

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

**FILED**

COMMISSIONER OF LABOR OF )  
THE STATE OF NORTH CAROLINA, )  
 )  
COMPLAINANT, )  
 )  
v. )  
 )  
INFRASTRUCTURE TECHNOLOGY )  
SERVICES, INC., )  
*and its successors,* )  
RESPONDENT. )

JUL - 7 2021

NC Occupational & Safety  
ORDER

OSHANC NO: 2018-6037  
INSPECTION NO.: 318133642  
CSHO ID: K0085

THIS MATTER came on for hearing and was heard remotely before the undersigned on May 12, 2021. The Complainant was represented by Special Deputy Attorney General Melissa H. Taylor and the Respondent was represented by Michael C. Lord. Complainant's witness was Mark Rasdall, who is a Compliance Safety and Health Officer with the North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witnesses were the following: John Myers, Foreman with Respondent at the time of the inspection, Harold (Rocky) Clayton, Foreman with Respondent at the time of the inspection and Edward (Eddie) Keever, Chief Executive Officer of Infrastructure Technology Services, Inc.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

**ISSUE PRESENTED**

The determinative issue of this case was whether the employees seen by the Compliance Safety and Health Officer were standing in an excavation four feet or more in depth.

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

29 CFR 1926.651(c)(2) provides as follows:

*Means of egress from trench excavations.* A stairway, ladder or ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 (7.62 m) feet of lateral travel for employees.

29 CFR 1926.651(g)(1)(iv) provides as follows:

*When controls are used* that are intended to reduce the level of atmospheric contaminants to acceptable levels, testing shall be conducted as often as necessary to ensure that the atmosphere remains safe.

### FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina (hereafter Complainant or Commissioner), is charged by law with responsibility 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) as well as the regulations adopted pursuant thereto.
2. Respondent, Infrastructure Technology Services, Inc., hereafter Respondent or ITS, was, at all times relevant to this case, in the business of providing excavation and trenching services.
3. Respondent ITS was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and Christopher Davis and Harold (Rocky) Davis were two of ITS's employees within the meaning of N.C. Gen. Stat. §95-127(10).
4. Compliance Safety and Health Officer (COSH) Rasdall conducted a partial scope inspection on April 9, 2018 of a site on Durant Road in the vicinity of where the road crosses Barton Creek in Raleigh, North Carolina after receiving a complaint on April 6, 2018 that an employee was working in a trench 8 feet deep without a trench box or shoring.
5. Officer Rasdall observed, from the right-of-way as he headed west on Durant Road, two employees standing in an excavated area. The observation was made as Rasdall passed by the site of the inspection when he was following a pilot car which was being used to take one lane of traffic at a time past the site. Rasdall came upon the site without knowing the location of the inspection area so he followed the pilot car up to the point in west bound traffic where he could turn around to head back in the opposite direction. When his turn came to follow the pilot car to return with east bound traffic, he passed the same site and again observed two employees in the excavation.
6. Rasdall then proceeded to a side street where he parked in the grass at the entrance to a subdivision.
7. Rasdall took "a couple minutes, 5-10 minutes max" from the time he passed the excavation the second time to his parking off the side street.
8. Rasdall did not describe, at any time, the depth of the excavation with respect to how much of the employees' bodies could be seen.

9. At some point after seeing the employees the second time and prior to his taking the picture which was introduced as Complainant's Exhibit 1-A, Rasdall saw the employees being assisted out of the trench.
10. Rasdall saw the employees being assisted out of the trench during the "a couple minutes, 5-10 minutes max" when he was getting to his parking spot or during the period after parking and prior to his taking the picture in Exhibit 1-A.
11. While it is not possible to determine precisely how much time passed between Rasdall's observation of the employees being assisted out of the excavation and his taking the picture, the undersigned finds that there was an opportunity for more excavation to have occurred before Complainant's Exhibit 1-A was taken or before the COSHO introduced himself.
12. Complainant's Exhibit 1-A was taken some distance away from the site of the excavation, as can be seen from the picture, and it was taken before Rasdall introduced himself to the Foreman in charge, John Myers.
13. The depth of the trench at the time Rasdall introduced himself and obtained permission to conduct the inspection appears to have been 4 feet or more.
14. At the time of the COSHO's introduction of himself to Myers, there were no employees in the excavation.
15. Myers was the operator of the excavator.
16. Before Rasdall was shown the enlarged picture of Complainant's Exhibit 1-A, which became Respondent's Exhibit 1, Rasdall was asked on cross examination if the operator who is pictured in the seat of the excavator was operating the excavator at the moment the picture was taken. Despite having testified earlier that he had watched the men leave the excavation, he testified on cross examination that the men were in the hole, and that was why he knew the excavator was not being operated. Rasdall even speculated that the crew must have been larger than the six employees he had stated in his report when the enlarged picture showed six people outside the hole.
17. There is no evidence to support the crew being larger than six employees.
18. Respondent's Exhibit 1 shows clearly that the men were outside the hole at the time the picture identified as Complainant's Exhibit 1-A was taken.
19. Rasdall's confusion as to when the employees were in the excavation detracted from his reliability.

20. Respondent's Exhibit 1 also shows Myers in the operator's seat and the five other employees standing outside the hole looking toward the area where the employees had been working in the excavation.
21. Rasdall, on redirect, conjectured that the excavator would not have been used for more excavation after the employees left the trench because it might have hit the gas line. On recross, Rasdall declined to repeat what he said on cross—that the men were in the excavation. Instead, he testified that it was "my conclusion" that the width of the bucket was too great for more digging.
22. The excavator was used for further excavation with a smaller bucket after the employees left the excavation and before the COSHO introduced himself.
23. At the time of Rasdall's observation of the employees, the employees were using shovels to locate a "Tap-T" connection for the gas line at a point when the excavator had dug to a depth of about 3 feet.
24. The employees knew approximately where to dig because the excavator had uncovered a warning tape that had been left about one foot above the gas line when it had been excavated and then re-covered a week earlier by Myers. Also, at the time of the excavation a week earlier, a yellow mark had been painted on the road surface to mark the location of the "Tap-T".
25. The approximate depth of the gas line was 4 feet.
26. Thus, at the time the employees were observed by Rasdall, they were standing at the bottom of an excavation that was, at that time, approximately 3 feet deep using their shovels to dig by hand to find the "Tap-T" about a foot lower.
27. There was additional excavation conducted after the employees were observed to leave the trench. It is more likely than not that the additional excavation took the depth of the trench from a depth less than 4 feet to a depth greater than 4 feet.
28. Rasdall took no written statements during his inspection from any witness.
29. Rasdall took notes during his inspection but did not preserve the notes. Instead of preserving the notes as part of the evidentiary record, he incorporated them into his report. Thus, Rasdall had no contemporaneous notes to support his observations.
30. There is not sufficient evidence from the Complainant to establish more probably than not that the excavation depth at the time Rasdall introduced himself to Myers was the same depth as when Rasdall observed the employees from his vehicle.
31. Complainant conceded in closing argument that the presence of employees in an excavation 4 feet or more in depth was necessary to support both citations of this case.

## CONCLUSIONS OF LAW

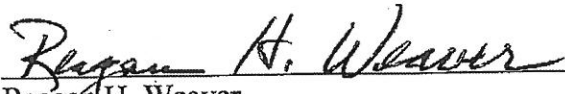
1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions of the Act.
3. Complainant has the burden of proof to establish the violation of the safety statutes that are the subject of the citations herein.

## DISCUSSION

Complainant carries the burden of proof to establish that Respondent violated the safety regulations that were at issue herein. After considering all the evidence introduced, there is substantial doubt in this hearing officer's mind that the employees who were observed to be in the excavation were ever present in the excavation when the depth of the excavation was greater than or equal to 4 feet. Complainant's failure to carry his burden of proof is fatal to both citations. The citations should be dismissed.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, IT IS ORDERED that the citations against the Respondent are hereby DISMISSED.

This the 1<sup>st</sup> day of June, 2021.



Reagan H. Weaver

Administrative Law Judge

North Carolina Occupational Safety and Health Review Commission

**CERTIFICATE OF SERVICE**

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

MIKE LORD  
WILLIAMS MULLEN  
PO BOX 1000  
RALEIGH NC 27602

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:


MELISSA TAYLOR  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

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 8 DAY OF July 2021.

  
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Karissa B. Sluss  
Docket and Office Administrator  
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