

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

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA
COMPLAINANT,
v.
YOUNG AND MCQUEEN GRADING, INC.,
and its successors
RESPONDENT.

ORDER
OSHANC NO. 2019-6117
INSPECTION NO. 318154093
CSHO ID: U6329

THIS MATTER was before the undersigned for hearing via the Lifesize video conference platform on November 3, 2021, beginning at 10:00 A.M.

The complainant was represented by Stacey A. Phipps, Assistant Attorney General; the respondent was represented by Greg C. Ahlum of Johnston Allison & Hord.

There was one preliminary matter to deal with before the hearing on the merits was started. On or about November 1, 2021, the respondent filed a motion to dismiss the citations or in the alternative to bar use of any witness/employee statements to the compliance officer, based on a violation by the complainant of the provisions of NCGS 95-136(e1), requiring the complainant to produce an unredacted copy of its file in this matter upon request of the respondent made more than 10 days before the scheduled hearing. The complainant filed a response to the motion on November 1, 2021.

From a review of the documents attached to the motion and the response, it appears that the complainant did not timely provide the unredacted file, although as of the morning of the hearing, the respondent was now in possession of an unredacted copy of the file. The undersigned decided that this violation did not rise to the level of requiring dismissal of the citation items, but did cause prejudice to the respondent with reference to the preparation of its case for the hearing. The undersigned decided that the witness statements obtained by the compliance officer, including any references to what was contained in those statements in the complainant's file, could not be used as evidence in this hearing, unless that witness testified in the hearing. After this ruling was announced, the undersigned asked counsel for both parties whether they wanted to proceed with the hearing, proceed with as much of the

hearing as we could do that day, or postpone the hearing. Both counsel indicated that they wished to proceed with the hearing that day.

Based on the evidence, consisting of testimony and admitted documents, in the hearing on the merits on these citation items, and based on the decision on the respondent's motion recited above, the undersigned makes the following

FINDINGS OF FACTS

1. The complainant as the Commissioner of Labor is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina ("the Act").

2. The respondent is a corporation which is authorized to do business in North Carolina. The respondent is a contractor that provides primarily road construction work for the North Carolina Department of Transportation.

3. Pursuant to N. C. Gen. Stat. § 95-135, the Review Commission has jurisdiction over the parties and subject matter to this action.

4. The respondent is an "employer" within the meaning of N. C. Gen. Stat. §95-127(10); all of respondent's employees referred to in the hearing are "employees" within the meaning of N. C. Gen. Stat. § 95-127(9).

5. On or about January 17, 2019, the respondent was working on an NCDOT project widening North Carolina Highway 268 in Wilkesboro, North Carolina, near its intersection with Fairplains Road.

6. The respondent was the general contractor for this project. Part of the project involved installing 8 foot square concrete boxes for highway drainage. In order to do this, the respondent had to dig an excavation.

7. Wilkes County is a Special Emphasis County for construction and there is a special emphasis by the complainant on trenching projects because of the hazards.

8. The respondent has about 120 employees, of which 15 employees were on this job site. This included John Swigert and Keith Moses, who were supervisors on the project.

9. On January 17, 2019, Danielle Knowland, a Safety and Health Compliance Officer with the OSH Division of the Department of Labor, conducted an inspection of the respondent's work site at North Carolina Highway 268/Fairplains Road. Ms. Knowland conducted the inspection as a focused partial, planned inspection. At the time of this inspection, Ms. Knowland had been with the OSH Division for many years and had conducted a number of inspections on excavations.

10. As a result of her inspection on January 17, 2019, Ms. Knowland recommended a total of 13 serious citation items. During and after the hearing, the

complainant indicated that it was withdrawing the following citation items: Citation 1, Items 003c, 005, 006 and 010. During and after the hearing, the respondent indicated that it was withdrawing its contest to Citation 1, Items 002 and 011.

11. In Citation 1, Item 001, the respondent was cited with a serious violation of 29 CFR 1926.21(b)(2), alleging that the respondent did not instruct its employees in the recognition and avoidance of unsafe conditions in their work environment in connection with the excavation in which they were working.

12. Ms. Knowland claimed that the excavation was a trench that was 60 feet long, 16 feet wide and 15 feet deep. However, Ms. Knowland did not herself conduct any measurement. The respondent provided a large amount of documentation that all of the employees in the excavation had been trained with reference to hazards arising from excavations.

13. The respondent's evidence showed that the excavation was only 10 feet deep and 30 feet long, and that since it was wider than it was deep, that it was not a trench as that term is defined in the standards but is an excavation, such that trenching standards did not apply.

14. The respondent had engaged a professional engineer to design a temporary timber shoring system for the excavation, the design of which indicated a depth 10 feet and used H shaped pilings that were set in place with a hydraulic diesel pile driver. These pilings supported horizontal timbers. Such a design is permitted by the standards.

15. There was no direct evidence to support a violation of the standard alleged in Citation 1, Item 001.

16. In Citation 1, Item 002, the respondent was cited with a serious violation of 29 CFR 1926.100(a), alleging that respondent's employees were not wearing hard hats while they were working in close proximity to excavator bucket, crane-suspended loads, timber lagging or employees using hand tools overhead. During the hearing, counsel for the respondent admitted this violation.

17. In Citation 1, Item 003a, the respondent was cited with a serious violation of 29 CFR 1926.350(a)(1), alleging that a valve protection cap was missing on a full oxygen compressed gas cylinder inside a metal Conex box.

18. Ms. Knowland undertook no tests to determine if the gas cylinder missing the cap was full or empty. The respondent's evidence was that the cylinder was missing a cap because the cylinder was empty. The respondent also contended that the inspection of the Conex box was outside the scope of the focused inspection. There is no persuasive evidence of a violation of this standard.

19. In Citation 1, Item 003b, it is not contested by the respondent that there was a serious violation of 29 CFR 1926.350(a)(10), in that inside the Conex box, oxygen and acetylene cylinders were stored together without the minimum distance required by the standard, except that the respondent contended that the inspection of the Conex box was

outside the scope of the focused inspection. However, there was evidence from the complainant that the employees working in the excavation were obtaining tools and equipment from the Conex box, which was near the excavation, which could be considered part of the focused inspection.

20. In Citation 1, Item 003c, the respondent was cited with a serious violation of 29 CFR 1926.350(a)(11), alleging that cylinders were kept in the Conex box, which the complainant contends was not ventilated. The respondent showed pictures of the manufactured vents in Conex box and that the door to the box was left open while employees were going in and out. The respondent also contended that the inspection of the Conex box was outside the scope of the focused inspection. After the hearing, counsel for the complainant indicated that the complainant was withdrawing this citation item.

21. In Citation 1, Item 004, the respondent was cited with a serious violation of 29 CFR 1926.352(d), alleging that suitable fire extinguishing equipment was not immediately available in the work areas where welding was being performed.

22. While there was not a fire extinguishing in the excavation next to where the steel shoring plates were being welding, there were eight fire extinguishers in the immediate area around the excavation, including four in the work trucks parked on the site, one in the Conex box, one in the crane and two in the pod.

23. In Citation 1, Item 005, the respondent was cited with a serious violation of 29 CFR 1926.651(c)(2), alleging that there was no safe means of egress for the employees from the trench excavation. The respondent contended that this standard only applied to trenches and that the employees could exit the excavation through the culverts that had been installed at the other end of the excavation. After the hearing, counsel for the complainant indicated that the complainant was withdrawing this citation item.

24. In Citation 1, Item 006, the respondent was cited with a serious violation of 29 CFR 1926.651(g)(1)(ii), alleging that the respondent did not take adequate precautions to prevent employee exposure to atmospheres containing less than 19.5% oxygen in the excavation while the welder generator with a gas engine was being used. Ms. Knowland conducted no testing to determine whether a violation of this standard actually existed. After the hearing, counsel for the complainant indicated that the complainant was withdrawing this citation item.

25. In Citation 1, Item 007, the respondent was cited with a serious violation of 29 CFR 1926.651(j)(1), alleging that adequate protection was not provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face along the south wall of the excavation and along the east wall of the excavation. In looking at all the pictures taken by Ms. Knowland during the inspection, it does not appear that this standard was violated. Her determination of the violations appeared to be based on her measurements of the excavation which have been determined to be incorrect and her determination that this excavation was a trench.

26. In Citation 1, Item 008, the respondent was cited with a serious violation of 29 CFR 1926.651(k)(1), alleging that respondent did not conduct daily inspection of

excavations by a competent person to determine hazard conditions. The respondent presented considerable documentary evidence that it had at least one competent employee on the jobsite at all times and that these employees had the certifications required to be considered "competent". These employees were Messrs. Sweigart, Bailey and Washburn.

27. In Citation 1, Item 009, the respondent was cited with a serious violation of 29 CFR 1926.652(a)(1), alleging that respondent did not protect its employees in an excavation from cave-ins by an adequate protective system design in accordance with the standards. The respondent had hired a professional engineer to design a temporary shoring system for the excavation with a depth of no more than 10 feet. Ms. Knowland had determined that the depth was 15 feet, but the respondent's evidence that the depth was only 10 feet was more persuasive. Ms. Knowland also determined that this depth required sloping of the east wall of the excavation, which contained Type C soil. As before, the pictures taken during the inspection did not support the measurements.

28. In Citation 1, Item 010, the respondent was cited with a serious violation of 29 CFR 1926.701(b), alleging that respondent allowed rebar to protrude from the ground in the excavation exposing employees to impalement hazards. The evidence showed that this was not rebar, but a post for a silt fence. After the hearing, counsel for the complainant indicated that the complainant was withdrawing this citation item.

29. In Citation 1, Item 011, the respondent was cited with a serious violation of 29 CFR 1926.053(b)(4), alleging that respondent's employees were using a self-supporting stepladder as a non-self-supporting ladder, such that it was being use for a purpose other than the purpose for which it was designed. During the hearing, counsel for the respondent admitted this violation.

Based on the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

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 respondent is subject to the provisions of the Act.
3. Citation 1, Items 003c, 005, 006 and 010 have been withdrawn by the complainant.
4. Citation 1, Items 002 and 011 have been admitted by the respondent as serious violations of the cited standards.
5. There was no direct evidence to support a violation of the standard in Citation 1, Item 001.

6. There was insufficient evidence to support a violation of the standard in Citation 1, Item 003a.

7. There was sufficient evidence to show a serious violation of the standard in Citation 1, Item 003b in that the cylinders were not being stored per the standard. The undersigned considers inspection of the Conex box to be a proper part of this focused inspection of the excavation because employees were using tools and equipment from the box while working in the excavation.

8. There was insufficient evidence to support a violation of the standard in Citation 1, Item 004.

9. There was insufficient evidence to support a violation of the standard in Citation 1, Item 007.

10. There was no direct evidence to support a violation of the standard in Citation 1, Item 008.

11. There was insufficient evidence to support a violation of the standard in Citation 1, Item 009.

12. The respondent did not contest the amount of any of the penalties nor the characterization of the citation items as serious.

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

1. Citation 1, Item 001, an alleged serious violation of 29 CFR 1926.21(b)(2), is dismissed.

2. Citation 1, Item 002, a serious violation of 29 CFR 1926.100(a), is affirmed, with a penalty of \$,1750.00.

3. Citation 1, Item 003a, an alleged serious violation of 29 CFR 1926.350(a)(1), is dismissed.

4. Citation 1, Item 003b, a serious violation of 29 CFR 1926.350(a)(10), is affirmed, without a penalty.

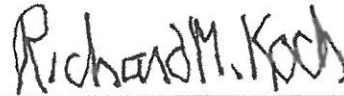
5. Citation 1, Item 003c, an alleged serious violation of 29 CFR 1926.350(a)(11), is dismissed.

6. Citation 1, Item 004, an alleged serious violation of 29 CFR 1926.352(d), is dismissed.

7. Citation 1, Item 005, an alleged serious violation of 29 CFR 1926.651(c)(2), is dismissed.

8. Citation 1, Item 006, an alleged serious violation of 29 CFR 1926.651(g)(1)(ii), is dismissed.
9. Citation 1, Item 007, an alleged serious violation of 29 CFR 1926.651(j)(1), is dismissed.
10. Citation 1, Item 008, an alleged serious violation of 29 CFR 1926.651(k)(1), is dismissed.
11. Citation 1, Item 009, an alleged serious violation of 29 CFR 1926.652(a)(1), is dismissed.
12. Citation 1, Item 010, an alleged serious violation of 29 CFR 1926.701(b), is dismissed.
13. Citation 1, Item 011, a serious violation of 29 CFR 1926.1053(b)(4), is affirmed, with a penalty of \$1,050.00.
14. The respondent shall pay the penalties for the affirmed citation items within 30 days of the date of this Order.
15. Each party shall bear its own costs and attorney's fees.

This 20th day of December, 2021.



RICHARD M. KOCH
HEARING EXAMINER

CERTIFICATE OF SERVICE

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

GREG C AHLUM
JOHNSTON ALLISON & HORD
1065 EAST MORHEAD ST
CHARLOTTE NC 28204

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

STACEY PHIPPS
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 29th DAY OF December 2021.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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