

BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

RALEIGH, NORTH CAROLINA

FILED

JUL -5 2023

NC OSH Review Commission

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA)

COMPLAINANT,)

v.)

JOHNSON CONCRETE COMPANY,)
and its successors)

RESPONDENT.)
_____)

FINAL ORDER

OSHANC NO. 2020-6242

THIS MATTER was before the undersigned for hearing via the Lifesize video conference platform on May 17-18, 2023.

The complainant was represented by Rory Agan, Special Deputy Attorney General; the respondent was represented by Greg C. Ahlum of Johnston, Allison & Hord.

Based on the evidence, consisting of testimony and admitted documents, and the post-hearing oral arguments of counsel, the undersigned makes the following

FINDINGS OF FACT

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 North Carolina corporation which is authorized to do business in North Carolina. The respondent is a manufacturer of cast concrete pipe and other water delivery products.
3. The respondent operates four different plant locations in North Carolina and has approximately 168 employees, of which 44 work at the site of the inspection.

4. This matter involves an inspection of the respondent's main facility located at 217 Klumac Road in Salisbury, North Carolina, based on a complaint about concrete dust, which was received by the complainant on June 24, 2019. The inspection by the complainant's safety and health compliance officer, Jill Warren, began on June 25, 2019 and continued at various times until August 12, 2019.

5. On June 24, 2019, CSHO Warren conducted an opening conference at the site with Brian Waller, respondent's site manager. At that time, during explanation of the inspection procedures, Ms. Warren told Mr. Waller that the inspection was a complaint inspection, which was limited to the specific hazards identified in the complaint, along with any 'plain view' hazards or those brought to the attention of the CSHO during the inspection.

6. During the inspection, Ms. Warren learned that there were temporary employees working in the production areas of the plant, which would affect the procedure for the inspection but not the scope. These temporary employees had not all been effectively trained on the equipment they were working on.

7. The facility operates two shifts. During the first shift, pipe and wire cages to form the pipe are manufactured. During the second shift, the pipe are removed from the kiln and rolled outside. The pipe are made from Portland cement, granite stone and manufactured sand. The wire cages are formed using the wire cage welding machine and serve as internal reinforcement during the manufacture of the concrete pipe. The wire cages are loaded onto a conveyor table, to be moved into position to be inserted into molds, which are on a turntable. The molds are then filled with concrete to the length required for the size pipe being manufactured.

8. The concrete raw materials are batch-mixed in a mixer and then released into a hopper, to be poured into the mold containing the wire cage. The employees use a hoist to move the concrete pipe onto a conveyor table to be transported into the kiln. The pipe are cured with steam overnight and then stacked in the outdoor yard, to later be transported by truck to customers.

9. All of this manufacturing activity is in plain view in the plant. During the manufacturing activity, Ms. Warren observed employees working with the equipment and saw the equipment in operation. She documented what she thought were violations of the OSHA standards. She also used a monitor to measure the dust levels in the plant on June 25, 2019, which was the basis for the complaint. None of the readings on that date indicated a violation of the OSHA standards related to dust levels.

10. On July 1, 2019, as part of this investigation, Ms. Warren conducted a full shift industrial hygiene sampling for RCS (Respirable Crystalline Silica) on four employees. Of the four, no RCS was detected with reference to two of the employees. For Mike Raye, a forklift operator in the yard, an RCS level at 50 ug/m³ was detected. For Marcus Brand, a pipe machine operator, an RCS level at 70 ug/m³ was detected.

11. The permissible exposure level (PEL) pursuant to the OSHA standards is 50 ug/m³. Any amount above that is not permissible. Any amount above 25 ug/m³ is considered at a level in which the employer needs to take some action to determine levels. Based on those tests on July 1, 2019, Mr. Brand had an impermissible level of RCS; while Mr. Raye's level was permissible, but in the range where monitoring needed to take place.

12. It appears from all the evidence that the respondent did have testing, engineering and work practice controls in place even though it had not from its own testing achieved any impermissible levels of RCS. From the time these standards concerning RCS had been put in place, the respondent was testing yearly for RCS, and was in the middle of an additional round of testing when this inspection occurred.

13. It also appears that the respondent had a respiratory protection program in place based on the low levels of exposure they were experiencing from their own testing and that they provided filtering facepiece respirators to employees who might experience higher levels of RCS from a particular job activity.

14. However, it does not appear from all the evidence that the respondent had a respiratory protection program that completely complied with the requirements of 29 CFR 1910.134.

15. Ms. Warren observed two employees performing cleanup operations on a Besser BiDi 48 pipe machine while exposed to electrical, hydraulic, pneumatic and gravity energies, while either standing under the mud pan, crosshead and roller-head or climbing on the mud pan to remove excess concrete from the machine.

16. Ms. Warren also observed two other employees, including Mr. Waller, standing under the mud pan was trying to move and insert guide tube pins into place, which would stop the mud pan from moving along the tube. A sign on the pipe machine reads "caution block crosshead and mud pan up before working below them also make sure power supply is turned off and locked out." The mud pan weighs more than 1000 pounds, and if it moved unexpectedly an employee underneath it could be crushed or one standing on top of it could lose balance and fall.

17. It does not appear that the work being performed by the employees on this machine constituted normal production operation or servicing or maintenance that would exempt these operations from lockout tagout requirements. Respondent's lockout tagout policy provided that this cleanup does require lockout. A Besser safety bulletin also requires turning off and locking out the main electrical panel.

18. It appears the pipe machine was not completely locked out for all energy sources during that work that Ms. Warren observed. At the time, Mr. Waller acknowledged this. At the time of the inspection, Mr. Waller also offered other reasons the machine was not locked out, such as problems with the control panel and the location of the machine relative to the building structure. At the hearing, there was a lot of testimony concerning how some of the energy sources could be locked out and allow these work procedures. However, it did not follow the sign on the machine, respondent's lockout tagout policy or the Besser safety bulletin. The

evidence was conflicting, but the undersigned does not believe that the evidence supported the respondent's position that it cannot operate or maintain this machine other than in the way that Mr. Waller testified to at trial.

19. In Citation 1, Item 1, respondent was cited for a repeat serious violation of 29 CFR 1910.147(c)(4)(i) for not having procedures developed, documented and utilized for control of potentially hazardous energy when employees could be exposed. The earlier violations were from an inspection on June 17, 2016, and another on March 2, 2018. At the hearing, the complainant acknowledged that the 2016 violation should not have been cited.

20. In Citation 1, Item 2, respondent was cited for a repeat serious violation of 29 CFR 1910.147(c)(7)(i)(A) for not having provided training for employees in recognition of applicable hazardous energy sources, citing the same March 2, 2018 previous violation.

21. These two repeat citation items involved temporary employees as well as regular employees, being exposed to these energy sources and not being trained.

22. The previous violation from March 2, 2018 was inspection number 318120102 involving a different piece of equipment of a different type in another part of the respondent's plant. A regular employee was injured when that machine hung up and his ankle was accidentally caught in the machine. His was a different job from that which was cited in this matter. It does not appear from the evidence that the respondent would have been put on notice from this previous incident that the violations cited in Citation 1 were obviously unsafe.

23. The respondent presented evidence through pictures taken by Ms. Warren and her testimony that the respondent did not provide a safe means of access and egress to and from walking-working surfaces and provided four different situations. Two of the situations involved different elevations between walkways and moveable pieces of equipment that could be walked on. Two others involved walkways leaving the plant that were littered with concrete debris and rubble.

24. From the evidence offered by the respondent, the two situations involving different elevations were created when the plant was constructed and cannot be modified and still allow the equipment to be accessed and operated by the employees. The undersigned finds this evidence to be somewhat compelling, but does believe that the different elevations could have been marked in some contrasting ways to make the difference more noticeable, particularly to persons not familiar with those areas. Apparently, Ms. Warren almost tripped over one of those situations. The two areas with debris and rubble represent bad housekeeping and should not exist over a period of time. Employees were exposed to each of these situations.

25. Employees were also exposed to random holes in the moving floor or conveyor table which was used as a walking-working surface. Some of the holes measured 8 inches by 5 inches and were up to 18 inches deep. According to the respondent, these holes were cut in order to allow access to provide maintenance for working parts of the machine. None of these holes were marked in a way to call attention to their existence and location.

26. The employees used a portable ladder to gain access into the 12-foot hopper to clean it. That ladder did not have side rails that extended at least 3-feet above the upper landing surface. With reference to cleaning this same hopper, the employees had to climb over the guardrail system around the hopper without being protected from falling.

27. The respondent acknowledged the above conditions as being violations of the standards and subsequent to the inspection the respondent had fabricated a special ladder built into the guardrail around the hopper, that allows the employees to enter the hopper to clean it safely, that appears to satisfy these standards.

28. With reference to whether the respondent documented the basis for determining that all hazards in a permit space had been eliminated, through a written certification and whether employees had been trained concerning permit required confined spaces with regard to the 12-foot hopper and the 80 cubic foot mixer, the evidence was conflicting. It appeared that the respondent had a confined space program in place with reference to these two machines and had a lot of documentation to support use of this program.

29. Ms. Warren did not believe that this program and its implementation with the employees rose to the level of complying with the standards. It was not really clear to the undersigned whether this was true, but it did appear that the respondent was trying to comply with the standards. Since the complainant has the burden of proof, the evidence of non-compliance was not more compelling than the evidence of compliance.

30. The respondent was cited for not ensuring that each container of hazardous chemicals in the workplace was labeled, tagged or marked with the product identifier and words, pictures, symbols or combination to provide at least general information regarding the hazard of the chemicals with reference to an offroad diesel tank. From the pictures, it appears that the tank was marked or labeled, in a way that should comply with the standard. The tank is marked on at least two sides facing employees with stenciling in contrasting colors "no smoking" and "offroad diesel". It seems to the undersigned that this should impart to any adult employee the hazard of that chemical.

31. The respondent was also cited for not maintaining material safety data sheets. These sheets were kept in a binder in the employee breakroom on a shelf. Since they were not in plain view, it seems that this went beyond the scope of Ms. Warren's complaint inspection and should not have been cited.

32. The proposed penalties were computed in accordance with the North Carolina Field Operations Manual.

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 2, Items 2a and 2b have been admitted by the respondent as serious violations of the cited standards.
4. There was sufficient evidence to show a serious violation of the standards in Citation 1, Items 1 and 2, but there was insufficient evidence to show that either of those violations should be classified as repeat violations, based on the case law governing repeat violations.
5. There was sufficient evidence to show a serious violation of the standards in Citation 2, Items 1a and 1b, and each of the subparts of the items.
6. There was insufficient evidence to support a serious violation of the standards in Citation 2, Items 3a and 3b.
7. There was sufficient evidence to show a serious violation of the standards in Citation 2, Items 4a, 4b, 4c and 5a). There was insufficient evidence to support a serious violation of the standard in Citation 2, Item 5b).
8. There was insufficient evidence to support a serious violation of the standard in Citation 2, Item 6.
9. There was insufficient evidence to support a non-serious violation of the standards in Citation 3, Items 1 and 2.
10. There was insufficient evidence to support a non-serious violation of the standards in Citation 3, Items 3 and 4.
11. The respondent did not contest the amount of any penalties nor the characterization of the citation items as serious and non-serious, except that it did contest the amount of the penalty and the characterization of the repeat citation.

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

1. Citation1, Item1, an alleged repeat serious violation of 29 CFR 1910.147(c)(4)(i), is affirmed as a serious violation of that standard, with a revised penalty of \$4,900.00, giving the respondent a size credit of 20% and a good faith credit of 10%, as provided in the other serious violations.
2. Citation1, Item 2, an alleged repeat serious violation of 29 CFR 1910.147(c)(7)(i)(A), is affirmed as a serious violation of that standard, with a revised penalty grouped with that of Citation 1, Item 1, above.

3. Citation 2, Item 1a, is affirmed as a serious violation of 29 CFR 1910.22(c), with a penalty of \$2,100.00.
4. Citation 2, Item 1b, is affirmed as a serious violation of 29 CFR 1910.22(d)(1), with a penalty grouped with that of Citation 2, Item 1a, above.
5. Citation 2, Item 2a, is affirmed as a serious violation of 29 CFR 1910.23(c)(11), with a penalty of \$2,100.00.
6. Citation 2, Item 2b, is affirmed as a serious violation of 29 CFR 1910.28(b)(3)(i), with a penalty grouped with that of Citation 2, Item 2a, above.
7. Citation 2, Item 3a, an alleged serious violation of 29 CFR 1910.146(c)(7)(iii) is dismissed.
8. Citation 2, Item 3b, an alleged serious violation of 29 CFR 1910.146(g)(1) is dismissed.
9. Citation 2, Item 4a, is affirmed as a serious violation of 29 CFR 1910.1053(c), with a penalty of \$5,600.00.
10. Citation 2, Item 4b, is affirmed as a serious violation of 29 CFR 1910.1053(f)(1), with a penalty grouped with that of Citation 2, Item 4a, above.
11. Citation 2, Item 4c, is affirmed as a serious violation of 29 CFR 1910.1053(g)(2), with a penalty grouped with that of Citation 2, Item 4a, above.
12. Citation 2, Item 5, is affirmed as a serious violation of 29 CFR 1910.1053(f)(2)(i), with a penalty of \$5,600.00.
13. Citation 2, Item 6, an alleged serious violation of 29 CFR 1910.1053(i)(1)(i) is dismissed.
14. Citation 3, Item 1, an alleged non-serious violation of 29 CFR 1910.134(c)(2)(i) is dismissed.
15. Citation 3, Item 2, an alleged non-serious violation of 29 CFR 1910.1053(k)(1)(ii) is dismissed.
16. Citation 3, Item 3, an alleged non-serious violation of 29 CFR 1910.1200(f)(6)(ii) is dismissed.
17. Citation 3, Item 4, an alleged non-serious violation of 29 CFR 1910.1200(g)(8) is dismissed.

18. The respondent shall pay the penalties for the affirmed citation items, a total of \$20,300.00, within thirty (30) days of the date of this Order.

19. Each party shall bear its own costs and attorneys' fees.

This 5th day of July, 2023.



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 MOREHEAD 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:

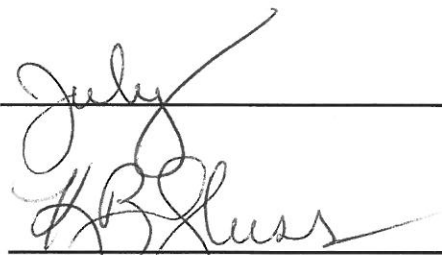
RORY AGAN
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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
carla.rose@labor.nc.gov

via email.

THIS THE 10 DAY OF July 2023.



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