

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

FILED

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NC OSH Review Commission

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA)
)
COMPLAINANT,)
)
v.)
)
RBC UTILITIES, INCORPORATED,)
and its successors,)
)
RESPONDENT.)
)
_____)

DOCKET NO. OSHANC: 2021-6393
INSPECTION NUMBER: 318211687
CSHO ID: H8087

ORDER

THIS MATTER came on for hearing and was heard remotely before the undersigned on September 14, 2023 pursuant to a notice of remote hearing. Complainant was represented by Stacey A. Phipps, Special Deputy Attorney General, North Carolina Department of Justice, Labor Section, and Respondent was represented by C. Grainger Pierce, Jr., Van Hoy Reutlinger Adams & Pierce, PLLC. No stipulations were agreed to by the parties. No employees appeared other than as noted below.

Complainant's witnesses were Griselle Negron, CSHO II, N.C. Department of Labor, and William D. Cummings, President, RBC Utilities, Incorporated, Respondent. Respondent's witnesses were Cummings, whose examination, with no objection from Complainant, was included in Complainant's calling of its witnesses, and Tyler Morenus, Respondent Foreman.

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

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.652(a)(1) provides as follows:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section

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

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

FINDINGS OF FACT

1. Respondent, RBC Utilities, Incorporated, is a South Carolina corporation, which was authorized to do business in North Carolina. It is active and current and operated at a construction worksite in Charlotte, North Carolina at all times relevant herein.
2. During the period from January 22, 2021, to June 4, 2021, Griselle Negrón, an Occupational Safety and Health Officer with the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at 527 W. Tremont Avenue, Charlotte, Mecklenburg County, North Carolina.
3. The inspection was initiated by the Department of Labor as a result of a complaint from an employee of Respondent.
4. Respondent was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and all the employees of Respondent mentioned herein were employees of Respondent within the meaning of N.C. Gen. Stat. §95-127(10).
5. At the time of the inspection, Respondent was engaged in the excavation of an area to provide for piping to connect to a previously installed catch basin for a sanitary and water utility installation.
6. As CSHO Negrón approached the excavation which is the subject of the citations, she observed Hector Hernández, a Laborer employed by the Respondent, in the excavation trench.
7. Hernández ran into the catch basin when he saw her.
8. The catch basin would have provided protection in the event of a cave-in, as it had its own manhole access.
9. The excavation was measured to be 8 feet deep, and approximately 14 feet wide and 25 feet long.
10. Hernández was removing concrete bricks that had fallen in the bottom of the trench excavation.
11. The excavation was neither benched nor sloped nor shored.
12. The spoils from the trench excavation were next to the excavation rather than two-feet from the edge.
13. On site was a trench box that Respondent planned to use for shoring, but it was not placed at the time CSHO Negrón observed Mr. Hernández.

14. Also observed in the trench excavation were shovels and an extension ladder.
15. Respondent's foreman for the excavation in question was Tyler Morenus.
16. Both Morenus and Hernandez had received Competent Person training for trenching and excavation as had other foremen and laborers of Respondent.
17. Respondent paid all expenses for laborers as well as foremen to become Competent Persons in trenching and excavations.
18. Respondent established a Safety and Loss Control Program which set out safety policies, but it was deficient in its establishment and communication of disciplinary rules and practices and record keeping of any employees' infractions.
19. Respondent had no records of employee discipline for safety infractions in its 15 year existence as a company.
20. As a result of the inspection, Complainant issued the following Citations on June 4, 2021:

CITATION NUMBER ONE (Repeat Serious)

Item No.	Standard	Abatement Date	Penalty
001	29 CFR 1926.652(a)(1)	During inspection	\$7,000.00

CITATION NUMBER TWO (Serious)

001	29 CFR 1926.651(j)(2)	During inspection	\$3,000.00
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21. Respondent had received a citation for violation of 29 CFR 1926.652(a)(1) or its equivalent standard on December 18, 2019 with a Final Order date of January 17, 2020.
22. Examination and cross-examination of CSHO Negron repeatedly considered four witness statements she prepared and the witnesses initialed and signed. The statements were part of the Inspection Report that was admitted into evidence without objection. Only one of the witnesses from whom Negron had taken statements testified at the hearing — Tyler Morenus. The three other statements were taken from laborers who were involved in removing the bricks. The statements referred to going "inside" without being clear whether the references were to *inside the catch basin* or *inside the adjoining excavation* that was hazardous.
23. Morenus ordered Hernandez and his two co-workers to retrieve the bricks that had fallen. Whether Morenus ordered any of the laborers to enter the hazardous area adjoining the catch basin was not proven, although evidence suggested that he may have ordered entry into the hazardous trench.
24. All four witness statements confirmed that Hernandez left the catch basin to retrieve bricks in the excavation adjoining the catch basin.

25. The witness statement from Foreman Morenus reports that Hernandez was out of the catch basin and in the adjoining excavation to retrieve bricks and minimizes, if not excuses, Hernandez's presence in the hazardous area by noting that he "... just was there for no so long. I don't recall but was a short period of time." (sic)
26. Morenus, despite contradictory evidence, is specifically found to have been in a position at the opposite end of the trench excavation, to have observed Hernandez's unsafe conduct.
27. Cummings, Respondent's President, conceded that he reprimanded Morenus for his handling of the incident.
28. It is specifically found that Morenus knew or should have known of the endangerment of Hernandez whether Hernandez entered the hazardous area on his own initiative or on the order of Morenus.
29. Two other excavations of the Respondent on the construction site were making use of trench boxes at the time of the inspection. A third trench box was available for Morenus to use as shoring for the excavation in question.
30. The hazards to which Hector Hernandez was exposed created the possibility of an accident, the substantially probable result of which could be death or serious physical injury.
31. The calculations of penalty for each Citation were properly calculated and adjusted.

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. Complainant proved by a preponderance of the evidence that Respondent committed a repeat serious violation of 29 CFR 1926.652(a)(1) and a serious violation of 29 CFR 1926.651(j)(2).
5. Respondent did not prove the affirmative defense of isolated employee misconduct.

DISCUSSION

While it is true that Complainant did not prove that Foreman Morenus ordered an employee to go into the hazardous area of the trench excavation adjoining the catch basin, the Complainant did prove that Foreman Morenus observed his subordinate, Hector Hernandez, go into the hazardous area to retrieve the bricks that had fallen into the trench excavation. Morenus' own statement to

CSHO Negron minimized, if not excused, the fact that Hernandez was in the hazardous trench because he was in it for such a brief period. Being in an 8 feet deep trench for any period of time when it is neither sloped, benched nor shored created a possibility of an accident the substantially probable result of which could be death or serious physical injury. Morenus observed the actions of his subordinate or should have known of the actions. In the final analysis, the company President admitted that Morenus was reprimanded for his handling of the incident.

Respondent strenuously argued that the defense of isolated employee misconduct should apply to the facts of the matter. The defense requires an employer to prove more probably than not that:

[I]t had taken all feasible steps to prevent an accident from occurring; that the employee action was contrary to an effectively communicated and enforced work rule; and that the employer had neither actual nor constructive knowledge of the violation.

Brooks v. O.S. Steel Erectors, 84 N.C.App. 630, 635 (1987).

Respondent established what it called its Safety and Loss Control Program which was created prior to the inspection for this case. In addition, it established a practice of training, not just foremen or supervisors, but laborers, too, to be Competent Persons. Respondent paid the cost of training as well as wages for the time spent in training. This practice indicates Respondent's interest in preventing accidents. Whether such training is an effective means of preventing accidents is a separate question, but Respondent's prevention orientation deserves recognition.

What was missing from Respondent's safety program was both evidence of disciplinary records (any in the 15 years of the company's existence) and disciplinary policies. Without written disciplinary policies that are clearly explained in writing, as well as orally, employees can not be expected to practice what they have not clearly been told to do or not do. Policies should also identify levels of discipline for different types of offenses. These gaps in the Respondent's safety program show that all feasible steps to prevent accidents had not been taken. The gaps also suggest that work rules were not sufficiently communicated or enforced.

Finally, and most importantly, it has been found herein that Tyler Morenus knew or should have known of the actions of Hector Hernandez in retrieving blocks from the trench adjoining the catch basin. That knowledge is imputed to Respondent and by itself, causes the defense of isolated employee misconduct to fail.

WHEREFORE, 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 CFR 1926.652(a)(1) with a penalty imposed of \$7,000.00;

2. Citation 2, Item 001 is affirmed as a serious violation 29 CFR 1926.651(j)(2) with a penalty imposed of \$3,000.00;
3. Respondent shall pay the total of \$10,000.00 within twenty (20) days of the date of the filing of this Order.

This the 12 day of November, 2023.

A handwritten signature in black ink, appearing to read "Reagan Weaver", is written over a horizontal line.

Reagan Weaver

Hearing Officer

CERTIFICATE OF SERVICE

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

C. GRAINGER PIERCE, JR.
VAN HOY, REUTLINGER, ADAMS & PIERCE, PLLC
737 EAST BLVD.
CHARLOTTE, NC 28203

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

STACEY A. 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
carla.rose@labor.nc.gov

via email.

THIS THE 15 DAY OF November 2023.



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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