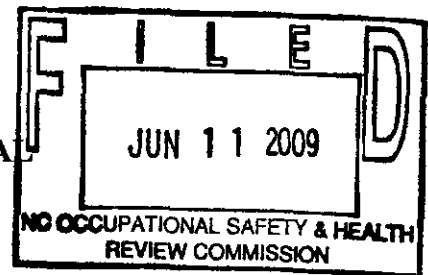


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2008-4793
OSHA INSPECTION NO. 311621445
CSHO ID: K4809

v.

HENDRIX-BARNHILL COMPANY
INCORPORATED

AMENDED ORDER

Respondent.

APPEARANCES:

Complainant:

Sonya Calloway, Assistant Attorney General
North Carolina Department of Justice

Respondent:

Michael C. Lord, Williams Mullen
Attorney for Respondent

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for a two day hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on February 26, 2009, at the North Carolina Medical Society Boardroom, 222 North Person Street in Raleigh, North Carolina and March 24, 2009 at the Department of Justice, Raleigh, North Carolina.

The complainant was represented by Ms. Sonya Calloway, Assistant Attorney General and the respondent was represented by attorney Michael C. Lord, Williams Mullen. Present for the hearing for the Department of Labor, OSHA Division, was Mr. Bruce Pearson and Darrell Lambert, Health & Safety Compliance Officers. Present at the hearing for the respondent were Mr. Rodney Bailey, site foreman and Eric Olsen, VP & Triangle Division Manager for Respondent.

At the outset of the hearing, the complainant moved to amend Citation 3, Item 1 to correct a typographical error. Respondent did not object to the amendment, but did object to Complainant using a prior settlement agreement as evidence of the "repeat"

DATABASE

6/12/09 *md*

violation. After hearing arguments from Complaint and Respondent, this Court ruled that the informal settlement agreement could not be used as evidence of a repeat violation where the settlement agreement did not conspicuously state in clear language that the employer agrees to admitting liability and in the future may be held for a repeat violation.

After reviewing Complainant & Respondents' briefs, the record file, hearing the evidence presented at the hearing, with due consideration of the arguments and contentions of all parties, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").
2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about June 13, 2008, contesting a citation issued on June 3, 2008 to Respondent, Hendrix Barnhill Company. ("Respondent" or "Hendrix")
3. Respondent, a corporation which does construction business in the State of North Carolina and maintains a place of business in Johnston County, NC and is subject to the provision of the Act (N.C. Gen Stat § 95-128) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent employs 85 workers.
4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. On January 15, 2008, Bruce Pearson, Health & Safety Compliance Officer ("HSCO Pearson") and Darrell Lambert ("HSCO Lambert") inspected Respondent's work site at a residential development called Colvard Farms at Colvard Farms Road & Castlewood Drive off Highway 751 in Durham, North Carolina ("site") on the basis of a partial inspection pursuant to a National Emphasis Program Inspection.
6. When HSCOs Pearson & Lambert arrived at the site at 2:45 p.m., they observed individuals down inside the excavation and one standing over the excavation.
7. Hendrix was laying water pipeline and reclaim on the site. Three employees were on the site when they arrived: Rodney Bailey, site

foreman and competent person, Wayne Bailey, laborer, and Mario Purata-Paramo, pipelayer.

8. HSCOs Pearson and Lambert began the opening conference with Rodney Bailey, ("Bailey"), who then called Eric Olsen ("Olsen") VP & Triangle Division Manager for Respondent. They presented their credentials to Bailey and later to Olsen when he arrived on the site and were given permission by Olsen to do the inspection.
9. The HSCOs took additional photographs and interviewed employees but did not take any written statements.
10. HSCOs Pearson and Lambert conducted a closing conference with both Bailey and Olsen on January 15, 2008 and then recommended that citations be issued.
11. As a result of the recommendations of the compliance officers, on June 3, 2008 the Complainant issued Citations to Respondent as follows:

Citation 3 Item 1: Repeat Serious

Citation 3, Item 1 alleges a serious violation of 29 CFR 1926.652 (a)(1): "Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal ;

- (a) job site -- where employees were observed working in an excavation classified as Type "C" soil measuring approximately 5'4" (deep), 7' to 10' (wide) and 24' (long). The excavation walls were vertical (approximately 90 degrees) and were not sloped.

The proposed penalty for this violation was \$3500.00.

Citation 4 Item 1: Serious

Citation 4, Item 1 alleges a serious violation of 29 C.F.R. 1926.200(g)(1): "Construction areas were not posted with legible traffic signs at points of hazards:

- (a) job site -- where employees were working within and in near proximity to the roadway exposed to struck hazards without the use of work zone signs to inform vehicular traffic of their presence.

The proposed penalty for this violation was \$1400.00.

Citation 4 Item 2: Serious

Citation 4, Item 2 alleges a serious violation of 29 C.F.R. 1926.651(j)(2):
“Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary:

- (a) (a) job site – where employee(s) were allowed to work in an unprotected excavation that was approximately 5’4” (deep) 7’ to 10’ (wide) and 24’ (long) with spoil piles less than 2’ from the face of the trench.

The proposed penalty for this violation was \$1400.00.

Citation 4 Item 4: Serious

Citation 4, Item 4 alleges a serious violation of 29 C.F.R. 1926.1053 ((b)(1):

“Portable ladders were not used for access to an upper landing surface and the ladder side rails did not extend at least 3 feet (.9m) above the upper landing surface to which the ladder was used to gain access;

- (a) job site – where employee(s) were observed working in an unprotected excavation that was approximately 5’4” (deep) 7’ to 10’ (wide) and 24’ (long) without the egress ladder (Werner Extension Ladder) extending 3’ above the ground.

The proposed penalty for this violation was \$600.00

Citation 3: Item 1 Excavation Measurement & Citation 4: Item 2 Spoil Pile

12. On January 15, 2008, Bailey used a backhoe to dig the excavation at the site and classified the soil as Class C soil.
13. The 24’ long excavation was not sloped and the walls were vertical, approximately 90 degrees on both sides.
14. No protective system was used at the site that day.

15. Bailey did not make a determination himself of how deep he had actually dug.
16. Prior to working in the excavation, Mario took several measurements of the depth of the excavation and communicated it to Bailey. No photographs were presented at the hearing of those measurements or any other measurements taken by Respondent.
17. There is conflicting testimony as to the actual depth of the excavation. Mario testified that he measured the depth at 4'8". The compliance officers testified that they measured the deepest point at 5'4" and 8'2" wide (See Complainant's Exhibit 2w and 3 (diagram)). Respondent employees were working in this area of the excavation. (See Complainant's Exhibit 3 marked "EE")
18. HSCO Pearson used a measuring rod with a weight on the end to measure this point. His arm was stretched out (so as not to get too close to the edge of the excavation) at the edge of the excavation closest to the nature trail when HSCO Lambert took the photograph. The rod was not perfectly plumb and there was no other measuring rod or measuring tape bisecting the rod. (See Complainants' Exhibits g and h and Respondents' Exhibits 4, 5 & 6)
19. Other measurements of the depth of the excavation were taken by the compliance officers. Two of those measurements taken by the compliance officers are also represented in the diagram, Complaint's Exhibit 3, as 5' deep. Photographs were also taken of those measurements. (Complainant's Exhibits 2i, 2j, 2jj, 2y and Respondents' Exhibits 7 and 8).
20. The angle at which those photographs were taken was never established.
21. With respect to the photographs (Complainants' Exhibits G and H and Respondents' Exhibits 4, 5 & 6), it is not clear to the Court if the measurement taken at the deepest point reflects 5'4" or 5'2".
22. HSCO testified that the trench floor was uneven in different locations. (See also Complainant's Exhibit 2gg)
23. In combination with the uneven excavation floor and the imprecise manner in which the measurements were taken as reflected in the various photographs, the Court is not persuaded that any of the measurements taken by the compliance officers accurately reflect the actual depth of the excavation.

24. After Bailey dug the excavation, he removed the excavated material and placed it over to the side of the excavation.
25. He was aware the spoil pile should be at least two feet from the edge of the excavation, but he was told by the general contractor not to put the material on the nature trail and the proximity of the trees to the excavation site prevented him from placing the spoil pile further away.
26. Bailey was aware he placed the spoil less than two feet from the edge of the excavation.
27. Bailey testified that he thought it was a safe distance from the edge of the excavation.
28. HSCO Lambert measured the distance from the spoil pile to the edge of the excavation to be approximately 1'3" or 4". (See Complainants' Exhibits 2r and 2s.)
29. A retaining device sufficient to prevent excavation material from rolling into the excavation was not in place.
30. The spoil pile at the site was several feet high. A cubic yard of dirt, 3'x 3' pile would weigh about 2,700 pounds.
31. Working in an excavation with a spoil pile less than 2 feet from the edge of the excavation without a retaining device created the hazard that an employee would be seriously injured as a result of the spoil pile falling on employees in the excavation.
32. The location of the spoil pile created the possibility of an accident, to wit: dirt clods falling in the excavation which could then cause the whole pile to fall on employees in the excavation or the weight of the soil pile could cause a cave-in.
33. The substantial probable result of such an accident is serious injury resulting from being crushed or death.
34. Two employees were exposed to this hazard for three to five hours on January 15, 2008.
35. Respondent had imputed knowledge of the hazardous condition as the hazard to Bailey, the site foreman, and two other employees was foreseeable and created by Bailey.
36. HSCO Pearson found the severity to be high, the probability to be medium and assessed a Gravity based penalty of \$3500.

37. HSCO Pearson applied a 50% reduction for respondent's size, history, good faith and cooperation and proposed a penalty in the amount of \$1,400. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.
38. The hazard could have been abated or reduced by setting the soil pile more than two feet or by having a shield system in place.
39. Working in an excavation without an adequate protective system created the hazard that an employee would be seriously injured as a result of a cave-in causing serious injury or death.
40. Working in an excavation without determining the potential for a cave-in and without a protective system in place created the possibility of an accident, to wit: a trench cave-in.
41. The substantial probable result of such an accident is serious injury resulting from being crushed or death.
42. Two employees were exposed to this hazard for three to five hours on January 15, 2008.
43. Respondent site foreman Bailey was aware of this situation because he was present on site and he knew that Respondent did not provide to its employees any protective system nor did Bailey examine the ground to determine there was no indication of a cave-in.
44. HSCO Pearson found the severity to be high, the probability to be medium and assessed a Gravity based penalty of \$3,500 and a repeat Gravity based penalty of \$7,000.
45. A repeated violation exists where there is a "subsequent violation by the same employer substantially similar to a prior violation or violations" when the employer knew or "should have known of the standard by virtue of the prior citation or citations." Brooks, Comm'r of Labor v. Grading Co., 303 N.C. 573, 590, 281 S.E.2d at 34 (1981).
46. Although not classified as serious, Respondent had a previous Citation for this same or similar standard in OSH Inspection Number 310502539 which was closed March 6, 2007, and was within three years of this inspection. (See Complainant's exhibit 1a)
47. Olsen testified that the Citation did not involve his division, but that he was aware of the previous citation.

48. HSCO Pearson applied a 50% reduction for respondent's size, good faith and cooperation and then proposed a penalty in the amount of \$3,500 in accordance with the provisions of the Field Operations Manual.
49. The hazard could have been abated by proper sloping of the excavation or putting a trench box or adequate protective system in place.

Citation 4: Item 1 Traffic Signs

50. The speed limit was 25 mph on Colvard Farms Road. Colvard Farms Road dead ends into a cul-de-sac. (See Respondents' Exhibits R-A and R13)
51. Traffic on Colvard Farms Road on January 15, 2008 was low to moderate.
52. All three of Respondent employees were wearing reflective vests.
53. The back hoe used to dig the excavation was placed on the side of the road near the excavation.
54. Orange cones were placed along the side of the excavation on Colvard Farms Road.
55. Colvard Farms Road had a set of speed humps after the traffic sign and before motorist reached the excavation.
56. There was no evidence presented at hearing of any speed humps between Barkwood Court and Castlewood Drive as motorists exit the development which would serve to slow motorists before reaching the site. Colvard Farms Road curves between Barkwood Court and Castlewood Drive.
57. A traffic sign which read "Road Construction Ahead" was posted on the right side of the road entering the Colvard Farms development warning motorists of upcoming construction activity. (See Respondent's Exhibit 10).
58. There was conflicting testimony as to whether there was another traffic sign posted on Colvard Farms Road as motorists exited the development.
59. At the hearing, Bailey testified that after the compliance officers left, he found the traffic sign as you exited Colvard Farms Road knocked over in a ditch. No mention of another sign was made to either compliance officer at the time of the inspection.

60. A letter from the on-site project manager for the utilities work performed in Colvard Farms admitted as hearsay stated that they provided two 3x3 orange traffic signs and "these signs were present at all times at least 200 feet from the jobsite on any given day and were placed on both sides of the road to alert oncoming traffic to work being done." (see Respondent Exhibit 11)
61. Wayne Bailey informed the compliance officers that the one traffic sign that he placed on the road at the beginning of the week was 2,500 feet from the excavation.
62. There was credible evidence from the testimony of the compliance officers in that neither Compliance Officer observed another sign on Colvard Farms Road as motorists were exiting the development.
63. During employee interviews on January 15, 2008, both Wayne Bailey and Rodney Bailey informed the compliance officers that there was only one traffic sign posted.
64. The circumstances that might cause a struck hazard are not so remote as to classify the violation as de minimus.
65. Two traffic signs would serve to alert motorists of the construction activity in both directions.
66. The lack of a traffic sign to alert motorists of the upcoming work site created a struck hazard for Respondent employees.
67. With motorists being unaware of the upcoming excavation while employees were working created the possibility of an accident; to wit, an employee being hit or struck, the substantial probable result being death, compound or multiple fractures.
68. Three employees were exposed to the hazard approximately four to five hours.
69. Respondent was aware of the hazard in that Bailey knew that signs warning oncoming traffic of construction work were supposed to be placed by the side of the road.
70. The placement of the backhoe near the excavation, speed humps and reflective vests, may have served as additional precautions, but do not provide sufficient advance warning to motorists.
71. HSCO Pearson found the severity to be high, the probability to be medium and assessed a Gravity based penalty of \$3500.

72. HSCO Pearson applied a 60% reduction for respondent's size, history, good faith and cooperation and then proposed a penalty in the amount of \$1,400 in accordance with the provisions of the Field Operations Manual.
73. The hazard could have been avoided or reduced by posting a sign on the side of the road as motorists exited the development.

Citation 4: Item 4 Ladder

74. HSCO Pearson testified that Wayne Bailey told him that he placed a ladder in the excavation on the morning of January 15, 2008. He used the ladder to access and egress the excavation.
75. Mario also used the ladder during the day to exit the excavation.
76. The ladder did not extend 3 feet above the lip of the excavation.
77. Working in an excavation where a ladder was used for access to an upper landing without the ladder side rails extending 3 feet above the upper landing created the hazard that an employee would fall to the surface below or onto pipes in the excavation causing injury.
78. Two employees were exposed to the hazard for less than 2 hours a day.
79. The hazard exiting an excavation on a ladder that does not extend 3 feet above the upper landing created the possibility of an accident.
80. The substantial probable result of that accident could be injury such as simple fractures to severe sprains or lacerations requiring sutures.
81. HSCO Pearson found the severity to be low, the probability to be medium and assessed a Gravity based penalty of \$1500.
82. HSCO Pearson applied a 60% reduction for respondent's size, history, good faith and cooperation and then proposed a penalty in the amount of \$600 in accordance with the provisions of the Field Operations Manual.
83. Extending the ladder 3 feet above the lip of the excavation would have reduced or eliminated the hazard of falling to the surface below.

Defense: Isolated Employee Misconduct

84. Bailey completed the Daily Excavation Checklist the afternoon of January, 15, 2008 after the Compliance Officers left the site.
85. Under the "General" category on the checklist, Bailey checked "no" for "spoils, material & equipment set back at least 2ft from the excavation" and "yes" for "adequate signs posted and barricades provided". He also noted that the excavation depth was 5 ft deep and 10 ft wide. (See Complainant's Exhibit 4)
86. On January 24, 2008, after the OSHA inspection at Colvard Farms, Respondent issued a Written Reprimand to both Bailey and Mario citing several violations, including "trenching deeper than 5ft without proper shoring or sloping, spoil pile closer than 2ft from edge of trench. Ladder not extending 3ft above trench", and in addition for Bailey, "inadequate traffic signs".
87. To prevail under the Isolated Employee Misconduct defense, the respondent has the burden of proving 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 work rule was effectively enforced; and (4) that respondent had no knowledge either actual or constructive of the violation.
88. While Respondent may have shown element (2) & (3) through Respondent's checklist and written reprimands, Bailey, as the site foreman and competent person, created the hazardous condition in digging the excavation and placing the spoil pile less than 2 feet from the edge of the excavation and in working on the site knew or should have known of the traffic sign and ladder violations by observation, knowledge which is imputed to Respondent. Further, Bailey's conduct was within his delegated authority.

CONCLUSIONS OF LAW

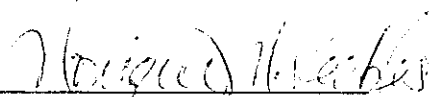
1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and jurisdiction of the Act.
3. Complainant proved by a preponderance of the evidence that respondent employees were not protected from cave-ins by an

adequate protective system in violation of 29 CFR §1926.652(a)(1).

4. Respondent failed to show that Bailey as the competent person examined the excavation to find no indication of a cave-in pursuant to 29 CFR §1926.652(a)(1)(ii).
5. Respondent has also failed to meet its burden of proving the affirmative defense that the employee action was a result of isolated employee misconduct.
6. Complainant proved by a preponderance of the evidence that the spoil pile created by Bailey was placed within 2 feet of the edge of the trench in violation of 29 CFR §1926.651(j)(2).
7. Complainant proved by a preponderance of the evidence that Respondent was in violation of 29 CFR 1926.200(g)(1) by failing to post a traffic sign to warn motorists who exit Colvard Farms of the work site.
8. Complainant proved by a preponderance of the evidence that respondent violated 29 CFR 1926.1053 ((b)(1) by not extending the ladder at least 3 feet (.9m) above the upper landing surface to which the ladder was used to gain access.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED** that Citation 3, Item 1 alleging a repeat serious violation of 29 CFR 1926.652(a)(1) is hereby affirmed; Citation 4 Item 1 alleging a serious violation of 29 CFR 1926.200(g)(1) is hereby affirmed; Citation 4, Item 2 alleging a serious violation of 29 CFR 1926.651(j)(2) is hereby affirmed; and Citation 4, Item 4 alleging a serious violation of 29 CFR 1926.10523(b)(1) is hereby affirmed.

This the 16 day of June 2009.


Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

**MICHAEL C. LORD
WILLIAMS MULLEN PA
P O BOX 19764
RALEIGH NC 27619-9764**

by depositing same the United States Mail, Certified Mail, postage prepaid at Raleigh, North Carolina, and upon:

**SONYA CALLOWAY-DURHAM
NC DEPARTMENT OF JUSTICE
Labor Section
P O Box 629
Raleigh NC 27602-0629**

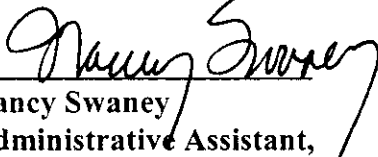
by depositing a copy of the same in the United States Mail, First Class;

**NC DEPARTMENT OF LABOR
Legal Affairs Division
1101 Mail Service Center
Raleigh, North Carolina 27699-1101**

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 16th DAY OF June, 2009.

**OSCAR A. KELLER, JR.
Chairman**


**Nancy Swaney
Administrative Assistant,
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
(919) 733-3589 FAX: (919) 733-3020**