

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DISTRIBUTION CONSTRUCTION CO.,

RESPONDENT.

OSHANC NO. 2006-4603
INSPECTION NO. 309847218
CSHO ID NO. B5670

ORDER

THIS MATTER was heard by the undersigned on August 23, 2006 in Charlotte, North Carolina.

The complainant was represented by Jane T. Hautin, Special Deputy Attorney General and Linda Kimbell, Assistant Attorney General; the respondent was represented by John J. Doyle of Constangy Brooks & Smith, LLC.

The parties agreed to submit a joint exhibit, which consists of the complainant's investigative file in this matter. This exhibit was marked and admitted as Joint Exhibit No. 1.

Based on the evidence presented and the post hearing memoranda and correspondence of counsel for the parties with the undersigned, the undersigned makes the following:

FINDINGS OF FACT

1. The complainant as Commissioner of Labor is charged with the responsibility for compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a corporation which is in the business of installing utility lines.
3. On February 6, 2006, the respondent was installing a natural gas line for Public Service of North Carolina at a worksite located at 701 Hawley Avenue and U.S. Highway 74 in Belmont, North Carolina.
4. On that date, employees of respondent were using rotating boring stems to drill a hole beneath the north side of Highway 74 in order to connect the gas line to the gas main located on the south side of the highway.
5. The boring stems were 20 feet long and 1 inches in diameter. They were joined together to create a 100 foot length. The stems rotate at a speed of approximately 130-135 rpm.
6. The boring stems were driven by a hydraulic motor attached to a Ditch Witch trenching machine.
7. The trenching machine was located some distance from the opening of the bore. The boring stems would rotate along their entire length, part of which would be under the highway as the bore proceeded. The other part would extend through a trench from the bore site along the ground back to the trenching machine.
8. On February 6, 2006, this procedure utilized at least four of respondent's employees. Jose Vidal was working as the "shooter", the employee who lined up the drill bit at the bore site in the trench. Jimmy Bowen was respondent's foreman on the site and was operating the trenching machine. Other employees including Alvin Hill were in the trench or the immediate vicinity assisting with this operation.
9. While operating this boring apparatus on February 6, 2006, Jose Vidal was injured when his safety vest and right hand became entangled with the rotating boring stem.
10. No one witnessed the exact circumstances that caused Mr. Vidal's injury. Mr. Bowen from his station at the trenching machine could not see Mr. Vidal in the trench. He deenergized the boring stems upon a signal from Mr. Hill, who heard Mr. Vidal's screams.
11. According to Mr. Vidal's statement given to complainant's compliance safety officer, while he was in the trench, the drill bit under the highway apparently hit something hard such as a rock. This made the boring stem line jump up, striking Mr. Vidal and knocking him down. In his effort to steady himself, Mr. Vidal pushed down on the boring stem with his right hand, which became entangled in the boring stem. The relentless rotation of the boring stem almost completely severed Mr. Vidal's right hand and degloved his right arm up to his shoulder.
12. On February 7, 2006, complainant's safety officer Cohen Elgin conducted an inspection of the site of Mr. Vidal's accident. This inspection was initiated as a result of the airing of a WBTV news report concerning the accident the preceding evening.
13. In addition to observing and photographing the accident site, Mr Elgin interviewed Messrs. Hill, Bowen and other of respondent's employees, including the interview of Mr. Vidal mentioned above.
14. The respondent has a written safety program covering its boring operations. That program required the use of a protective sleeve at least 48 inches in length to cover the boring stem at the location of the shoot.
15. The respondent's employees working at the accident site on February 6, 2006 told Mr. Elgin that a protective sleeve was in place on the boring stem at the shoot location at the time of the accident. The exact length of the sleeve varies with the statement of the employee.
16. When Mr. Elgin investigated the next day, he found a 24 inch sleeve. It is unclear from the evidence whether this sleeve was on the boring stem at the time of the accident the previous day. Mr. Elgin did not observe the boring stem shoot site during his time at the accident site.
17. As a result of Mr. Elgin's investigation, the complainant cited respondent with a serious violation of 29 CFR §1926.300(b)(2), with a proposed penalty of \$2,800.00. This citation was contested by respondent, which contends alternatively that it did not violate this standard, but if it did, the violation was the result of an isolated instance of employee misconduct.
18. From the evidence and arguments there appears to be no dispute about the characterization of the alleged violation as serious and the calculation of the penalty, if the citation item were affirmed.
19. 29 CFR §1926.300(b)(2) provides as follows:

Belts, gears, shafts, pulleys, sprockets, spindles, drums, fly wheels, chains or other reciprocating, rotating or moving parts of equipment shall be guarded if such parts are exposed to contact by employees or otherwise create a hazard. Guarding shall meet the requirements as set forth in American National Standards Institute, B15.1-1953 (R1958), Safety Code for Mechanical Power-Transmission Apparatus.
20. It is clear from the evidence that at least a portion of the rotating portion of the boring stem was not protected from contact by a worker. That portion would be the part that Mr. Vidal touched in the trench, which caused his injury.
21. The evidence presented focused on the length and location of the sleeve that was in the trench on the bore stem at the time of the accident. The length and location cannot be reconciled from the evidence presented.
22. The question is whether the cited standard requires the entire length of the bore stem that is rotating to be guarded. If so, the short length of sleeve argued about is irrelevant.
23. On its face, the standard would seem to require the entire length of the bore stem to be guarded. However, the standard does say that the guarding requirements are those set forth in the ANSI B15.1-1953 (R1958).
24. The complainant presented no evidence concerning the ANSI standard, about which the undersigned cannot just take judicial notice, as the ANSI standard alone is a voluntary standard and is not one that is part of the body of law that is automatically recognized without introduction into evidence and proof of the relevant provisions. See Rule 201 of the North Carolina Rules of Evidence and N.C. Gen. Stat. Chapter 8.
25. Without knowing what the ANSI standard requires for guarding for the length of the bore stem, it cannot be known whether the bore stem was required to be guarded at the location where Mr. Vidal contacted the bore stem or at any other location along its length to which employees may have been exposed.
26. The complainant provided the undersigned with a copy of the ANSI standard subsequent to the hearing, at which time the undersigned and counsel learned that the ANSI standard in the citation had been superseded.
27. Not only was Mr. Vidal exposed to the unguarded rotating bore stem in the trench, other workers were exposed to them along their length on the ground, using shovels to hold them in place and keep them from wobbling.
28. Documentary evidence regarding respondent's boring stem policies showed that five of respondent's employees have been seriously injured in boring stem accidents since 1995.
29. The respondent raised the affirmative defense of isolated employee misconduct, for which it carries the burden of proof. To prove this defense the respondent must prove each of the following elements: (1) that it took all feasible steps to prevent a violation from occurring; (2) that the employee's action was contrary to an effectively communicated work rule; (3) that the employee's action was contrary to an effectively enforced work rule; and (4) that respondent had no knowledge either actual or constructive of the violation.
30. There is no evidence to show that Mr. Vidal or any other employee violated one of respondent's work rules. The evidence is scant that respondent's work rules relating to bore stems were effectively communicated or enforced. Such rules amounted to a verbal warning with no documentation of any discipline.

Based on the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are adopted as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The respondent is subject to the provisions of the Act.
3. The complainant has failed to prove by the greater weight of the evidence a violation of 29 CFR §1926.300(b)(2).
4. The respondent has failed to prove by the greater weight of the evidence the affirmative defense of isolated employee misconduct.

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

1. Citation 1, Item 1, an alleged serious violation of 29 CFR §1926.300(b)(2), is dismissed.

This 11th day of June, 2007.

RICHARD M. KOCH
HEARING EXAMINER