

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

HARRISSON-WRIGHT CO., INC.,

RESPONDENT.

DOCKET NO. OSHANC 94-3087
OSHA INSPECTION NO. 111162152
CSHO ID NO. A4624

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 11:00 A.M. on the 15th day of December, 1995 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and L. McKay Whatley, sitting as designated member of the North Carolina Safety and Health Review Board. A rehearing of the Appeal with the taking of further evidence bearing upon the characteristics of the spoil pile and trench, the nature of the hazard and the seriousness of the potential injury was heard on January 22, 1996 before the same Board members at or about 9:00 a.m. at the Wake County Courthouse, Room 700 on the seventh floor, 316 Fayetteville Street Mall, Raleigh, North Carolina.

APPEARANCES

John Sullivan, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

L. Cameron Caudle, Jr., of Caudle & Spears, P.A. for Respondent.

ISSUES PRESENTED

1. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the Respondent violated 29 CFR 1926.651(j)(2) by placing a spoil pile within two feet of a trench?
2. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that Respondent committed a serious violation of 29 CFR 1926.651(j)(2) by placing a spoil pile within two feet of a trench?
3. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the Respondent committed a nonserious violation of 29 CFR 1926.59(g)(8) for failing to have MSDS sheets available at the worksite?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.651(j)(2) which provides:

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 combination of both if necessary.

2. 29 CFR 1926.59(g)(8) which provides:

The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access, microfiche, and other alternatives to maintaining paper copies of the material safety data sheets are permitted as long as no barriers to immediate employees access in each workplace are created by such options.)

3. 29 CFR 1926.59(g)(9) which provides:

Where employees must travel between workplaces during a work shift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

4. N.C.G.S. § 95-127(18) which provides:

A "serious violation" shall be 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 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. (emphasis added).

Having reviewed and considered the record, the briefs, the arguments of the parties and the evidence presented at the rehearing, the Safety and Health Review Board of North Carolina hereby reverses the decision of the Hearing Examiner in part and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).
4. The employer (Respondent) Harrison-Wright Co., Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. An inspection was made of Respondent's work site located in Wilmington, North Carolina on June 15, 1994 by the Occupational Safety & Health Division of the North Carolina Department of Labor. The inspection was initiated as a result of an apparent serious violation of the trenching standards observed by a safety compliance officer from a public highway pursuant to an OSHA national emphasis program on trenching violations.
6. As a result of that inspection two serious violations of the trenching standards were alleged in one serious citation and two nonserious violations of the hazardous communications standards were alleged in one nonserious citation which were issued on July 7, 1994.
7. An informal conference was held on August 11, 1994 and by letter dated August 15, 1994, Respondent was notified of the results of the informal conference.
8. By letter dated August 29, 1994, Respondent rejected the settlement proposed as a result of the informal conference and contested all of the citations.

9. Respondent filed its statement of position requesting formal pleading with the Review Board on September 15, 1994.

10. Complainant filed its complaint on October 4, 1994 and the Respondent filed its answer with the Board on October 25, 1994.

11. On January 26, 1995 a hearing was held before the honorable Carroll D. Tuttle. At the beginning of the hearing the Complainant moved to dismiss Citation Two, Item 1 which concerned a written hazard communication program and Judge Tuttle granted that motion.

12. At the conclusion of the Complainant's evidence, the Respondent moved to dismiss Citation one Item 1 which concerned safe egress from a trench with a depth greater than four feet and Judge Tuttle granted that motion.

13. At the conclusion of the hearing Judge Tuttle requested that the parties submit post-hearing briefs which both parties presented during the week after the hearing.

14. On February 23, 1995, Judge Tuttle issued an order holding the following:

1. Citation One, Item 1 was dismissed;

2. Citation One, Item 2 was affirmed as a serious violation of 29 CFR 1926.651(j)(2), with a proposed penalty of \$5,950.00;

3. Citation Two, Item 1 was dismissed and

4. Citation Two, Item 2 was affirmed as a nonserious violation of 29 CFR 1926.59(g)(8), with no penalty.

15. On March 27, 1995, Respondent timely petitioned the Review Board for a review from the portion of the decision of the hearing examiner holding that the Respondent committed a serious violation of 29 CFR 1926.651(j)(2) and a nonserious violation of 29 CFR 1926.59(g)(8).

16. An Order granting review was filed on April 10, 1995.

17. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

18. On August 21, 1995, the Board issued a Notice of Review granting Respondent's Petition for Review and scheduling the hearing for September 27, 1995.

19. The issues on appeal were heard by the full Board on December 15, 1995.

20. On January 5, 1996, the Board issued an Order scheduling the case for an evidentiary hearing on January 22, 1996 on the issues relating to the characteristics of the spoil pile and trench, the nature of the hazard and the seriousness of the potential injury.

The following findings are based primarily on the evidence taken January 22, 1996:

21. The Board adopts the Hearing Examiner's findings of facts numbered 16 through 18 and 23 through 25.

22. The trench was dug in undisturbed stable sandy soil which was covered by grass sod whose roots penetrated deep into the soil and held the soil together.

23. The trench ran parallel to a highway but was 50 to 60 feet from the highway so that vibrations from the highway did not affect the stability of the trench.

24. The height of the spoil pile within two feet of the trench ranged from 5 inches to 8 inches and was not of sufficient weight or height to cause a cave-in of the walls of the trench.

25. The 5 inches to 8 inches of soil in the spoil pile within 2 foot of the edge of the trench created the hazard that some of the spoil pile would fall into the trench but the substantially probable result of that spoil pile falling into the trench was not death or serious bodily injury.

26. Two employees, Matt Warren and Daniel Batten were exposed to the hazard of some of the spoil pile falling into the trench.

27. The Respondent's employees often worked at several different work sites during the day and that on the day of the inspection, the foreman, Thomas Garner worked at another site.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

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 Board has jurisdiction of this cause and the parties are properly before this Board.
3. The Commissioner has failed to prove by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1926.651(j)(2) by placing the spoil pile within 2 feet of the edge of the trench.
4. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a nonserious violation of 29 CFR 1926.651(j)(2) by placing the spoil pile within 2 feet of the edge of the trench.
5. The Commissioner has failed to prove by the greater weight of the evidence that the Respondent committed a nonserious violation of 29 CFR 1926.59(g)(8) for failing to have MSDS sheets available at the worksite.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence. Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In order to prove that the Respondent committed a serious violation of a specific standard the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

1. A hazard existed;
2. employees were exposed;
3. the hazard created the possibility of an accident;
4. the substantially probable result of an accident could be death or serious physical injury and
5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The standard, 29 CFR 1926.651(j)(2), and the case law support at least two ways that a violation of the standard can be serious. The first is if there is danger of a large rock or of a huge spoil pile rolling or falling onto an employee in a trench and causing serious physical harm. The other is the presence of the spoil pile within two feet of the trench contributing to the danger of a cave-in which could result in a serious accident. The Commissioner has proven that there is a possibility of an accident in having the spoil pile within two feet of the trench but has failed to prove by a preponderance of the evidence that the substantially probable result of an accident could be death or serious physical injury. The evidence and the findings of fact support the conclusion that if an accident occurred the resulting injuries would be nonserious. See, Brooks v. McWhirter, 2 NCOSHD 115, 303 NC 573 (Supreme Court, 1981). (The North Carolina Supreme Court reversed the Board's conclusion that a trenching violation was serious but found that the Commissioner had shown a nonserious violation). The case law and the evidence before the Board supports a finding of a nonserious violation for a spoil pile with these characteristics. See, e.g., Brooks v. Trans-State Construction Company, 4 NCOSHD 246 (1991); Brooks v. Marboro Constructors, Inc., 5 NCOSHD 224 (1993); Brooks v. T & S Road Boring, Inc., 4 NCOSHD 569 (1992).

The only findings of fact made by the hearing examiner that support a conclusion that the spoil pile violation is serious was the opinion of the safety officer that the hazard created by the spoil pile was a cave-in and that the substantially probable result of the cave-in would be death or broken bones. A further finding was that the men had to squat to make the pipe connections and that the trench was close to a highway which increased the possibility of a cave-in. The evidence is that the trench was not susceptible to a cave-in and was 50 to 60 feet from the highway and that the traffic on the highway at that distance from a stable shallow trench would not contribute to a cave-in. The preponderance of the evidence is that the spoil pile did not create the hazard of a cave-in and the Commissioner has failed to prove the existence of a hazard that could cause a serious accident. A serious trenching violation may be proven by opinion testimony that the substantially probable result of an accident could be death or serious injury. See, Brooks v. McWhirter, 2 NCOSHD 115, 303 NC 573 (Supreme Court, 1981). However, if that opinion is contradicted by the preponderance of the evidence that the result of an accident would be nonserious, then the finding is within the discretion of the Board..

The Respondent's position with respect to the violation of 29 CFR 1926.59(g)(8) is that they met the requirements of 29 CFR 1926.59(g)(9) and were allowed to keep their MSDS's at a central location and were not required to keep them at the job site. Section 9 provides:

Where employees must travel between workplaces during a work shift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at the primary

workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

The evidence at the hearing puts the Respondent within the purview of Section 9 and allows it to keep its MSDS sheets at a central location and Respondent was not in violation of 29 CFR 1926.59(g)(8) and the citation for that violation is dismissed.

The remaining item to be considered is the appropriate penalty for the nonserious violation of 29 CFR 1926.651(j)(2). N.C.G.S. 95-138 states the following with respect to penalty assessment by the Board:

. . . the Board in case of an appeal, shall have authority to assess all civil penalties provided by this Article, giving due consideration to the appropriateness of the penalty with respect to the following factors:

- (1) Size of the business of the employer being charged,
- (2) The gravity of the violation,
- (3) The good faith of the employer, and
- (4) the record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.

. . . the report, decision, or determination of the Board on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

After giving due consideration to the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board finds that a penalty of \$500.00 is appropriate for the nonserious violation of 29 CFR 1926.651(j)(2) by Respondent.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's February 23, 1995 Order in this cause be, and hereby is, **REVERSED** with respect to the holding affirming Citation One, Item 2 as a serious violation and Respondent is found to have committed a nonserious violation of 29 CFR 1926.651(j)(2) and is **ORDERED** to pay a penalty of \$500.00 to the Department of Labor;

The Review Board further **ORDERS** that the Hearing Examiner's holding affirming Citation Two, Item 2 as a nonserious violation of 29 CFR 1926.59(g)(8) is hereby **REVERSED** and Citation Two, Item 2 is **DISMISSED**. The disposition of the remainder of the citations pursuant to the Hearing Examiner's order was not appealed and is not affected by this order.

This the 1st day of November, 1996.

ROBIN E. HUDSON, CHAIR

KENNETH K. KISER, MEMBER

L. MCKAY WHATLEY, DESIGNATED MEMBER