

to file an annual report. Its managing member has been continuously identified as John Caves, Jr., and its business address has been continuously identified as 3335 Jason Avenue in Charlotte, NC 28202-5897 (Mecklenburg County).

4. In October 2018 Respondent was an "employer" within the meaning of N.C.G.S. § 95-127(11), and controlled 202 employees, as defined by N.C.Gen.Stat. § 95-127(10).

5. In 2018 general contractor Branch & Associates hired the Respondent to excavate and install an 8-inch water line by boring underneath Weddington Road in Concord (Cabarrus County), NC and tapping into an existing 12-inch diameter water main that ran parallel to Weddington Road.

6. According to the accompanying engineering drawings for the proposed work, the top of the existing water main was 3.5 feet below grade, so that the excavation would have to be dug 4.5 feet deep to fully expose the water main, and then would have to be dug a further amount to allow the workers room below the water main to work, including aligning the pipes and flange and turning wrenches to tighten the bolts that held the flange to the pipes.

7. On Monday, October 29, 2018, the Complainant received a non-formal complaint regarding excavation near 3247 Weddington Road in Concord (Cabarrus County), NC, specifically: "Employees are exposed to a trench collapse hazard while installing pipes inside a 8 foot deep excavation, without a trench box. The work is being performed several feet from the roadway."

8. On October 30, 2018, the person who made the informal complaint told the Complainant's CSHO that the excavation was opened on October 29, 2018, the excavation was at least 8 feet deep with no trench box, the workers inside the excavation were over their head, and the walls were not sloped.

9. On October 30, 2018, the Complainant's CSHO traveled to the area, identified the site of the complaint as an excavation occurring at 4001 Weddington Road, and after receiving appropriate authorizations, opened an inspection.

10. At the time of the inspection there were four workers present: the Respondent's foreman, Robert Nicholson; the operator of a CAT 316F L Excavator, Benito Perez; and laborers Claudio Perez Hernandez and Anthony Isidor. All four workers were employees of the Respondent.

11. Mr. Nicholson was the responsible competent person at the excavation site.

12. The excavation was less than two feet from, and parallel to a busy two-lane road within one-half mile of an elementary school.

13. The excavation was 15 feet wide and more than 16.5 feet long, at grade.

14. The side wall of the excavation nearest the road was a vertical wall with no slope. The opposite wall was sloped at approximately 1:1, with a 3.5 foot rise over a 4 foot run. The end of the excavation where the Excavator was located also appeared to be a 1:1 slope, and the opposite end was a vertical wall.

15. At the time of the inspection the excavation was 2.5 feet deep at the end opposite the Excavator, and 3.5 feet deep at its deepest point, but the Respondent's contemporaneous

documentation recorded (and its employees confirmed) that the excavation was 5 feet deep at 9:00 a.m. on October 30, 2018, and 6.5 feet deep on October 29, 2018.

16. The excavation was in Type B soil.

17. During the inspection, Mr. Perez stated that he, Mr. Hernandez and Mr. Isidor all worked in the excavation when it was more than five feet deep, and Mr. Nicholson confirmed that this statement was true.

18. The employees were working near the vertical wall that was adjacent to the road.

19. There was no warning system to prevent workers from inadvertently entering the danger zone for cave-ins, nor was there a warning line inside the excavation.

20. The inspection forms completed by Mr. Nicholson clearly reflected the requirement that a protective system be used for the excavation and Mr. Nicholson indicated on the form that the Respondent was using sloping as the protective system.

21. The Respondent did not use any protective system in the form of sloping, benching, shoring or trench boxes for the vertical walls of the excavation, and Mr. Nicholson admitted knowing that sloping was not used on the vertical walls of the excavation, explaining that the close proximity of the roadway did not allow sloping.

22. The inspection forms completed by Mr. Nicholson clearly reflected the requirement that the spoil pile be located at least 2 feet away from the edge of the excavation.

23. The spoil pile was located on the long edge of the excavation opposite the roadway and was approximately 4-5 feet above grade on October 30, 2018, prior to the inspection.

24. On October 30, 2018 the spoil pile was not set back from the edge of the excavation, there was no discernable difference between the edge of the excavation and the spoil pile, and there was no evidence that the Respondent used any retaining device sufficient to prevent material from falling or rolling into the excavation.

25. The failure to provide protective systems, and the placement of the spoil pile less than two feet from the edge of the excavation exposed the Respondent's employees to a serious engulfment hazard that could cause multiple/compound fractures, crushing injuries, and/or asphyxiation resulting in permanent disability or death.

26. While the Complainant's CSHO conducted the closing conference, the Respondent's employees filled in the excavation and thus abated the hazards.

27. The Complainant did not identify any inspections in the three years prior to this inspection for which the Respondent received a serious, willful or repeat citation.

28. On December 6, 2018, the Complainant issued the following citations, each with a proposed penalty of \$5,600:

Citation 1 Item 001 (serious): 29 CFR 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 combination of both

if necessary: (a) Weddington Road Jobsite – where employees working inside a trench were exposed to struck by/engulfment hazards from excavated materials which could potentially roll into the excavation due to the excavated material (spoil pile) not being set back at least two (2) feet from the edge of the excavation or otherwise restrained. There was no discernable difference between the sloped wall and the spoil pile.

Citation 01 Item 2 (serious): 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(b) or (c): (a) Weddington Road Jobsite – where employees were working inside an excavation with depths of up to six and one half (6.5) feet that had a combination of vertical walls and sloped walls.

29. The Complainant calculated its proposed penalties by determining that death or permanent disability could result from the violation, so that the severity of injury was high; and the probability that an accident or health hazard exposure would result from the hazard was greater (adding the probability factors for employees (3), frequency (5), and proximity (8), for a total average of 5.3), warranting a gravity-based penalty of \$7,000. To that sum, the Complainant made a 10% adjustment for size and a 10% adjustment for history, making the total proposed adjusted penalty for each violation \$5,600.

30. On December 20, 2018, the Respondent requested an informal conference, but on January 7, 2019, the day before the scheduled informal conference, the Respondent submitted its Notice of Contest and requested a formal hearing of this matter.

31. This matter was set for hearing on September 30, 2021, but on September 28, 2021 the Respondent filed a Motion to Continue based on counsel's discovery that on February 5, 2021 the Respondent filed a Chapter 7 bankruptcy petition in the Bankruptcy Court for the Western District of North Carolina, and counsel's inability to communicate with Respondent. The Complainant consented to this continuance.

32. On September 29, 2021, the undersigned granted Respondent's motion and directed counsel to respond with their positions on issues relative to Respondent's contention that the bankruptcy court's automatic stay precluded further proceedings during the pendency of the bankruptcy petition.

33. On November 11, 2021, after considering the submissions of counsel, the undersigned issued an Order concluding that these proceedings were excepted by 11 U.S.C. § 362(b)(4) from the automatic stay arising under 11 U.S.C. § 362(a)(1), and that a hearing could proceed for purposes of establishing an OSH Act violation (or not) and assessing penalties based on that violation, but not for purposes of collecting any penalty. The Respondent did not appeal from this Order.

34. The Respondent's bankruptcy petition remains pending in the bankruptcy court as of the date of this Order.

Based on the foregoing, the undersigned makes the following:

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. At all times material to this proceeding the Respondent was subject to the requirements of N.C.Gen.Stat. § 95-126 *et seq.* and the standards promulgated thereunder.

3. The Review Commission has jurisdiction of the parties and the subject matter.

4. The Complainant has established by a preponderance of the evidence that the cited standards applied to the Respondent's activities on October 29 and 30, 2018, as set out above.

5. The Complainant has established by a preponderance of the evidence that the Respondent violated 29 C.F.R. § 1926.651(j)(2) by failing to place and keep excavated materials that could pose a hazard by falling or rolling into the excavation at least two feet from the edge of the excavation or by the use of retaining devices that are sufficient to prevent materials from falling or rolling into excavations, or by a combination of both.

6. The Complainant has established by a preponderance of the evidence that the Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to provide an adequate protective system to protect employees in an excavation from cave-ins.

7. The Complainant has established by a preponderance of the evidence that employees were exposed to the hazards covered by 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1).

8. The Complainant has established by a preponderance of the evidence that the Respondent knew or should have known of the conditions creating each hazard.

9. The Complainant has established by a preponderance of the evidence that each hazard created the possibility of an accident, the substantially probable result of which could be death or serious bodily injury.

10. The Complainant correctly calculated the proposed penalty for each citation, in accordance with the Field Operations Manual.

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

1. Citation 1, Item 001 is affirmed as a serious violation of 29 C.F.R. § 1926.651(j)(2), with a penalty of \$5,600.
2. Citation 1, Item 002 is affirmed as a serious violation of 29 C.F.R. § 1926.652(a)(1), with a penalty of \$5,600.
3. Pursuant to N.C.Gen.Stat. § 95-138, the Respondent is assessed total penalties of \$11,200.

This the 20th day of July, 2022.



Digitally signed by Laura J Wetsch
DN: cn=Laura J Wetsch, o=Winslow Wetsch, PLLC,
ou_email=lwetsch@winslow-wetsch.com, c=US
Date: 2022.07.20 17:22:32 -0400

Laura J. Wetsch, Hearing Examiner

CERTIFICATE OF SERVICE

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

JOHN and TRACY CAVES
ADVANCED DEVELOPMENT CONCEPTS
3335 JASON AVE
CHARLOTTE NC 28208

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

RORY AGAN
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

via email to carla.rose@labor.nc.gov.

THIS THE 20 DAY OF July 2022.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
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