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NC OSH Review Commission

BEFORE THE NORTH CAROLINA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA	)	**DOCKET NO: 2023 - 6537**
	)	**INSPECTION NO: 318257862**
Complainant,	)	
	)	**CSHO ID: S3158**
v.	)	
TERAFLEX GROUP LLC and its successors	)	**FINAL ORDER**
Respondent.	)	

Appearances:

Madison Beveridge, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina

For Complainant

Aaron A. Dean and Madeline E. Davis, Attorneys with Moss & Barnett, Minneapolis, MN, **Pro Hac Vice**
(Scott M. Tyler, Attorney with Moore & Van Allen, PLLC, Charlotte, North Carolina, was the associated North Carolina counsel)

For Respondent

Before: R. Joyce Garrett, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission

DECISION AND ORDER

I. PROCEDURAL HISTORY

Pursuant to a Notice of Hearing filed November 8, 2023, an evidentiary hearing was held via Lifesize teleconferencing platform at 10 a.m. on January 3, 2024 and continued to 9:30 a.m. on January 4, 2024.

Respondent requested formal pleadings in this matter: Complainant's Complaint was filed May 10, 2023 and Respondent's Answer was filed May 30, 2023. Pursuant to an order of the Undersigned, on December 29, 2023 Respondent submitted 'Respondent Teraflex Group LLC's Pre-Trial Statement'. On December 29, 2023 Complainant submitted 'Complainant's Pre-Trial Statement'. Subsequently on January 2, 2024 Respondent submitted 'Respondent Teraflex Group, LLC's Amended Pre-Trial Statement' ("Respondent's Amended Statement"). Based on objection by Complainant at the beginning of the Hearing on January 3, 2024, Respondent's Amended Statement was ordered excluded from the Record.

Both Complainant and Respondent presented opening statements. Respondent requested that witnessed be sequestered; there was no objection by Complainant.

At the Hearing the following witnesses were called to testify by Complainant: (1) Compliance Safety and Health Officer Denese Ballew ("CSHO Ballew") who assisted in the OSHA inspection at the construction site, and (2) Compliance Safety and Health Officer Michael Greer ("CSHO Greer") who was the lead inspector. CSHO Ballew and CSHO Greer are sometimes collectively referred to herein as the "OSHA Inspectors". Complainant's Exhibits C1 – C21 were admitted into evidence. Although not called as a witness, Kay Knezevich, District Supervisor for the Director at the North Carolina Department of Labor, was present during the Hearing.

The following witnesses were called to testify by Respondent: (1) Mr. Mark Graig who was the foreman at the construction site, (2) Mr. Heyward Ledford who is the current Safety Director for Respondent, and (3) Mr. Andy Brown who is a 50% owner of Respondent. Respondent's Exhibits R1 – R3, R7, R13 – R20, and (over objection) R21 were admitted into evidence. Other than the witnesses called by Respondent no persons or employee of Respondent attended to have a say in, or participate as a party in, the Hearing.

At the Hearing, Complainant and Respondent agreed upon and entered into certain stipulations ("Joint Stipulations") which were entered into the record.

At the close of the Hearing the parties requested that they be permitted to submit post-hearing briefs in lieu of closing arguments. Such request was granted. Based upon agreement of the parties post-hearing briefs were submitted on January 26, 2024.

II. JOINT STIPULATIONS

Complainant and Respondent, at the beginning of the Hearing, agreed upon and stipulated to the following Joint Stipulations:

(1) the Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize";

(2) the presence of a court reporter during the Hearing is waived;

(3) the Hearing's audio and video will be recorded through Lifesize (the "Recording");

(4) the Recording will be the official record of the Hearing;

(5) the Recording will be made available to all counsel after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);

(6) the Hearing Examiner shall control when the Hearing is on and off the record;

(7) the Hearing will be deemed to have taken place in Raleigh, North Carolina;

(8) the Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules");

(9) Complainant and Respondent have no objection, either procedural or otherwise, to this Hearing.

III. THE CITATION AND NOTIFICATION OF PENALTY

SUMMARY OF CITATION

Complainant issued to Respondent a 2 item citation (the "Citation") alleging serious violations of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina ("Act") with a total proposed penalty of $10,326.20.

Citation 01 – Type Serious

Item Number	Standard	Abatement Date	Penalty
001	29 CFR 1926.100(a)	Corrected During Inspection	$1,625
002	29 CFR 1926.652(a)(1)	Corrected During Inspection	$8,701.20

SPECIFIC ITEMS IN CITATION

A. Citation 01, Item 001 – Type of Violation: Serious

Complainant allege a serious violation of the Act in Citation 01, Item 001 as follows:

29 CFR 1926.100(a): Employees working in areas where there was a possible danger of head injury from impact, or falling or flying objects, or from electrical shock and burns, were not protected by protective helmets:

a) Worksite at Rutledge Road and Tulip Tree – where an employee was in an open trench, over 5 feet in depth, working with no form of head protection worn to protect the employee from falling debris, tools, or other items above the employee.

Date By Which Violation Must Be Abated:	Corrected During Inspection
Proposed Penalty:	$1,625.00

B. Citation 01, Item 002 – Type of Violation: Serious

Complainant allege a serious violation of the Act in Citation 01, Item 002 as follows:

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) Worksite at Rutledge Road and Tulip Tree Court – where two employees were working in an unprotected trench that was over 5 feet in depth.

Date By Which Violation Must Be Abated:	Corrected During Inspection
Proposed Penalty:	$8,701.20

Based upon consideration of Complainant's Complaint, Respondent's Answer, Respondent Teraflex Group, LLC's Pre-Trial Statement, Complainant's Pre-Trial Statement, the Joint Stipulations, the sworn testimony of the witnesses presented at the Hearing, the documents and exhibits received and admitted into evidence, the entire record in this proceeding, and applicable law, the Undersigned makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact the Undersigned as weighed all the evidence and assessed the credibility of the witnesses. Factors taken into account for judging credibility included, but were not limited to, the demeanor of the witness, and any interests, biases, or prejudice the witness may have. Further, the Undersigned considered the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. A judge is not required to enumerate all the facts shown by the evidence, but only sufficient material facts to support the Court's decision. *Green v. Green, 284 S.E.2d*

171, 174, 54 N.C. App. 571, 575 (1981); In re Custody of Stancil, 179 S.E.2d 844, 847, 10 N.C. App. 545, 549(1971). Specific findings are not required on each piece of evidence presented. *See Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993)*(stating that the tribunal "need only find those facts which are material to the resolution of the dispute.")

FINDINGS OF FACT

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter "the Act"), including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§95-133 et seq.

2. Pursuant to N.C.G.S. §95-135 the Review Commission has jurisdiction over the parties and the subject matter of this action.

3. Respondent is a North Dakota limited liability company which was authorized to do business in North Carolina on December 21, 2016; it is active and current and maintains a place of business in Waynesville, North Carolina. Respondent is in the business of performing grading and utility work. Respondent is an "employer" within the meaning of N.C.G.S. Section 95-127(11); Respondent's employees referred to in this matter are "employees" within the meaning of N.C.G.S. Section 95-127(10).

4. On January 10, 2023, Occupational Safety and Health Compliance Officers Michael Greer and Denese Ballew employed by the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at the intersection of Rutledge Road and Tulip Tree Court, Fletcher, Buncombe County, North Carolina (the "Inspection"). The Inspection was initiated pursuant to Operational Procedure Notice (OPN) 123X, Special Emphasis Program for Construction Activities, and pursuant to Compliance Directive CPL 02-00-161 Special Emphasis: Trenching and Excavation.

5. While driving down a public road (Rutledge Road) CSHO Ballew and CSHO Greer observed a construction site with an open trench at the intersection of Rutledge Road and Tulip Tree Court. (The open trench is sometimes herein referred to as "Trench #2".) CSHO Greer was driving; he drove past the construction area and then drove back, through the work zone (signs and signalers), toward the construction site and again passed the construction area where the trench was located. CSHO Ballew observed two persons standing at the long edge of Trench #2 with two persons in the trench. From the vehicle CSHO Ballew took some photographs of the site. CSHO Greer then turned onto Tulip Tree Court and parked. At that time more photographs of the trenching and construction activity at the intersection of Rutledge Road and Tulip Tree Court were taken. CSHO Ballew and CSHO Greer then put on PPE and entered the construction

site at approximately 2:15 in the afternoon. An opening conference was held and a walk-around was conducted. On January 11, 2023 an on-site closing conference was held.

6. As a result of the Inspection, on January 31, 2023, Complainant issued the following Citation and Notification of Penalty (herein referred to as the "Citation"):

CITATION 01 (Serious)

Item No.	Standard	Abatement Date	Penalty
001	29 CFR 1926.100(a)	Corrected During Inspection	$ 1,625.00
002	29 CFR 1926.652(a)(1)	Corrected During Inspection	$ 8,701.20

7. Respondent submitted a timely Notice of Contest dated February 21, 2023. On or about April 24, 2023, Complainant received "Employer's/Respondent's Statement of Position" which requested that formal pleadings be served. The Complaint was filed May 10, 2023 and Respondent's Answer was filed May 30, 2023.

8. The Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules").

9. Complainant and Respondent have no objection, either procedural or otherwise, to this Hearing.

10. Purpose of Respondent's Construction Project

10.1 Respondent's construction project was to install water utility from the south side of Rutledge Road to the north side of Rutledge Road by installing a 6 inch diameter water line;

10.2 A residential subdivision was to be developed on the north side of Rutledge Road;

10.3 To accomplish its task, Respondent had to excavate more than one trench.

11. Site Description on First Day of Inspection – January 10, 2023

11.1 The construction site was located near and at the intersection of Rutledge Road and Tulip Tree Court in Buncombe County, North Carolina;

11.2 Trench #2 was open and was part of the project providing utilities to the proposed new subdivision on the north side of Rutledge Road;

11.3 In general, Rutledge Road ran east to west and Tulip Tree Court ran north to south (and perpendicular to Rutledge Road at the intersection);

11.4 Rutledge Road was a two-lane road, with one lane of travel in each direction;

11.5 Trench #2 extended into the southern lane of Rutledge Road; the southern lane of Rutledge Road was blocked preventing traffic from using that lane;

11.6 Trench #2 was immediately adjacent to, and partially in, the intersection of Rutledge Road and Tulip Tree Court

11.7 There were signalmen controlling traffic and all traffic traveling Rutledge Road had to use the northern lane of Rutledge Road;

11.8 Trench #2 was the only open trench at the construction site on the first day of the Inspection.

12. Additional Specifics Regarding Citation 01 Item 001 29 CFR 1926.100(a)

12.1 CSHO Ballew took photographs of the construction site, including Trench #2, while she and CSHO Greer were riding in their vehicle on Rutledge Road (before they parked on Tulip Tree Court). One of the photographs shows two men standing at the long side of the trench and two workers in the trench.

12.2 The two men standing at the side of Trench #2 were Mr. Craig, Respondent's foreman at the construction site, and Mr. Roberts, a representative of the City of Hendersonville. The side of the trench was approximately 20 feet long. The workers in the trench were within approximately 20 feet of Mr. Craig. There were no obstructions to Mr. Craig's view of the workers in the trench.

12.3 The two employees of Respondent working in Trench #2 were Mr. Lorenzo Tovar and Mr. Hugo Cruz.

12.4 Mr. Graig testified at the Hearing in English; no evidence was presented that he was bilingual in Spanish.

12.5 Mr. Tovar was not called to testify at the Hearing; however, the testimony of Mr. Brown established that Mr. Tovar was bilingual in Spanish and English.

12.6 Mr. Cruz was not called to testify at the Hearing; however, the testimony of Mr. Brown established that Mr. Cruz spoke only Spanish and was not bilingual in English.

12.7 Complainant's evidence showed that there were tools (shovels; prod) located on the ground at the top of, and on the benches along the sides of, Trench #2. Respondent presented no evidence challenging this evidence.

12.8 Complainant's evidence showed that above the employee's head was loose gravel/sand and asphalt associated with an exposed asphalt/road bed area along the length of Trench #2. Respondent presented no evidence challenging this evidence.

12.9 The worker not wearing a hard hat was in various positions in the excavation – standing, bending over – while performing his work.

12.10 CSHO Greer testified that the tools or gravel/sand/asphalt could have fallen and impacted the worker in Trench #2. Respondent presented no evidence challenging this testimony.

12.11 Complainant's evidence show that if debris, tools, or other items above the worker were to fall and strike the worker the resulting injuries could be contusions, a concussion, and/or bone fractures which may require medical care or hospitalization. Respondent presented no evidence challenging this evidence.

12.12 At the Hearing Respondent's witnesses did not deny that each worker in Trench #2 should have been wearing a hard hat and did not deny that a hazard existed from not wearing a hard hat.

12.13 Mr. Craig testified that he and Mr. Roberts were talking with Mr. Tovar (the worker in the trench wearing a hard hat) concerning the waterline connection that was being installed in the trench. The other worker in the trench, Mr. Cruz (who was not wearing a hard hat) was not included in the discussion. Mr. Craig testified that he had just returned to the trench area (from a personal needs break), that he had been there only about 15 to 30 seconds, that he was talking to Mr. Roberts and Mr. Tovar, and that he did not notice that Mr. Cruz was not wearing a hard hat. He also testified that at some point Mr. Cruz exited the trench on his own and that the next time he saw Mr. Cruz he was in the trench wearing a hard hat. Mr. Craig further testified that he had been at the trench before he took his break but, at that time, Mr. Cruz was not in the trench and was not wearing a hard hat.

12.14 Respondent had a written 435 page Health Safety & Environmental Manual that had sections such as but not limited to policy overview, HSE planning, abrasive blasting, asbestos awareness, confined spaces, electrical safety, power tools, trenching/excavation, and hazard communication, and set out in detail its commitment to provide safe and healthy working conditions and outlined the steps Respondent takes to meet those commitments.

12.15 Respondent had a written 53 page Employee Handbook which expressly states "Teraflex Group expects employees to follow rules of conduct that will protect the interests and safety of all employees…"

12.16 Respondent's written rules and policy regarding trenching and excavation were set out in a 10 page policy statement contained in Complainant's Investigation Report.

12.17 Respondent had a written 64 page power-point presentation to train employees regarding trenching and excavation, and a written 3 page excavation check-list.

12.18 Respondent had a safety committee made up of the general manager, supervisor, and safety manager that met weekly to discuss any safety issues or concerns. Any pertinent information would be disseminated to supervisors out in the fields.

12.19 Supervisors out in the field conducted weekly safety meetings with their crews and conducted daily toolbox talks.

12.20 Respondent had a full-time dedicated safety manager for the company.

12.21 At the construction site at the time of the Inspection there were two 'competent persons' trained in trenching and excavation, which were Mr. Craig and Mr. Tovar.

12.22 There were daily inspections of work as well as 'surprise inspections' for work safety, weekly tool-box meetings on safety topics, and annual safety days on safety topics.

12.23 In the event of violations of Respondent's work rules Respondent had a disciplinary program that was followed: verbal warnings, written warnings and termination; employees had in fact been disciplined in accordance with the disciplinary program.

12.24 As of the time of the Hearing no worker had been disciplined regarding the failure to wear a hard hat at the time of the Inspection. Respondent's witnesses testified that (i) Respondent thought that Mr. Tovar was the worker in Trench #2 who was accused of not wearing a hard hat, that Mr. Tovar was questioned, and that Mr. Tovar affirmatively stated that he was wearing his hard hat; Respondent thought the citation was in error; and (ii) Respondent's witnesses testified that they did not know that Mr. Cruz was the worker not wearing a hard hat in Trench #2 until just a few days before the Hearing.

12.25 Respondent's Health Safety & Environmental Manual, the Employee Handbook, the power-point presentation used to train employees regarding trenching and excavation, the rules and policy regarding trenching and excavation, and the excavation checklist presented at the Hearing were in English; no evidence was presented that these documents had been translated into Spanish and distributed to Spanish speaking workers. No evidence was presented that the safety meetings with the crews, the daily toolbox talks or the annual safety days on safety topics were presented in, or translated into, Spanish for the benefit of Spanish speaking workers. Respondent did not present evidence regarding how it provided its health and safety rules and guidelines, either orally or written, to workers who were not bilingual and spoke only, or primarily, Spanish.

12.25 Regarding the penalty calculation relative to Citation 01 Item 001, Complainant assessed a Gravity Based Penalty of $6,500.00 (based on medium severity and low probability) and applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty of $1,625.00: 40% credit for size; 25% credit for good faith; and 10% credit for history (total 75% credit). Respondent did not raise any specific challenge as to the proposed penalty amount itself or the Adjustment Factors.

Additional specifics regarding Citation 01 Item 002 29 CFR 1926.652(a)(1)

13 Trench #1 and Its Spoil Pile

13.1 Prior to the first day of the Inspection, and prior to excavating Trench #2, Respondent had excavated a trench ("Trench #1") which was located to the south of Rutledge Road and west of Tulip Tree Court;

13.2 Installation of utilities in Trench #1 was complete and Trench #1 had been filled (was no longer open), prior to the Inspection;

13.3 Trench #1 was adjacent to or near the ramp area of Trench #2 (i.e. it was south of Rutledge Road and west of Tulip Tree Court);

13.4 When Trench #1 was dug the excavated soil was place in a spoil pile ("Trench #1 Spoil Pile") on the south side of Rutledge Road and to the west of the area where Trench #2 would be dug;

13.5 Trench #1 Spoil Pile was in the vicinity of a functional fire hydrant, but at a place which did not interfere with the use of the hydrant if such use were necessary;

13.6 Some soil remained in Trench #1 Spoil Pile such that Trench #1 Spoil Pile was only about 12-16 inches high;

13.7 The soil remaining in the Trench #1 Spoil Pile (the "Trench #1 Remaining Soil") had been exposed for one or more days to environmental elements such as light, air, temperature variation, wind and water;

13.8 Mr. Graig testified that the amount of Trench #1 Remaining Soil was not of sufficient quantity to have been the entire spoil pile created when Trench #2 was excavated.

14. Trench #2

14.1 Trench #2 was open at the time the OSHA Inspectors began the Inspection;

14.2 Trench #2 had been excavated using a Caterpillar 310 with a 36 inch bucket;

14.3 In order to open Trench #2 Respondent had to saw cut through paved roadway;

14.4 The ramp area providing ingress/egress to Trench #2 was considered by the OSHA Inspectors to have been properly prepared;

14.5 A six inch water line was being installed along the bottom of Trench #2.

15. Trench #2 Spoil Pile

15.1 When Tench 2 was excavated the excavated soil was placed in a spoil pile on the north side of Rutledge Road (the "Trench #2 Spoil Pile"); the explanation for using that location was that placing the spoil pile on the south side of Rutledge Road nearer to Trench #2 would have resulted in the Trench #2 Spoil Pile hindering the use of a fire hydrant if it were needed;

16. Trench #2 Depth

16.1 CSHO Ballew attempted to measure the depth of Trench #2 but her measurement was taken at an angle and considered not to be accurate; CSHO Greer testified that CSHO Ballew's measurement of the depth of Trench #2 was not considered by Complainant for purposes of issuing the citation to Respondent;

16.2 While the OSHA Inspectors were present Mr. Graig went down the ramp and made some measurements of the height of Trench #2 at one location; Mr. Graig called out his measurements and the measurements were written down by CSHO Greer;

16.3 Trench #2 had been benched; the measurements called out by Mr. Craig ("Graig's Measurements") were as follows:

from trench floor to first bench: 32 inches (vertical wall);
the first bench was 16 inches (horizontal);
from first bench to second bench: 16 inches (vertical wall);
the second bench was 16 inches (horizontal); and
from second bench to ground level: 16 inches (vertical wall);

16.4 There was only one series of measurements made by Mr. Craig;

16.5 Mr. Graig acknowledged that the benching of Trench #2 was 'sloppy';

16.6 There was conflicting testimony concerning where Mr. Craig was standing when he made the measurements; the measurements where of the wall of Trench #2 (i.e. and not measurements of the ramp area) in the area where a valve was being installed in the water line; no other measurements of the depth of Trench #2 were made at any other location;

16.7 Based on Graig's Measurements CSHO Greer asserted that the calculated height of Trench #2 was 64 inches (5 feet 4 inches), the height being the sum of the vertical walls;

16.8 CSHO Greer relied on Mr. Craig's statement that both long sides of Trench #2 were identical; however, no measurements or other evidence were presented substantiating Mr. Graig's statement;

16.9 The top portion of Trench #2 consisted of 6 to 7 inches of roadway asphalt;

16.10 CSHO Greer considered the depth of Trench #2 to be 5 feet 4 inches; Mr. Craig excluded the asphalt layer in determining trench depth and considered the depth of Trench #2 to be less than 5 feet;

16.11 Mr. Graig asserted that CSHO Greer asked him to enter Trench #2 to take measurements of the trench depth; CSHO Greer denied that assertion.

17. Trench #2 Width

17.1 No measurement was made of the width of the floor of Trench #2; however, Mr. Graig testified that Trench #2 was dug using a 36 inch bucket so the trench floor would have been 'a little bigger than 36 inch bucket';

17.2 The OSHA Inspectors measured the width of Trench #2 to be 9 feet 3 inches; no photographic evidence was introduced to verify that measurement and there was no testimony concerning the means-and-methods used in obtaining the width measurement; there was no evidence regarding whether one or more measurements of the width of Trench #2 were taken;

17.3 Mr. Graig testified that the saw cut through paved roadway which had to be made in order to open Trench #2 was 11 feet in width and that Trench #2 was 11feet wide; no measurement by Mr. Graig and no engineering/architect drawings or other written specifications showing the proposed, or as-built, dimensions for Trench #2 were introduced into evidence.

18 Trench #2 Length

18.1 The OSHA Inspectors measured the length of Trench #2 to be 20 feet;

18.2 There appears to be no controversy between Complainant and Respondent that Trench #2 was 20 feet long.

19. Materials Along Side Of Trench #2

19.1 Mr. Craig testified that the top portion of Trench #2 was made of materials forming the road surface and the road bed, including. asphalt, sand, and gravel;

19.2 Based on photographs introduced into evidence there was road surface/bed materials at the top of each long side of Trench #2;

19.3 Mr. Craig testified that the road surface/bed materials consisted of approximately 6 to 7 inches of asphalt placed on top of approximately 9 inches of aggregate road base;

19.4 Mr. Craig testified that he believed the soil below the aggregate road base to be virgin undisturbed soil as evidenced by the presence of roots in the soil and there being no utilities under the aggregate road base;

19.5 Mr. Craig testified that he classified the soil type in Trench #2 as A over B, or B.

20. Soil Testing by CSHO Greer

20.1 CSHO Greer observed a spoil pile on the south side of Rutledge Road;

20.2 CSHO Greer inquired of Mr. Craig if the spoil pile on the south side of Rutledge Road was the soil from the open trench, and Mr. Craig confirmed to him that the soil in that spoil pile was from the open trench;

20.4 Mr. Craig did not inform CSHO Greer that there had been a prior open trench at the construction site;

20.5 Mr. Graig did not inform CSHO Greer about the spoil pile on the north side of Rutledge Road; Mr. Graig testified that his reason was because CSHO Greer 'did not ask';

20.6 The spoil pile on the south side of Rutledge Road was the Trench #1 Spoil Pile;

20.7 CSHO Greer assumed that the spoil pile on the south side of Rutledge Road contained the soil from Trench #2;

20.8 CSHO Greer conducted soil penetrometer tests, and other soil classification tests, on the soil from the spoil pile on the south side of Rutledge Road (i.e. Trench #1 Spoil Pile);

20.9 The soil subjected to testing by CSHO Greer was not soil from Trench #2;

20.10 Mr. Craig saw CSHO Greer conducting soil classification tests on the soil that had been removed from Trench #1;

20.11 Mr. Craig did not inform CSHO Greer that the soil he was testing was not from Trench #2.

21. Trench Box

21.1 Mr. Graig testified that there was a trench box on the construction site;

21.2 On cross examination Mr. Craig admitted that the trench box was not the appropriate size or design for use in Trench #2.

DISCUSSION

A. General Applicable Law To Establish A Violation

To establish a violation of a specific OSHA standard, Complainant must establish: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to or had access to the hazardous condition covered by the standard; and (4) the employer had actual or constructive knowledge of the violative condition (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). The elements are collectively referred to herein as the "Required Elements".

Further, to establish that the violation was serious the Complainant must also establish that the hazard created the possibility of an accident and that the substantially probable result of an accident could be death or serious bodily injury. *Commissioner of Labor v Liggett Group, Inc., OSHANC 94-3175 (1996); Commissioner of Labor v Yates Construction Company, Inc., OSHANC 93-2967 (1995).*

Complainant has the burden of establishing each Required Element by a preponderance of the evidence. *Commission Rule .0514(a) of the Rules of Procedure of the Safety and Health Review Commission of North Carolina; See Hartford Roofing Co., 17 BNA OSCH 1361, 1365 (No. 92-3855, 1995); N&N Contrs. Inc. v. OSHRC, 255 R.3d 122, 126 (4th Cir. 2001).* A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

An employer who has been issued a citation can present evidence which negates or reduces the validity or strength of Complainant's evidence offered to support a Required Element. However, when a standard provides for an exception to its applicability and the employer claims the benefit of such exception then the employer bears the burden of proof that its situation falls within that exception. *See Ford Dev. Corp., 15 BNA OSHC 2003, 2010 (No. 90-1505, 1992; Sec'y of Lab. v. J.D. Abrams, LP, 2022 OSAHRC Lexis 32 (O.S. H.R.C. August 29, 2022).*

Regarding the alleged violation of 29 CFR 1926.100(a), Respondent asserts that it did not have knowledge of the violative condition and it also raises the affirmative defense of unpreventable employee misconduct.

Regarding the alleged violation of 29 CFR 1926.652(a)(1), Respondent asserts that Trench #2 falls within the exceptions specified in the standard.

Regarding Citation 01 Item 001 29 CFR 1926.100(a)

29 CFR 1926.100(a) provides: "Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets."

Complainant established by a preponderance of evidence that one of Respondent's workers was working the Trench #2 without wearing a hard hat and that there were tools and other material such as asphalt/road bed materials gravel, etc. above his head and on the benches on the sides of the trench; those items/materials could have slipped/fallen and impacted the worker; impact could have resulted in injury to the worker requiring medical attention. The depth of the trench is not determinative of whether or not a violation of 29 CFR 1926.100(a) has occurred.

Respondent's witnesses did not deny that the worker should not have been in the trench without his hard hat or assert that he was not exposed to a serious hazard. Respondent did assert that Respondent did not have knowledge of the worker being in the trench without his hard hat. Evidence was presented that the worker may have been in the without his hard hat for only a short time period.

Even if a worker is only in a trench without his hard hat for a short duration, this nevertheless constitutes exposure. *See Flint Eng'g & Const. Co., No 90-2873, 1992 WL 394727, at *4 (OSHRC, Dec. 21, 1992)* ("even if a hazardous condition exists only briefly, or if employees are exposed to a hazardous condition only briefly, brief duration does not negate the violation or its seriousness").

Regarding knowledge, "[e]mployer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing, Inc., 1995 WL 82313, at *3.* To prove employer knowledge the Complainant "must show that the employer either actually knew of the noncomplying condition, or constructively knew of it – that is, the employer could have known with the exercise of reasonable diligence." *Par Elec. Contractors, Inc., No. 99-1520, 2004 WL 334488, at *3 (OSHRC, Feb 19, 2004).* The knowledge of a supervisory employee may be imputed to his or her employer. *Id.*

In this case Mr. Graig, who was Respondent's foreman at the job site, was standing at the side of Trench #2 talking with Mr. Roberts, a representative of the City of Hendersonville, who was standing beside him. Mr. Graig was simultaneously talking with Mr. Tovar, who was working in the trench, about the valve being installed. Mr. Cruz, who was not wearing a hard hat, was also working in the trench. The workers in the trench were in plain view of Mr. Graig. Mr. Graig was within approximately 20 feet of the workers in the trench. No evidence was presented that Mr. Graig was not able to simultaneously see Mr. Tovar and Mr. Cruz. With the exercise of reasonable diligence Mr. Graig could have observed both workers in the trench. Case law has established that where the cited conditions are in plain view and supervisory personnel

are present as is this case, this constitutes constructive knowledge of the violative conditions. *See Kokosing Constr. Co., 17 BNA OSHC 1869, 1871-72 (No. 92-2596, 1996); American Airlines, Inc., 17 BNA OSHC 1552, 1555 (No. 93-1817 and 93-1965, 1996).* The Undersigned determines that Respondent had knowledge of the violative condition cited in Citation 01 Item 001imputed through its foreman Mr. Graig.

Respondent asserts the defense of unpreventable (isolated) employee misconduct with respect to the alleged violation of 29 CFR 1926.100(a). Respondent carries the evidentiary burden of proving this affirmative defense. *Commission Rule .0514(a) of the Rules of Procedure of the Safety and Health Review Commission of North Carolina.* The four elements of proof required are (1) that the employer had established work rules designed to prevent the violative condition from occurring; (2) that the employer has adequately communicated those work rules to its employees; (3) that employer has taken steps to discover violations of those rules; and (4) that the employer effectively enforced the rules when violations have been discovered. *Gem Indusl., Inc., 17 O.S.H. Cas. (BNA) ¶ 1861 (O.S.H.R. Dec. 6, 1996); Jensen Constr. Co., 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979); see also, General Dynamics Corp. v. OSHRC, 599 F.2d 453 (1st Cir. 1979).*

Respondent had established safety work rules regarding trenching and excavations, took steps to discover violations and attempted to enforce its rules. However, an employer may not take advantage of "an adequately communicated work rule" when it did not communicate the rules to a non-English speaking employee in a language that employee could understand. See, e.g., Modern Continental Construction Company, Inc. v. OSHRC, 305 F.3d 43, 52 (1st Cir. 2002); Star Brite Construction Co., 19 (BNA) OSHC 1687, 1695 n.12 (N. 95-0343, 2001). Respondent's Health Safety & Environmental Manual, Employee Handbook, policy statement pertaining to trenching, excavation checklist, and power-point presentation to train employees regarding trenching were in English, not Spanish. There was no testimony presented that the toolbox meetings or other oral safety training sessions were presented in Spanish. Based on the record, the Undersigned cannot determine by a preponderance of the evidence whether Respondent's work rules were adequately communicated to workers such as Mr. Cruz who is Spanish speaking and not bilingual with respect to the English language.[1] When the record in a case lacks sufficient evidence on a disputed issue, normally that issue is resolved against the party having the burden of proof. *See Caterpillar Tractor Co., No. 80-4061, 1986 WL 53446 (OSHRC, Apr. 16, 1986)* Therefore, because Respondent failed to establish by the preponderance of the evidence that it adequately communicated its work rules to all its employees, including those who speak only Spanish, Respondent failed to establish that the violation was due to unpreventable (isolated) employee misconduct.

[1] The video recording on day 2 contains the following at approximately 6:15 - 6:17: Question by Attorney Beveridge: "At any point did you, you know, investigate further, um, or ask Mr. Craig, you know, whether he had been the one, you know, not wearing the hard hat?" Answer Mr. Brown: "No I didn't. Mr. Cruz is not, is not, bilingual; he's just Spanish, so anything I had to say with him I had to say to Lorenzo and Lorenzo had to translate it. But the hard hat part with Hugo didn't come up. I did talk to Lorenzo about the hard hat because that's what I thought it was all about."

Regarding the penalty amount assessed by Complainant, Respondent did not raise any specific challenges to the proposed penalty amount itself or its method of calculation. However, when a citation is contested the Commission has the sole authority to assess penalties. *Valdak Corp., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), aff'd 73 F.3d 1466 (8th Cir. 1996).* To determine the appropriate penalty, the following must be considered: the size of the business of the employer; the violation's gravity; the employer's good faith; and the employer's violation history. *Orion Constr., Inc., 18 BNA OSHC 1867 (No. 98-2014, 1999).* At the time the Citation was issued the maximum statutory penalty for a serious violation was $7,000.00. Based on medium severity and low probability a Gravity Based Penalty of $6,500.00 is appropriate. Regarding size: Respondent had about 100 employees so a credit of 40% is appropriate; regarding gravity, one person was exposed, and being hit in the head by a falling tool or piece of gravel, dirt or asphalt could result in severe injury; regarding good faith Respondent had a safety and health program so a credit of 25% is appropriate; regarding history Respondent had not had a serious violation of OSHA in the last three years so a credit of 10% is appropriate. Based on a Gravity Based Penalty of $6,500.00 applying this analysis results in a total adjusted penalty of $1,625.00.

Regarding Citation 01 Item 002 29 CFR 1926.652(a)(1):

29 CFR 1926.652(a)(1) provides:

"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 except when

(i) Excavations are made entirely in stable rock; or
(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in."

In this matter, Respondent does not assert that Trench #2 was excavated entirely in stable rock but it does assert that Trench #2 was less than five feet in depth. The calculated depth of Trench #2 based on Graig's Measurements was 65 inches (5 feet 4 inches). However, Mr. Graig testified that in order to excavate Trench #2 it was necessary to saw cut through a portion of the roadway and that the top 6 to 7 inches of Trench #2 was asphalt. Mr. Graig did not consider the asphalt in his determination of trench height; excluding the asphalt layer Mr. Graig asserted that Trench #2 was less than 5 feet deep.

Mr. Graig testified that he could not recall whether he had been taught to exclude asphalt in determining trench depth. Respondent's work rules pertaining to trenching does not include a provision that an asphalt layer at the top of a trench should be disregarded in determining trench depth. Applicable case law provides that depth includes the asphalt layer. *See Sec'y of Lab. v.*

J.D. Abrams, LP, 2022 OSAHRC LEXIS 32 (O.S.H.R.C. August 29, 2022); see also, Andrew Catapano Enters., 1994 OSAHRC LEXIS 92 (O.S.H.R.C. August 9, 1994).

In this matter Respondent did not carry its burden of proof that Trench #2 was a trench within the exceptions to the applicability of 29 CFR 1926.652(a)(1).

Relating to Trench #2 Complainant's evidence regarding the width of the top of Trench #2 was disputed. Further, Complainant's evidence regarding the classification of the soil in Trench #2 was disputed. Complainant's determination that Trench #2 was not properly sloped/benched was disputed. Based on the evidence presented at the Hearing Complainant did not carry its burden of proof regarding these matters. Complainant has not demonstrated by a preponderance of evidence that 29 CFR 1926.652(a)(1) was violated. However, Complainant's failure to carry its burden of proof does not mean that Trench #2 was protected from cave-ins by an adequate protective system.

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain Conclusions of Law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); Peters v. Pennington, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011); Warren v. Dep't of Crime Control, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, disc. Rev. den., 366 N.C. 408, 735 S.E.2d 175 (2012).* 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 an "employer" within the meaning of N.C.G,S. §95-127(11); Respondent's employees referred to in the Complaint are "employees' within the meaning of N.C.G.S. §95-127(10).

3. The Safety and Health Review Commission of North Carolina has jurisdiction over the parties and the subject matter of this Hearing, and Respondent is subject to the provisions of the Act.

4. Complainant has the burden to prove by the preponderance of evidence that the OSHA standard that is the basis for the citation issued applies to the cited condition or conduct.

5. Respondent carries the evidentiary burden of proof by the preponderance of evidence of its affirmative defense of unpreventable employee misconduct.

6. When a standard provides for an exception to its applicability and the Respondent claims the benefit of such exception, Respondent carries the evidentiary burden of proof by the preponderance of evidence to show that its situation falls within the stated exception.

7. Relative to Citation 01 Item 001, the alleged serious violation of 29 CFR 1926.100(a): Complainant has demonstrated by a preponderance of evidence that the standard applies; that one of Respondent's worker was in a trench without wearing a hard hat; that Respondent, though its foreman knew, or with reasonable diligence could have known that the worker was in the trench without wearing a hard hat; that the worker was exposed to the hazard of possible impact from falling objects, and that the probable result of such impact would be serious physical injury requiring medical attention. Complainant has established that Respondent violated 29 CFR 1926.001(a) and that the violation is properly classified as serious.

8. With due regard given to the enumerated penalty calculation factors, the Undersigned finds a penalty of $1,625.00 is appropriate for the serious violation of 29 CFR 1926.100(a).

9. Relative to Citation 01 Item 002, the alleged serious violation of 29 CFR 1926.652(a)(1): Complainant did not carry its burden of proof to establish that there was a serious violation of this standard.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is Ordered that:

1. Citation 01 Item 001 alleging a serious violation of 29 CFR 1926.100(a) is AFFIRMED and a penalty of $1,625.00 is ASSESSED.

2. Citation 01 Item 002 alleging a serious violation of 29 CFR 1926.652(a)(1) is VACATED and no penalty is assessed.

SO ORDERED.

Effective the 31st day of January 2024.

R. Joyce Garrett
Hearing Examiner

CERTIFICATE OF SERVICE

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

AARON A. DEAN
MOSS & BARNETT
150 SOUTH FIFTH ST.
SUITE 1500
MINNEAPOLIS, MN 55402

MADISON BEVERIDGE
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602

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 2 DAY OF February 2024.

Karissa B. Sluss
Docket Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
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