

**BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION**

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

OSHANC NO. 2005-4474  
OSHA INSPECTION NO. 309220748  
CSHO ID NO. E0808

v.

MAINLINE CONTRACTING, INC.,  
and its successors,

**ORDER**

RESPONDENT.

THIS MATTER was scheduled for hearing before the undersigned on June 30, 2005 in Raleigh, North Carolina. The Complainant was represented by Jane Ammons Gilchrist, Assistant Attorney General, and Respondent was represented by Jay M. Wilkerson of Conner Gwyn Schwenk, PLLC.

Complainant's witnesses were: Captain Duffy Deyo and Firefighter Nick Murray, employees of the City of Raleigh Fire Department; Napier G. Partin, John A. Cooke, Bobby D. Freed, and Kenneth C. Carwell, employees of PSNC Energy; and Ervin Shaw, Safety Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witnesses were: Alejandro Villareal, Respondent's Foreman; Richard Wilbourne, Respondent's Superintendent; and Les Basnight, Respondent's Project Manager.

**ISSUE PRESENTED**

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.651(b)(4) when, while an excavation was opened, underground installations were not protected, supported or removed as necessary to safeguard employees.

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

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.

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)

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

**FINDINGS OF FACT**

1. 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 employer (Respondent) Mainline Contracting, Inc., is subject to the provisions of OSHANC (N.C. Gen. Stat. § 95-128).
5. On or about September 14, 2004, Respondent Mainline Contracting, Inc., was at the site of Rex Hospital, in Raleigh, North Carolina, on a construction project in progress at the hospital. Respondent was preparing to excavate a water line.
6. Beginning on September 15, 2004, and ending on October 19, 2004, Safety Compliance Officer (SCO) Ervin Shaw, employed by the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at Rex Hospital, 4420 Lake Boone Trail in Raleigh, North Carolina.
7. The inspection was initiated as a result of a gas leak that occurred on September 14, 2004.
8. As a result of the inspection, a citation was issued to Respondent on January 10, 2005, for a serious violation of 29 CFR 1926.651(b)(4) with a proposed penalty of \$525.00.
9. Respondent submitted a timely Notice of Contest and, subsequently, Respondent's Statement of Employer/ Respondent's Position.
10. On September 14, 2004, Respondent's foreman, Alejandro Villareal, determined that he would move a piece of equipment to the site of the water line to perform the excavation, and he began to move a tracked, approximately 47,500 pound excavator to the water line site.
11. In route to the site, the excavator came in contact with a fitting on top of a gas pipeline. The fitting was a "sav-a-valve" device. The contact with the "sav-a-valve" fitting resulted in the fitting being bent over, and an opening approximately 1 3/4" wide was torn in the top of the steel gas pipe. Consequently, the pressurized gas was expelled into the atmosphere and City of Raleigh Fire Department personnel were called to the scene.
12. The "sav-a-valve" fitting was attached to the stub of a gas line that remained after a gas line at that location was excavated and relocated earlier during the summer of 2004.
13. The stub of the gas line had not been covered up after it was excavated.

**DISCUSSION**

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence." Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

Whether the stub of the gas line had been covered, after it had been excavated earlier in the summer, is important to the determination of this case. The testimony relating to this question is summarized in paragraphs 14 - 21:

14. City of Raleigh Fire Department employees, Captain Duffy Deyo and Firefighter Nick Murray, were on the scene shortly after the gas line was hit, and they viewed the line while it was spewing gas in the air from their observation point on the third floor of the adjacent Birthing Center of the hospital.
15. Deyo and Murray testified that they saw a two to three foot section of the pipe exposed while the gas was escaping.
16. Napier Partin, an employee of PSNC, viewed an exposed "about two foot" section of the pipe shortly after he arrived at the site, which was while the gas was escaping the pipe. His testimony corroborated the testimony of Deyo and Murray.
17. Partin opined that the pipe was uncovered before the accident.
18. John Cooke, one of the first responder employees from PSNC, viewed the scene, while the gas was escaping, from a distance of about five feet. He testified that he saw the top one-quarter of the pipe exposed above the surface of the surrounding dirt.
19. PSNC employee, Bobby Freed, opined that the gas escaping from a two-inch hole on top of a pipe such as the pipe in this case would not have caused a two to three foot exposure of a gas line.
20. Respondent's representative told SCO Ervin that the pipe was covered by two to three feet of compacted dirt at the time of the accident; however, at the closing conference with SCO Ervin, Respondent's owner said it had been covered by one foot of compacted soil. Neither of these witnesses testified at the hearing. Respondent's witness, Basnight, testified as to how he considered the exposure of the line could have occurred.
21. Although there is conflicting evidence, I find the testimony of the Fire Department employees more credible and further, that Complainant proved through its witnesses that, more probably than not, the gas line was at least partially exposed at the time of the accident. If the line was not covered, then Respondent's excavator employee should have seen the line and avoided the accident.
22. While testimony established that PSNC had marked gas lines on the site on multiple occasions, the testimony did not establish whether the stub had been marked specifically. Whether the stub was marked, however, is not necessary to the decision of whether the cited violation occurred because I find that the line, where it was damaged, was at least partially exposed and in view prior to the accident.
23. In order to prove a serious violation of an OSH standard the Complainant must prove the following:
  - a. A hazard covered by the cited standard existed;
  - b. employees were exposed;
  - c. the hazard created the possibility of an accident;
  - d. the substantial probability of an accident could be death or serious physical injury and
  - e. 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 1984) of the condition or conduct that created the hazard. (Commissioner of Labor v. Shelton Pipeline, Inc., OSHRB NO. OSHANC 2001-4069, *reversed on other grounds by the Superior Court.*)

**DISCUSSION**

An analysis of the above factors as applied to the facts of this case follows in paragraphs 24 - 28.

24. The cited standard provides that while an excavation is opened, the underground installations shall be protected. In this case, the location of the gas line was visible, not otherwise marked and not protected from persons or equipment. The failure to protect a visible, partially exposed gas line was a hazard.
25. As workers were in the vicinity of the accident, including the operator of the excavator, there were employees exposed to the hazard.
26. Moving a 47,500 pound excavator in the proximity of an exposed gas line creates a danger if the gas line is not protected from being damaged.
27. Substantial precautions were taken by the emergency responders as well as the PSNC employees to fix the damaged pipeline. The gas emitted from the damaged line created a serious hazard of fire in an area close to the Rex Birthing Center and ignition hazards were close by in the adjacent parking garage; thus, the substantial probability of such an accident could have been death or serious physical injury.
28. The Respondent, if it did not have actual notice of the exposed gas line, should have known of the line's exposure, its hazardous condition, and the consequent danger.

**CONCLUSIONS OF LAW**

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and jurisdiction of the Act.
3. The Complainant met 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 failing to protect employees while an excavation was open.
4. Respondent stipulated that the penalty imposed by the Complainant was properly calculated.

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

- a. Citation Number 1, Item 1 is affirmed as a serious violation of 29 CFR 1926.651(b)(4) and a penalty of \$525.00 is imposed.
- b. The penalty shall be paid within twenty (20) days of the filing date of this Order.

This the 31st day of October, 2005.