

BEFORE THE SAFETY AND HEALTH REVIEW COMMISSION
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

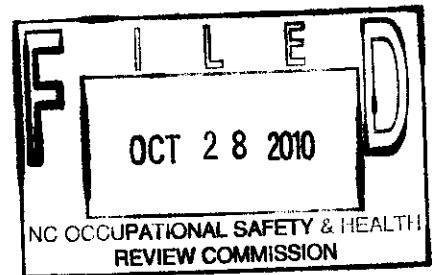
v.

HENDRIX-BARNHILL COMPANY
INCORPORATED,

RESPONDENT.

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

ORDER



DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 29th day of March, 2010 in the Board Room, Main Floor, N. C. Medical Society Building, 222 North Person 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

Sonya Calloway, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for the Complainant.

Michael C. Lord, Williams Mullen, Raleigh, North Carolina, for the Respondent.

DATABASE
10-28-10
CB

ISSUES PRESENTED

- 1. DID THE HEARING EXAMINER PROPERLY AFFIRM THE CLASSIFICATION OF CITATION 3, ITEM 1, AS A REPEAT VIOLATION?**
- 2. DID COMPLAINANT MEET ITS BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE AND BY SUBSTANTIAL EVIDENCE THAT THERE WAS A HAZARDOUS TRENCH?**
- 3. DID COMPLAINANT MEET ITS BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE AND BY SUBSTANTIAL EVIDENCE THAT RESPONDENT COMMITTED A SERIOUS VIOLATION IN RESPECT TO TRAFFIC SIGN POSTING?**
- 4. DID COMPLAINANT MEETS ITS BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE AND BY SUBSTANTIAL EVIDENCE THAT A SERIOUS VIOLATION OF 29 CFR 1927.651(J)(2) OCCURRED IN RELATION TO THE SPOIL PILE?**
- 5. DID COMPLAINANT MEET ITS BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE AND BY SUBSTANTIAL EVIDENCE THAT A SERIOUS VIOLATION HAD OCCURRED IN VIOLATION OF 29 CFR 1926.1053(B)(1) IN THAT THE LADDER WAS NOT RAISED AT LEAST 3 FEET ABOVE THE EDGE OF THE TRENCH?**
- 6. DID THE HEARING EXAMINER ERR WHEN SHE FOUND THAT RESPONDENT DID NOT MEET ITS BURDEN OF PROVING ISOLATED EMPLOYEE MISCONDUCT?**

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR sec 1926.652(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* [emphasis added] when: 1926.652 (a)(1)(1) Excavations are made entirely in stable rock; or 1926.6529(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.

29 CFR sec 1926.200(g)(1)

Construction areas shall be posted with legible traffic signs at points of hazard.

29 CFR sec 1926.651(j)(2)

Employees shall be protected from excavated or other material or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (61 m) from the edge of the excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

29 CFR sec 1926.651(k)(2)

Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous

atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

29 CFR sec 1926 1053(b)(1)

When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grab rail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

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) Hendrix-Barnhill Company, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. The undersigned have jurisdiction over this case. N.C. Gen. Stat § 95-135.

6. 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 and Castlewood Drive off Highway 751 in Durham, North Carolina (site), on the basis of a partial inspection pursuant to a National Emphasis Program Inspection.

7. When HSCOs Pearson and Lambert arrived at the site at 2:45 pm, they observed individuals down inside the excavation and one standing over the excavation. 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 and 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. The HSCOs took additional photographs and interviewed employees but did not take any written statements. HSCOs Pearson and Lambert conducted a closing conference with both Bailey and Olsen on January 15, 2008, and then recommended that citations be issued.

9. 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) ;

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) 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;

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

10. The Safety and Health Review Commission received Respondent's Notice of Contest on June 13, 2008.

11. On June 29, 2008, Respondent filed its Statement of Employer's/Respondent's Position in which it contested Citation 3, Item 1; Citation 4, Item 1; Citation 4, Item 2; Citation 4, Item 3; and Citation 4, Item 4 and objected to the penalties.

12. On February 26, 2009, Respondent filed an Amended Statement of Employer's/ Respondent's Position in which it contested Citation 3, Item 1; Citation 4, Item 1; Citation 4, Item 2; Citation 4, Item 3; and Citation 4, Item 4 and objected to the penalties and listed the defense of isolated employee misconduct and preemption by Specific Trenching Standard and denied the classification of Citation 3, Item 1, as "repeat serious."

13. On February 26, 2009, and March 24, 2009, this matter was heard before the Honorable Monique M. Peebles, Hearing Examiner, Raleigh, North Carolina.

14. On May 27, 2009, Hearing Examiner Peebles issued an order and on June 11, 2009, she issued and filed an amended order affirming Citation 3, Item 1; Citation 4, Item 1; Citation 4, Item 2; and Citation 4, Item 4.

15. Respondent appealed the decision, and the case was heard by the full Commission at the quarterly meeting on June 15, 2010.

16. The Commission adopts the Hearing Examiner's findings of facts numbered 12-43, 50-63, and 65-88.

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. Citation 3, Item 1, was incorrectly classified as a repeat violation of 29 C.F.R. §1926.652(a)(1).
4. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 C.F.R. §1926.652(a)(1).
5. The Complainant has proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. §1926.200 (g)(1), as alleged in Citation 4, Item 1, for failure to have a traffic sign at points of hazard.
6. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 C.F.R.

§1926.651(j)(2), as alleged in Citation 4 Item 2, for the failure to keep the spoil pile two feet from the edge of the trench.

7. The Complainant has proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. §1926.1053 (b)(1), as alleged in Citation 4, Item 4, for failure to have a ladder extending at least 3 feet above the upper landing surface.

8. The Responded failed to prove isolated employee misconduct.

DISCUSSION

The evidence to support the standing on Citation 3, Item 1, as a repeat violation was obscure. There would need to be more evidence, including the presentation of witnesses, for this classification to be supported.

In the second issue we note that 29 CFR 1926 (a)(1) requires that employees shall be protected in excavations by an adequate protection system except when: (1) excavations are made entirely of stable rock or are less than 5 feet in depth; AND (2) examination by a competent person provides no indication of a potential cave-in. Hearing Examiner Peebles found in Conclusion of Law #23 that the evidence did not support that the trench was 5 feet or more, and there was no suggestion made by any party that the excavation was made of stable rock, so the first prong of the exception was met. Therefore, we must look at the second prong that the "competent person provides no indication of a potential cave-in." There is clear evidence that the spoil pile was less than 2 feet from the trench. Mr. Bailey, site foreman and competent person, testified extensively that a spoil pile falling in would create a weight hazard which could crush or injure someone beneath it. The compliance officers both testified that the excess weight of a spoil pile less than 2 feet from the edge of a trench poses the potential for a cave-in.

The third issue before us deals with the violation of traffic sign posting. The evidence was uncontroverted and, therefore, substantial that there was only one construction sign posted at the time of the inspection. The standard requires that legible signs be posted at all points of hazard. The compliance officer testified that there was a curve in the road that prohibited traffic coming from the opposite side to see the one remaining sign. He also testified that the existing sign was "one-sided."

The evidence was substantial that the one sign that was up was not legible for all points of hazard; the employees were working at or near the roadway without a sign for all points. There was the possibility that one of the employees could have been hit by a vehicle and, therefore, a substantial probability that they could have been injured or killed.

The fourth issue is related to the spoil pile and its location from the trench. The evidence was substantial and uncontroverted that the spoil pile was less than 2 feet from the edge of the trench. Two Hendrix Barnhill employees were working in the trench and were, therefore, exposed to the hazard. There was the possibility of an accident, as the trench could have caved in because of the excess weight of the soil in close proximity to the trench or because the spoil pile could have fallen in. There was a substantial probability that such an injury could have been serious or that death may have occurred. Respondent knew about the hazard. Although the Respondent argues that no dirt actually fell into the trench, North Carolina does not recognize *de minimus* violations.

The fifth issue looks at the ladder in the trench. The standard requires that the ladder extend at least three feet above the edge of the trench. The evidence was clear that the ladder extended less than the required 3 feet, although it may have been as little as four inches less.

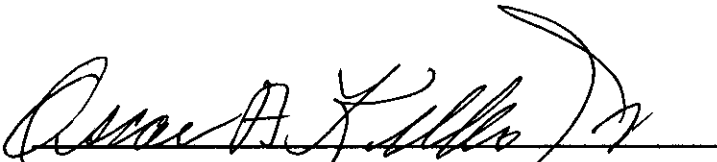
The last issue addressed the defense of isolated employee misconduct which was asserted by the Respondent. In order to prove the defense of isolated employee misconduct, Respondent must have shown the following: (1) the employer has taken all feasible steps to prevent an accident from occurring; (2)

the employee action was contrary to an effectively communicated work rule; (3) that work rule was effectively enforced; and (4) that the employer had neither actual nor constructive knowledge of the violation. *O.S. Steel Erectors v. Brooks*, 84 N.C. App 630, 353 S.E.2d 869 (1987). The Respondent did not show that it took all feasible steps to prevent an accident from occurring, because no trench box or other protective system was in place. Mr. Bailey's acts were within the scope of his delegated authority. The Hearing Examiner properly found that the Respondent failed in its defense. Isolated employee misconduct of supervisory employees can only be shown where the supervisor's action or omissions are beyond the scope of their delegated authority. *Brooks v. Floyd S. Pike Electrical Contractors, Inc.* OSHANC 86-1304 (RC 1987). The acts in question are: maintaining signage at points of hazard; and supervising use of the trench, ladder, and spoil pile. All those activities were within the scope of Mr. Bailey's delegated authority as site foreman and competent person.

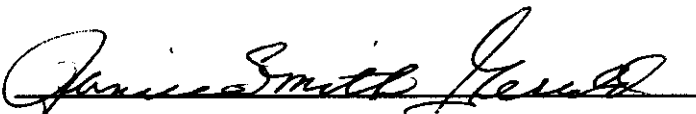
ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's June 11, 2009, Amended Order in this cause be, and hereby is, **AFFIRMED** in that Citation, 4 Item 1, with a penalty of \$1,400; and Citation 4, Item 2, with a penalty of \$1,400; and Citation 4, Item 4, with a penalty of \$600 are affirmed; and it is hereby **OVERRULED** in that it found that Citation 3, Item 1, was NOT a repeat violation, thereby, reducing the penalty from \$3,500 to \$2,800. Respondent is ORDERED to abate the violations and pay the assessed penalty of \$6,200 within 30 days of the filing date of this Order.

This the 28th day of October, 2010


OSCAR A. KELLER, JR., CHAIRMAN


RICHARD G. PEARSON, MEMBER


JANICE SMITH GERALD, MEMBER

CERTIFICATE OF SERVICE

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

MICHAEL C LORD
WILLIAMS MULLEN PC
PO BOX 1000
RALEIGH NC 27602-1000

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

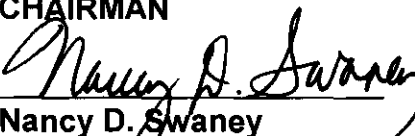
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

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

THIS THE 29th DAY OF October 2010.

OSCAR A. KELLER, JR.
CHAIRMAN



Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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