

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

FILED

MAR 20 2023

**COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
)
COMPLAINANT,)
)
v.)
)
)
UNITED OF CAROLINAS, INC.)
and its successors,)
RESPONDENT.)**

ORDER

NC OSH Review Commission

OSHANC NO.: 2022-6465
INSPECTION NO.'s: 318235033
CSHO ID: Q7129

THIS MATTER came on for a virtual recorded hearing and was heard remotely before the undersigned on February 15, 2023. The Complainant, Commissioner of Labor of the State of North Carolina, hereafter referred to as Complainant or Commissioner, was represented by Jonathan Jones, Associate Attorney General, North Carolina Department of Labor. Respondent, United of Carolinas, Inc., hereafter referred to as Respondent or United, represented itself without legal counsel through its President, Ali Bahmanyar. Complainant's witnesses were Ed Joye, Compliance Safety and Health Officer, Jose Hernandez, Laborer, and Jose Delgado, Foreman. Respondent called no witnesses.

Based upon the evidence presented at the hearing and relevant facts stated in Respondent's Pre-Trial Report, and with due consideration of oral argument and 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

Whether Complainant met its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.652(a)(1) by having employees working inside a trench ranging in depth from approximately 5'4" to 6'8" without being protected from a collapse or cave-in by a protective system, such as sloping, benching, shoring or shield system.

SAFETY STANDARD AND/OR STATUTE AT ISSUE

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. . . .

FINDINGS OF FACT

1. This case was initiated by a timely Notice of Contest dated May 9, 2022 that was received by the Commissioner and that admitted the violation while contesting the “serious” classification of the violation noted in the citation that was issued on March 28, 2022 to Respondent.
2. Complainant is charged with responsibility for the enforcement of the Occupational Safety and Health Act of North Carolina, N.C. Gen. Stat. §95-126 *et seq.*, hereafter the “Act.”
3. Respondent is an employer with an office located at 1008 N. Tryon Street, Charlotte, NC 28206. Respondent is in the business of public utility construction and repair and is an employer within the meaning of N.C. Gen. Stat. 95-127(11).
4. On December 20, 2021, Compliance Safety and Health Officer, Ed Joye, employed by the Complainant, met at a site on Eastburne Road, Charlotte, NC with Jose Delgado, Foreman, and Jack Gould, Vice President, who are employees of Respondent. The purpose of the meeting was to initiate and conduct an inspection following receipt of a complaint that was received by the Raleigh offices of Complainant.
5. Officer Joye properly entered the work site and was permitted to conduct an inspection by Foreman Delgado and Vice-President Gould.
6. Officer Joye does not speak Spanish.
7. Officer Joye did not observe any violation of a safety regulation prior to or during his inspection of Respondent’s work site.
8. Officer Joye found a trench excavation on the site that measured approximately 8’8” long that exposed a culvert. The depth of the excavation ranged from 5’4” to 6’8”. At the end of the trench that measured the deepest there was a culvert or pipe exposed that was pictured in Complainant’s Exhibits 8 and 9. Close to the exposed culvert, which had been wrapped with felt or a silt fence material, was a pump that was working to pump out water that was draining into the excavation.
9. The bottom of the culvert pipe was at a depth close to the depth of the pump and would have been at a depth exceeding five feet.
10. Attached to the pump was a thin rope that could be used to lift or move the pump.
11. Officer Joye interviewed two laborers, Jose Hernandez, and Rafael Mauricio, in the presence of Foreman Jose Delgado who assisted with interpreting. Upon reporting the interviews of the laborers to his District Supervisor, Lee Peacock, Joye returned to the

site to interview the two laborers again with a third party translator. After conducting repeat interviews using the third party interpreter, the employees' stories did not change significantly — both of them had been in the excavation the Thursday before without a protective system in order to put the felt, or silt fence material, around the culvert.

12. Officer Joye also interviewed Foreman Delgado whose testimony was interpreted in Spanish at the hearing and who Joye considered to have no issues understanding and communicating in English. He found Mr. Delgado to be “brutally honest” in admitting that he and the two laborers had all three been in the excavation without protection.
13. While Officer Joye believed that Foreman Delgado and he communicated successfully, it is found by this examiner that the two men did not communicate clearly or understandably with each other. In particular, it is found that Officer Joye did not learn from his conversation with Foreman Delgado that in fact, the day of the inspection was Foreman Delgado's first day on that job site. Officer Joye understood from his discussion with Foreman Delgado that he, Delgado, had been on the job site for four days. It is found specifically that Foreman Delgado had been on the job site only the Monday of the inspection. Officer Joye understood from his discussion that the foreman and the two laborers had been on the job site for going on two weeks while it is found that the work began just the Tuesday before the inspection. Officer Joye testified that the two laborers told him that they had been in the trench on Wednesday, Thursday and the morning of the inspection, yet the statements he took from them said only that they had been in the unprotected trench on Thursday. It is found specifically that the two laborers were the only employees to have entered the trench when protection was needed and that they were in the trench on only Thursday, as stated in their written statements.
14. There was no evidence admitted to explain the difference between the witness statements taken by Officer Joye and his testimony.
15. In short, this examiner's confidence in what Officer Joye reported from his conversations with the Spanish-speaking witnesses is insufficient to reliably decide what facts reported and admissions made by Respondent's witnesses to Officer Joye during his inspection were understood and which were not.
16. It is more likely than not that both Laborer Jose Hernandez and Laborer Rafael Mauricio, were in the unprotected trench on Thursday before the inspection and that the trench was more than five feet deep at the time of their presence in the trench. It is found specifically that both employees were exposed to a hazard that had a substantial probability of death or serious physical harm had there been a cave-in or collapse.
17. The primary purpose of the Laborers being in the excavation was to cover the culvert pipe with the felt or silt fence material.
18. Covering the end of the culvert was to protect the end of the culvert from damage when the replacement culvert was lowered into place.

19. A foreman named Jorge LNU was in charge of the job site prior to being replaced by Jose Delgado on Monday. Jorge's physical presence at the excavation at the time the Laborers went into the excavation was not addressed in any witness' testimony.
20. Whether Foreman Jorge LNU ordered or even observed the entry of the Laborers into the excavation was not addressed at the hearing. Jorge LNU was not a witness in the hearing.
21. Respondent routinely uses trench boxes to protect its employees.
22. The soil in the trench was saturated. One of Complainant's pictures of cracks in the adjacent road surface showed water weeping up through the cracks. In addition, Respondent was pumping water out of the bottom of the trench.
23. A collapse or cave-in of a trench that is greater than five feet deep exposes anyone inside it to the harm of great weight falling and compressing a body causing loss of limbs or serious physical injury, if not death.
24. Officer Joye obtained a sample of the soil and conducted tests on the soil subsequent to the inspection.
25. Officer Joye reported that Foreman Delgado said he thought the soil was a 'B.'
26. At hearing, Delgado said that he thought the soil was an 'A.'
27. Based on the expert analysis of the soil by Officer Joye, the soil was a 'B.'
28. A 'Class B' soil usually requires the employer to use some kind of protective system for exposed employees.
29. Officer Joye was qualified by training and experience to act as an expert in trenching, soil classifications and trench protective systems.
30. Based on Officer Joye's expert testimony on trenches and soil types, there was a need for a protective system in this trench before employees accessed the inside of the trench.
31. Of the various kinds of protective systems that can be used in trenches, benching was not a possible method because the proximity of the road surface prevented access for benching of the side closest to the road.
32. Respondent's Notice of Contest admitted the violation but contested the classification of the violation.
33. Respondent's Pre-Trial Report served before the hearing made numerous admissions in its recitation of "relevant facts" including:

- a. The depth of the trench ranged from 5'4" to 6'8"
 - b. The laborers had been in the trench on December 15 and 16 (Wednesday and Thursday) immediately before the December 20 (Monday) inspection and were also in the trench on the morning of the inspection.
 - c. "The Foreman Mr. Delgado advised Mr. Joye that he told the workers to go into the culvert to get the culvert ready, put felt at the end and come right back out."
 - d. The purpose of being in the trench was to get the culvert ready by putting felt on the end of it.
 - e. The foreman was disciplined for violating company policy.
 - f. The company "... does not dispute that the events occurred, nor does it dispute the penalty assessed"
34. The statements referenced in the immediately preceding paragraph were made by Respondent's President rather than by counsel. As noted previously, Mr. Bahmanyar, appeared *pro se*, and he was not a witness.
35. There was a substantial probability that death or serious physical harm could result from a cave-in of the trench while an employee or employees were in the trench without a protective system.
36. Complainant did not prove more likely than not that Respondent knew of the violation committed by the two Laborers. Further, Complainant did not prove more likely than not that Respondent could have known, with the exercise of reasonable diligence, of the violation described above.

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 and jurisdiction of the Act.
- 3. A serious violation is "deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such a place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation."

DISCUSSION

This case turns entirely on the difficult parsing of testimony to determine what was said or not said and what was understood and not understood by witnesses, including Officer Joye. The facts found are intended to highlight how close Respondent has come to an affirmation of the Citation. The only reason Respondent is not being found responsible for the violation of the safety regulation cited is that there was a lack of evidence as to Foreman Jorge LNU's

knowledge of the violation. There is simply no evidence that the Respondent knew, or could have known with the exercise of reasonable diligence, of the violation.

In addition, this hearing officer has chosen to acknowledge the lack of legal representation to explain the extraordinary admissions found in Respondent's Pre-Trial Report. It would have been helpful to have the statements found in Paragraph 33 of the Findings of Fact examined at the hearing. As representations of what Respondent considered "relevant facts," they could have served as the basis for the missing element of proof of knowledge of the company. There was no case law found to address whether Pre-Trial Reports (pre-hearing reports) can be taken as pleadings, thus allowing admissions to be gleaned from them. Since there was no such precedent and the submission was presented as the work of a non-attorney, and the statements were not addressed in witness testimony, no evidentiary value was accorded to the submission.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, **IT IS ORDERED** as follows:

The Citation 1, Item 1 is **DISMISSED**.

This the 20 day of March, 2023.



Reagan H. Weaver
Hearing Officer

CERTIFICATE OF SERVICE

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

ALI BAHMANYAR
UNITED OF CAROLINAS, INC.
1008 NORTH TRYON ST
CHARLOTTE, NC 28206-7049

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

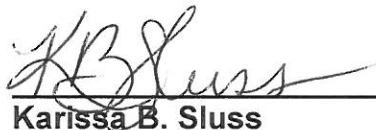
JONATHAN JONES
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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 22 DAY OF March 2023.



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