in original).

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 Commission hereby REVERSES the decision of the Hearing Examiner 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, Mainline Contracting, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat. § 95-128).
5. The Respondent, Mainline Contracting, Inc. was a subcontractor to the general contractor, Brasfield and Gorrie, on a construction project at Rex Hospital in Raleigh, North Carolina. Mainline had been hired to install the water, sewer and storm drain work at the Project.
6. Aleandro Villarsreal, a foreman with Respondent, ran over and ruptured a gas line while moving a track hoe from one side of the work site to another causing a gas leak.
7. Safety Compliance Officer, Ervin Shaw, conducted an inspection the day after the accident and cited the Respondent with a serious violation of 29 CFR 1926.651(b)(4) with a proposed penalty of \$525.00.
8. Respondent contested the citation and a hearing was held before the Honorable Reagan Weaver on June 30, 2005 in Raleigh, North Carolina.
9. Hearing Officer Reagan issued an order on October 31, 2005 affirming the serious violation of 29 CFR 1926.651(b)(4) and the penalty of \$525.00.
10. Respondent appealed the case to the North Carolina Occupational Safety and Health Review Commission and a hearing was held before the full Commission on August 31, 2006.
11. The Commission adopts the Hearing Examiner's findings of fact numbered 1 through 12.
12. The Commission adopts the Hearing Examiner's findings of fact numbered 14 through 19.
13. Duffy Deyo, a fire department captain with the city of Raleigh was not at the site at the time of the accident and did not observe whether the pipe was covered or uncovered prior to the accident. (T p 27, 62).
14. Duffy Deyo did not see any marks on the ground showing the location of the gas line. (T p 28).
15. Duffy Deyo's viewpoint for all of his observations of the accident scene was from the 3rd floor of the Birthing Center. (T p 28).
16. Nicholas Murray, a firefighter and Hazardous Material technician with the City of Raleigh fire department made all of his observations of the accident scene from the 3rd floor of the Birthing Center which was 36 to 40 feet in the air. (T p 39).
17. Nicholas Murray was not at the site at the time of the accident and did not observe whether the pipe was covered or uncovered prior to the accident. (T p 45-46).
18. Nicholas Murray did not see any marks on the ground showing the location of the gas line. (T p 46).
19. Nicholas Murray couldn't say whether or not the Public Service people had been working on the repair of the pipe line prior to his arrival. (T p 47).
20. Nicholas Murray couldn't say whether or not the pipe was uncovered by someone digging it out by hand or by the action of the high pressure gas. (T p 47).
21. Napier Partin, a first responder with PSNC Energy, was the first one to arrive at the scene of the accident from PSNC Energy and he saw approximately two feet of uncovered pipe with a hole in it about the size of a baseball. (T p 71).
22. Napier Partin's opinion was that it would have taken a mighty big pressure to blow the pipe clean and the pipe had been clear for a while before the Respondent hit the pipe. (T pp 88-89).
23. Napier Partin does not remember whether there was any dirt piled up around the pipe as if it had been excavated. (T p 89).
24. Napier Partin didn't observe the accident and could not say that the line was uncovered prior to the accident. (T p 97).
25. The closest marking to the damaged gas line was 50 feet away. (T p 101-104).
26. The two to three feet section of pipe that was damaged was a stub out of a pipeline that had been excavated before the accident by another contractor and not by Respondent. (T p 130).
27. John Cooke was another first responder with PSNC Energy who arrived on the site shortly after the accident and his opinion was that the gas leak could not have created a two feet to three feet exposure of the gas pipe. (T pp134-135).
28. John Cooke did not know if prior to the accident the pipe had been covered with dirt and did not know who may have excavated the pipe if it, in fact, had been excavated. (T p 153).
29. Bobby Freed was a crew leader operator with PSNC Energy at the time of the accident and his job was to install and repair gas lines. (T p 156).
30. Bobby Freed was part of the crew that repaired the broken gas pipe and his opinion was that somebody had to have moved the soil around the pipe. (T p 158).
31. Bobby Freed was not physically there to see the pipe before the accident and did not know whether the dirt around the pipe had been moved by some other means but his opinion was that it was not moved by the action of the gas leak. (T p 167).
32. Kenneth Carwell was a pipe layer with PSNC Energy at the time of the accident and he was one of the employees who repaired the gas leak. (T p 178).
33. Kenneth Carwell, prior to the accident, had gone to the site and moved a 20 feet section of the pipeline, the remnants of which were the two to three feet section that was later ruptured. (T pp 179-181, 183).
34. Mr. Wilbourne, superintendent for Respondent, assisted Mr. Carwell's crew when they moved the pipe by building a ramp so PSNC could get their equipment down into the excavation so PSNC could move the pipe. After building the ramp, Mr. Wilbourne returned to working at another part of the worksite and did not watch them move the pipeline and did not know that the stub out existed. (T pp 182, 320-323).
35. Kenneth Carwell was not present at the site on the day of the accident prior to the accident and didn't know whether the dirt was removed from the pipe by the high pressure of the gas leak or by some other means. (T pp 185-186).
36. Ervin Shaw was the safety compliance officer who inspected the worksite on September 15th, the day after the accident. He was not on the site the day of the accident. (T pp 196-197, 250).
37. Compliance Officer Shaw interviewed PSNC employees at the PSNC facility and made a diagram of the site with the aid of the PSNC employees who had been present at the site the day of the accident and took photographs of the diagram which was introduced as Complainant's exhibits numbered 7 and 14. (T p 197-200).
38. When Compliance Officer Shaw arrived on the site the day after the accident, he observed an approximate three feet section of pipe sticking out of an embankment which had dirt removed along the full length of the pipeline which in his opinion indicated that there were signs of excavation of the pipeline. (T p 213).
39. Compliance Officer Shaw interviewed employees of PSNC Energy, the Raleigh Fire Department, Mainline Contracting, the Respondent, and Brassfield and Gory, the general contractor and from those interviews formed an opinion as to what happened on the day of the accident and what caused the accident. (T pp 213-214, 249).
40. The opinion that Compliance Officer Shaw formed based on his interviews of the employees mentioned above in the immediate preceding finding of fact was that at the time of the accident approximately three feet of the pipeline had previously been excavated and was exposed such that about an inch of the pipeline stuck up above the surrounding ground. (T p 216).
41. Compliance Officer Shaw's opinion, again based on his interviews, was that the pipeline was visible at the time of the accident and could have been avoided and did not have any protective barrier. (T p 216).
42. Compliance Officer Shaw also interviewed Jim Gile, superintendent for Respondent, who was not on the site at the time of the accident and Mr. Gile indicated that the pipe was covered with two to three feet of dirt and did not need to have protective barriers. (T pp 224- 226).
43. Mr. Gile's opinion was that the weight of the 47,500 pound excavator was too heavy for the two to three feet of soil above the pipeline to withstand and that the excess weight caused the pipe to rupture. (T p 226).
44. Napier Partin, a first responder for PSNC who came out to the accident site in response to the accident, did not write in his witness statement that the pipe was uncovered for two and one-half feet. (T pp 245-247).
45. John Cooke, another first responder for PSNC who came out to the accident site on the day of the accident in response to the accident, did not write in his witness statement that the pipe was uncovered for two feet. (T pp 248-249).
46. Compliance Officer Shaw was not on the site the day of the accident and cannot say based on direct observations that the pipe was uncovered prior to the accident and cannot say who uncovered the pipe. (T pp 250-251).
47. Compliance Officer Shaw wrote in his report that "independent eyewitness statements indicated that the immediate area surrounding the four inch steel natural gas pipeline had been partially excavated down to approximately one and a half to two inches below grade for approximately two and a half to three feet". (T pp 257-258, Respondent's exhibit #6).
48. Compliance Officer Shaw interviewed the fire department personnel but did not take any witness statements from them. (T pp 258-259).
49. Aleandro Villarsreal, a foreman for Respondent, was operating the track hoe that ruptured the gas pipeline. He was moving the track hoe from one side of the worksite to another and did not see the gas line or any marks on the ground indicating where the gas line was located. (T pp 306-307).
50. Respondent did not dig up the gas line at any time as part of its work on the jobsite. (T p 308).
51. Aleandro Villarsreal was aware that the gas pipe line had been moved up higher next to the Birthing Center. (T p 312).
52. Aleandro Villarsreal and Richard Wilbourne, superintendent for Respondent checked the area before Aleandro moved the track hoe and did not see any exposed gas line or any markings on the ground where Aleandro was to drive the track hoe indicating the location on any gas lines. (T pp 313-314, 319).
53. The location of the gas pipeline where it came down parallel to and close to the Birthing Center of Rex Hospital and cut around the corner of the Birthing Center was located on the ground by marks and Mr. Wilbourne and Mr. Villarsreal located the pipe next to the building by those markings. (T pp 322-323).
54. The two to three feet section of pipe that was ruptured in the accident was a stub out that was capped and left over after the gas pipe line had been previously moved by PSNC. (T p 323, 328, 341-346, 179-181, 183).
55. PSNC Energy demanded that Respondent pay for the repair work on the gas line that was ruptured when Aleandro Villarsreal ran over it with the track hoe and Mainline has refused to pay it. (T p 352).
56. Napier Partin and Bobby Freed, two of the employees of PSNC Energy who were witnesses at the hearing before the Hearing Examiner testified that they were not aware that their employer had made a demand that Respondent pay for the cost of responding to and repairing the gas leak. (T pp 111, 169).
57. The track of the track hoe sitting next to the repaired pipe was sunk down in the dirt about 8 inches indicating the soil in that location was loose soil. (T pp 330-334, Complainant's Exhibit # 1).
58. Aleandro Villarsreal, Richard Wilbourne and Wes Basnight were all employed by Respondent at the time of the Hearing before the Hearing Examiner. (T pp 302, 317, 328 and 339).
59. The attorney for the Commissioner questioned Mr. Wilbourne about his and Mr. Villarsreal's current employment with Respondent. (T p 328).
60. The attorney for Respondent brought up that questioning and asked Mr. Wilbourne if any of his co-employees at Mainline had asked him to do anything other than to tell the truth and Mr. Wilbourne answered that that was right. (T p 331).
61. The attorney for Respondent questioned Mr. Basnight about his current employment with Respondent and whether it would be wonderful if the Hearing Examiner found that the Respondent was not at fault and could then refuse to reimburse PSNC for the cleanup costs. (T pp 353-354).

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 failed to prove by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.651(b)(4) by not protecting, supporting or removing underground installations, as necessary to safeguard employees, while an excavation was open.

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. Schloss 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).

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

At issue in this case is element 1 and 5 above, whether the hazard existed and whether the Respondent knew or should have known about the condition that created the hazard. The hazard was whether the gas pipeline had been exposed in an excavation and, if it were exposed, whether the Respondent knew or should have known about the exposed gas line. The Commission follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . . Substantial evidence means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion". Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976). The Commissioner of Labor has the burden of proving each element of a citation by a preponderance of the evidence. Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Commission of North Carolina, revised February 3, 1992, amended effective April 1, 1993.

The Hearing Examiner found that the gas line was at least partially exposed and the operator of the excavator should have seen it. He based his conclusion on the opinion of the Compliance Officer and on the opinions of the Fire Department employees and PSNC employees that the escaping gas could not have blown the soil off of the pipe and, therefore, the pipe had to have been exposed prior to the accident. The factual elements of a violation may be proven by the opinion evidence of the Compliance Officer. Brooks v. McWhirter, 2 NCOSHD 115, 303 NC 573 (Supreme Court, 1981).

While the safety officer may give his opinion on the factual elements, he is incompetent to testify on the ultimate legal issue. . . .All that is required of the commissioner is that he produce substantial evidence, whether it be data or opinion, that the violation created a *possibility* of a serious accident.

Brooks v. McWhirter, 2 NCOSHD 115, 128-129, 303 NC 573 (Supreme Court, 1981)

However, the opinion of the Compliance Officer must be based on something other than mere speculation. Clancy and Theys Construction Company, Slip. Op. OSHANC 97-3570 (RB 2000).

The substantially probable result of an accident can be proven by the opinion evidence of the compliance officer but that opinion must be based on something other than mere speculation to rise to the level of substantial evidence.

Clancy and Theys Construction Company, Slip. Op. OSHANC 97-3570 (RB 2000). The opinion of the Compliance Officer was based entirely on the opinion evidence of the firefighters and gas company employees that the force of the gas could not have blown off several feet of soil covering the pipe and, therefore, the pipe must have been exposed prior to the accident. The opinion of the firefighters and gas company employees is speculation based on speculation. None of the witnesses for the Commissioner was present immediately prior to the accident and none could testify based on personal knowledge that the gas pipeline was uncovered prior to the accident. The pipeline could have just as easily been covered with 1/4 inch of loose soil or ½ inch of loose soil or an inch of loose soil, *et cetera*, and been invisible and unseen by the operator of the track hoe rather than to have been uncovered and visible. It is pure speculation not based on any discernible facts that the pipeline was uncovered prior to the accident. There was evidence introduced that the Respondent's employees stated that the pipeline was covered by several feet of soil. The opinion evidence of the firefighters and the gas company employees all focused on their opinion that the force of the gas leak could not have blown several feet of dirt off of the pipe and, therefore, it could not have been covered with several feet of dirt. Armed with that conclusion, they and the Compliance Officer then jumped to the conclusion that the pipe, therefore, must have been uncovered. Even if we were to accept as a fact that the pipe was not covered by several feet of dirt and we do not, that premise does not lead to the conclusion that the pipe was uncovered prior to the accident, it could just as easily have been covered by a small amount of loose soil rather than several feet and still be invisible. The burden is on the Commissioner to prove that the pipe was uncovered prior to the accident and not on the Respondent to prove that the pipe was covered and the Commissioner has failed in that burden.

The Hearing Examiner gave greater credibility to the testimony of the Commissioner's witnesses than that of the Respondent's witnesses. The testimony of the Respondent's witnesses was that they did a walk around before moving the track hoe and located by markings the gas line that had been relocated to the perimeter of the Birthing Center. They testified that they did not see either a visible uncovered stub out pipeline or any markings on the ground indicating that the pipe stub out was underneath the surface. It is true that the Review Commission gives great deference to the credibility determinations of the Hearing Examiner. The Hearing Examiner did not give credibility to the three witnesses who testified for the Respondent. There was testimony elicited from those three witnesses by the attorney for the Complainant implying that since the three employees who testified were current employees of the Respondent they had a vested interest in testifying favorably for their employer and keeping their jobs. There was also testimony elicited by the attorney for the state that the witnesses for Respondent had a vested interest in a finding that Respondent was not at fault to avoid reimbursing PSNC for the cleanup costs. In any case in which an employer has its employees testify, they will have a vested interest in keeping their jobs but that does not disqualify them from testifying. If you did so, an employer would never be able to present evidence of its case. The usual cases in which an employee's testimony is discredited is when they testify differently from the witness statements and information that they gave to the Compliance Officer. Another situation in which an employee's testimony is discredited is when their testimony does not comport with observable facts. A common example is when an employee testifies that no one worked in the 14 feet deep trench when the photographs clearly show footprints and an earth compactor in the trench and the Compliance Officer observed employees in the trench. The testimony of such an employee does not comport with other observable facts and is not credible. In this case, the employees of the Respondent were the only ones who testified about the condition of the pipeline stub out prior to the accident and their testimony was that it was not visible. There was no contrary testimony to counter their testimony but only speculative opinion that the pipe was uncovered.

Of all the witnesses who testified, the two firefighters were the only two who did not have a stake in the outcome of the hearing. The PSNC gas company employees who testified all had a stake in finding the Respondent at fault in the accident since their employer was seeking compensation from Respondent for the cost of the repair of the ruptured pipeline. Two of the gas employees' equivocal statements that they didn't know that their employer was seeking compensation from Respondent is just not credible.

Even if we were to accept the credibility determinations of the Hearing Examiner and discredit the testimony of the Respondent's employees and if we were to accept the opinion testimony of the Complainant's witnesses that the force of the escaping gas could not have blown several feet of dirt off of the pipeline, it does not follow that the pipeline was, therefore, uncovered before the accident. Any assertion by the firefighters and gas company employees that the pipe was uncovered before the accident is speculative opinion. The Compliance Officer's opinion that the pipeline was uncovered prior to the accident was based entirely on the opinions of the firefighters and gas company employees and is, therefore, also speculative. It could just as easily have been covered with a small amount of soil and still been invisible. The burden is not on the Respondent to prove that the pipe was covered, the accident is on the Complainant to prove that it was visible so that the Respondent knew or should have known that the underground installations needed to be protected, supported or removed. The Complainant has failed to prove the essential elements of the citation, that the pipeline was visible and/or that the Respondent knew or should have known that it was uncovered and, therefore, needed protection.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's October 31, 2005 Order in this cause is, **REVERSED** and the citation alleging that Respondent committed a serious violation of 29 CFR 1926.651(b)(4) is hereby **DISMISSED**.

This the 14th day of December, 2006.

OSCAR A. KELLER, JR., CHAIRMAN

RICHARD G. PEARSON, MEMBER

JANICE SMITH GERALD, MEMBER