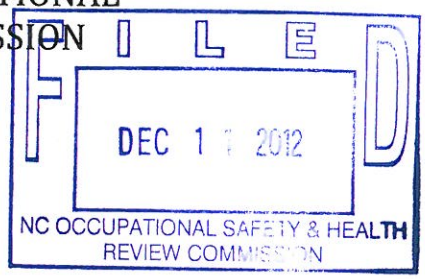
BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2011-5244
OSHA INSPECTION NO. 314879065
CSHO ID: N8928

vs.

KEEN PLUMBING CO
and it successors

Respondent.

ORDER

APPEARANCES:

Complainant:
Jill Cramer, Assistant Attorney General
North Carolina Department of Justice, Labor Section

Respondent:
J Anthony Penry, Penry Riemann PLLC
Counsel for Respondent

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on

DATABASE

September 20, 2012, at the North Carolina Medical Society Auditorium, 222 North Person Street in Raleigh, North Carolina.

The Complainant was represented at the hearing by Assistant Attorney General Jill Cramer, North Carolina Department of Justice, and the Respondent was represented by Attorney J. Anthony Penry, Penry Riemann, PLLC.

As a preliminary matter at the hearing, Respondent moved to dismiss Complaint's Citation with prejudice arguing that the citation was dismissed once already and that the Hearing Examiner can no longer hear the case. The relevant filing dates are as follows:

June 29, 2011 – original inspection
July 29, 2011 – original citation
September 15, 2011- Notice of Contest
September 23, 2011 – Notice of Docketing
October 4, 2011 – Respondent's Statement of Position
October 6, 2011 – Complainant's Notice of Withdrawal of Citation
October 26, 2011 – New Citation issued
November 10, 2011 – Notice of Contest
December 22, 2011 – Complaint
January 17, 2012 – Answer

The Respondent argued this an appeal, not an original proceeding; and therefore, the complainant cannot take a withdrawal without prejudice once the Respondent enters the notice of contest and it's docketed. The Court found that while the Commissioner under 95-135 (b) hears and issues decision on appeal entered from citations, this proceeding is still an evidentiary hearing and one of original proceeding. Under OSH Rule .0401, Complainant may withdraw a citation, and in conjunction with the Rules of Civil Procedure, dismiss it without prejudice. Therefore, the Court denied Respondent's Motion to Dismiss the citation.

Complainant withdrew Citation 2, Item (1)(a), and the hearing proceeded with Citation 2, Items (b-f).

After reviewing the record file, the evidence presented at the hearing, 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 November 10, 2011, contesting a citation issued on October 26, 2011, to Respondent, Keen Plumbing Company ("Respondent" or "Keen Plumbing").

3. Respondent, a utility contractor, is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent maintains a place of business in Goldsboro, North Carolina, and employs 35 workers overall; and 7 people were employed at the worksite at the time of the accident.

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

5. On June 29, 2011, Compliance Safety and Health Officer Gene Powell ("CSHO Powell") inspected Respondent's worksite at 1601 Central Heights Road, Goldsboro, North Carolina ("site") pursuant to Special Emphasis Program and conducted a partial inspection after viewing the excavation in plain sight.

6. The excavation was five feet from the edge of the Central Heights Road in front of a school. The location was in a mostly residential development in a semi-rural area. (See exhibit C1)

7. CSHO Powell properly entered the site and received consent to the inspection by Mr. Jeff Barnes, project manager for Respondent ("Barnes").

8. At the time of the inspection, Respondent was excavating and digging a trench to replace part of a water pipe.

9. As a result of plain view site hazards, CSHO Powell conducted an opening conference with Barnes.

10. CSHO Powell took photographs and interviewed Respondents' employees.

11. CSHO Powell conducted a closing conference with Barnes at the completion of the inspection at the site, and he recommended that citations be issued.

12. As a result of the recommendations of the compliance officer, on October 26, 2011 the Complainant issued a serious citation to Respondent concerning the web slings used and the inadequate protective systems in the excavation. The citation for the synthetic web slings was issued as follows:

Citation 2 Item 1b-1f: Serious

Citation 2, Item 1b, alleges a serious violation of 29 CFR 1926.251(a)(6): "Each day before being used, the sling and all fastenings and attachments were not inspected for damage or defects by a competent person designed by the employer. Additional inspections were not performed during sling use, where service conditions warrant. Damaged or defective slings were not immediately removed

from service;" Citation 2, Item 1c, alleges a serious violation of 29 CFR 1926.251(e)(1)(i): Synthetic web slings were not marked or coded to show name or trademark of manufacturer, rated capacity and type of material; Citation 2, Item 1d, alleges a serious violation of 29 CFR 1926.251(e)(1)(ii): Synthetic web slings were not marked or coded to show the rated capacity; and Citation 2, Item 1e, alleges a serious violation of 29 CFR 1926.251(e)(1)(iii): Synthetic web slings were not marked or coded to show the type of material and Citation 2, Item 1f alleges a serious violation of 29 CFR 1926.251(e)(8): Synthetic web slings were not removed from service when the sling had cuts and tears.

ALLOY STEEL CHAIN AND SYNTHETIC WEB SLINGS

13. As CSHO Powell drove up to the excavation site, he observed and photographed a 1686 pound aluminum trench box ("trench box") approximately 50' away from excavation. (See Exhibit C2)

14. CSHO Powell also observed and photographed pipes being lowered into an excavation using a back-hoe. (See Exhibit C2)

15. Synthetic web slings were attached to the back of the back-hoe used to lower pipe in the trench to connect it to the original pipe (water line) for the storm drain. (See Exhibits C12 and 17)

16. The synthetic web sling used to lower the pipes was used as a "chocker" that increased the load capacity to 5,000 pounds. (See Exhibit C4)

17. Respondent needed to complete this project within 4 hours as 1500 residents were without water during the project.

18. The City of Goldsboro construction inspector was at the site.

19. The competent person on the site was Barnes.

20. While CSHO Powell was conducting the inspection of the site, he observed the trench box being lowered into the trench. (See exhibit C4)

21. Respondent attached two synthetic web slings and an alloy steel chain to the back of the back-hoe and the trench box to lower the trench box into the trench. (See exhibit C4 and 21)

22. The alloy steel chain CSHO Powell inspected did not have a manufacturer tag indicating lifting capacity.

23. Barnes was able to recognize the strength of the chain by the color.

24. The color of the alloy steel chain used at the site was gold and had a load capacity to handle the trench box.

25. The synthetic web slings used to lower the trench box along with the alloy steel chain was used in "basket mode" with a load capacity of 12,800 pounds. (See Exhibit C4)

26. Two synthetic web slings were used to create a stable platform. Using only one would create an unstable platform.

27. The trench box was never lifted over anyone's head and never lifted more than 2' off the ground when moved from that location to excavation.

28. Several different synthetic web slings were in use at the same time while the pipe was lowered into the excavation, and the trench box was moved and lowered into the excavation. (See Exhibits C4 and 20)

29. CSHO Powell observed Respondent employees remove the synthetic web slings from the trench box, then he photographed them.

30. CSHO Powell testified that he looked at the synthetic web slings and noted tears, frays, and exposed green indicator threads that would indicate they should be taken out a service. (See Exhibits C5-10)

31. Although the synthetic web slings had a leather tag attached to it, CSHO Powell found no legible markings on the synthetic web slings used at the site to show name or trademark of manufacturer, rated capacity, and type of material. (See Exhibit C6)

32. Barnes testified that the frayed sling in the photographs was used to lower the pipes, and the one with the knot was used for tag line, not lifting.

33. Barnes testified Exhibit C7 was not the web sling used to maneuver the trench box and he knew that because it had a knot in it. (See Exhibit C7)

34. Barnes testified that it was the only synthetic sling with a knot in it at the site.

35. Barnes looked at the slings but did not personally inspect them.

36. Barnes was the competent person on site directing the employees' actions, and the condition of the synthetic web slings were in plain view.

37. The synthetic web slings with missing information, tears, frays, and exposed green indicators were not in good enough condition to be considered safe for employees on the site.

38. Respondent had a superintendent on site also.

39. Neither Barnes nor the superintendent inspected the synthetic web slings to discover the missing information

and damage to them or instruct that any of the synthetic web slings be removed from service.

40. The Respondent knew, or should have known, through reasonable diligence that the synthetic web slings were damaged and were required to be immediately removed from service.

41. The Respondent knew, or should have known through reasonable diligence, that the synthetic web slings were not marked or coded to show name or trademark of the manufacturer, rated capacity, or type of material.

42. The violative condition of the synthetic web slings used to maneuver the trench box created a hazardous condition for Respondent's employees on the site.

43. The violative and hazardous condition of the synthetic web slings created the possibility of an accident if the trench box fell over due to failure of the synthetic web slings, the substantial probable result of serious injury being struck by alloy steel parts, or death.

44. The hazard could have been abated by removing the synthetic web slings from service.

45. CSHO Powell found the severity to be high, the probability low, and accessed a Gravity based penalty of $5,000. He applied a 80% credit for size, safety and health program, cooperation and history and proposed an adjusted penalty in the amount of $1,000. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

46. Citation 2 Items 1(c-f) were grouped with Citation 2 Item (b).

Excavation Protection

47. Citation 2, Item 2, 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 paragraph (b) or (c) of this section. (a) Site, excavation – an employee was allowed to enter and work in a 5 feet deep 5 feet wide trench dug in type C soil, with vertical walls, without the benefit of a trench box or sloping of the excavation walls (face) to protect the employee from possible cave-in. The edge of the trench was 5 feet from the edge of a heavily traveled road.

48. The trench at the site was 29 feet long and 5 feet wide.

49. There were two levels of the trench; the shallow end (southern end) of the trench where the original pipe (white pipe) was located and was less than 5 feet, and the deeper end (northern end) where the black pipe was located.

50. There was approximately a 2' difference between the lower and higher levels.

51. CSHO Powell measured the middle of the trench using a measuring rod which extended in the trench on an angle into the bottom of the trench.

52. A close-up photograph of the measurement showed that the middle part of the trench was between 5'7" and 5'8" deep. (See Exhibit C14)

53. Even measured at an angle, the middle part of the trench was more than 5 feet.

54. The black pipe was located at the deeper end of the excavation. (See Exhibit C21)

55. Photographs of footprints in the trench indicate that that work performed in the trench was performed at the north and south end. (See Exhibits C16 and 17)

56. The soil in the trench was type C soil.

57. The walls of the trench were vertical and were not sloped or shored.

58. There was no evidence that an examination of the ground by a competent person was performed providing no indication of a cave-in of the trench at the site, in particular the south end of trench which was less than 5 feet.

59. Inspection of the trench by CSHO Powell revealed a crack in the wall, and additional dirt had fallen on top of the new pipe that was installed at the site. (See Exhibits C19 and 22)

60. Barnes and another one of Respondent's employees, laborer Fermin Contreas, entered the trench before the trench box was used at the site.

61. Contreas was in the trench for about 10 minutes to cut the original pipe for removal of that portion of the pipe.

62. Working in a 29 foot long 5 feet wide excavation, more than 5 feet deep, in type C soil, without sloping, shoring, or any adequate protective system created a hazardous condition in violation of §1926.652(a)(1).

63. Working without adequate protection in a 29 foot long 5 feet wide excavation, less than 5 feet deep, in type C soil, without an examination providing no indication of a cave-in of the trench, created a hazardous condition.

64. The violative and hazardous condition of the excavation created the possibility of an accident, to wit: the sides of the excavation could fall on employees in the excavation.

65. The substantial probable result of such an accident is serious injury resulting from being crushed or death.

66. Two employees were exposed to this hazard at the site.

67. Respondent knew or should have known of the hazardous condition as the hazard was in plain sight by Barnes who was directing employee actions at the site and observable to a reasonable and prudent employer discharging the duty of safety at the site.

68. CSHO Powell found the severity to be high, the probability low, and accessed a Gravity based penalty of $5,000. He applied a 80% credit for size, safety and health program, cooperation and history, and proposed an adjusted penalty in the amount of $1,000. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Discussion

To sustain a serious violation, the Commissioner must show: (1) the violative condition created the possibility of an accident, (2) a substantial probability that death or serious physical harm could result if an accident did occur as a consequence of the violation and (3) that either the employer knew or a reasonably prudent employer would have known that the violation existed. Brooks, Comm'r of Labor v. Grading Co., 303 N.C. 573, 584-586, 281 S.E.2d 24, 31-32 (1981)

The Violative Condition

Barnes agreed that middle of the trench was more than 5 feet; however, he testified that no one was going in middle of trench unless a trench box was in the hole. Respondent argues that Respondent employees were not working in an area that the Act required an adequate protective system. 29 CFR §1926.652 requires that each employee **in** an excavation 5 feet or more, be protected from cave-ins by an adequate protection system. The Complainant is not required to prove employee involvement in the exact location where the trench was measured as being improper. "The safety standard is implicated by the depth of a particular trench, without regard to an individual worker's precise position in it." *P. Gioioso & Sons v. Occupational Safety & Health Rev. Com'n.*, 115 F.3d 100, 103 (1st Cir. 1997). In *Daniel International Corp. v. Donovan,* the 10th Circuit Court of Appeals held that the Secretary need show only the existence of the hazardous condition and its accessibility to employees in order to satisfy the burden of proving exposure. *705 F.2d 382* (10th Cir. 1983) quoting *Stahr and Gregory Roofing Co.*, 1979 CCH OSHD p 23,261 (No. 76-88-1079). The Second and Fifth Circuit have also reached a similar conclusion pertaining to the proof necessary to establish exposure. (See *Mineral Industries & Heavy Construction Group v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir.1981) and *Brennan v. Occupational Safety & Health*

Rev. Com'n. (Underhill Construction Co.), 513 F.2d 1032, 1038 (2d Cir. 1975). See also, *Commissioner of Labor v. Weekley Homes*, 169 NC. App. 17, 25, 609 S.E.2d 407, 414 (2005) (N.C. Court of Appeals, quoting the 2nd Circuit Court's holding from *Brennan*). Walking north, this trench sloped deeper and Respondents' employees had access to the entire length of the trench. They were within the zone of danger, and, therefore, exposed to the hazardous condition.

In accordance with 29 CFR§1926.652 (a)(ii), a protective system is not required when it is less than 5 feet and examination of the ground by a competent person provides no indication of a potential cave-in. Barnes testified that the northern and southern ends of the trench, where he and Contreas were working, were both less than five feet. Respondent bears the burden of proving the excavation was less than 5 feet in depth and that its inspection did not indicate the potential for cave-ins. *A.E.Y. Enterps.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006). Respondent failed to submit any evidence that an examination of the ground was performed providing no indication of a cave-in as required by the trenching standard.

Possibility of an Accident

The Act only requires the Complainant to prove the ***possibility*** of an accident. This entire trench which was dug in Class C soil, the least stable, with heavy construction equipment at the site, 5 feet from the edge of the road, with visual evidence of a crack in the vertical wall as well as evidence of falling dirt near the southern end, was susceptible to a cave-in without an adequate protection system. Barnes even testified that they had a trench box "just in case the edge started to fall."

The Court also finds that the Complainant presented relevant evidence that supports the conclusion that the substantially probable result of a possible cave-in resulting

from a violation of the trenching standard protecting employees in excavations was serious injury or death.[1]

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 and substantial evidence that the Citation 2, Item 1b, was a serious violation of 29 CFR §1926.251(a)(6).

4. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 2, Item 1c, was a serious violation of 29 CFR §1926.251(e)(1)(i).

5. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 2, Item 1d, was a serious violation of 29 CFR §1926.251(e)(1)(ii).

6. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 2, Item 1e, was a serious violation of 29 CFR §1926.251(e)(1)(iii).

7. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 2,

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[1] Although Contreas was in the southern end working about ten minutes, a brief exposure to a hazardous condition does not negate a violation or its seriousness. *H.H. Hall Construction Co.,* 10 BNA OSHC 1042 (No. 76-4765, 1981) (five to ten minutes in an unsafe trench results in serious violations).

Item 1f, was a serious violation of 29 CFR §1926.251(e)(8).

8. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 2, Item 2, was a serious violation of 29 CFR §1926.652(a)(1).

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that all of the citations and penalties are hereby affirmed; and Respondent shall pay the penalties as set forth in the Findings of Fact and Conclusions of Law above.

This the 26 day of November 2012.

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:

J ANTHONY PENRY
PENRY RIEMANN PLLC
1330 ST MARY'S STREET
SUITE 260
RALEIGH NC 27605

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

JILL CRAMER
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 12th DAY OF December 2012.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney

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