BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CLANCY & THEYS
CONSTRUCTION CO.
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 97-3570
OSHA INSPECTION NO. 301783197
CSHO ID NO. P9873

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 13th day of March, 2000 in Room 124 on the first floor of the Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by J. B. Kelly, Chairman, Robin E. Hudson, Member and Henry M. Whitesides Member of the North Carolina Safety and Health Review Board.

APPEARANCES

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

Jay M. Wilkerson , of BUGG & WOLF, 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 Respondent committed a serious violation of 29 CFR 1926.652(a)(1) by having employees working in a trench 5.8 feet deep in type B soil without adequate sloping and benching or other form of cave-in protection?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".

2. 29 C.F.R. §1926.652(a)(1) which provides:

> (a)(1) 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:
>
> > (a)(1)(i) Excavations are made entirely in stable rock; or

(a)(1)(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.

3. 29 C.F.R. §1926.652(b) which provides:

Design of sloping and benching systems. The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows:

(b)(1) Option (1) - Allowable configurations and slopes.

(b)(1)(i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

(b)(1)(ii) Slopes specified in paragraph (b)(1)(i) of this section, shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in Appendix B to this subpart.

4. Appendix A to §1926 Subpart P-Soil Classification which provides in part:

"Type B" means:

(i) Cohesive soil with an unconfined compressive strength greater than

0.5 tsf (48 kPa) but less than 1.5 tsf (144 kPa); or

(ii) Granular cohesionless soils including: angular gravel (similar to

crushed rock), silt, silt loam, sandy loam and, in some cases, silty clay

loam and sandy clay loam.

(iii) Previously disturbed soils except those which would otherwise be

classed as Type C soil.

(iv) Soil that meets the unconfined compressive strength or cementation

requirements for Type A, but is fissured or subject to vibration; or

(v) Dry rock that is not stable; or

P> (vi) Material that is part of a sloped, layered system where the layers

dip into the excavation on a slope less steep than four horizontal to one

vertical (4H:1V), but only if the material would otherwise be classified

as Type B.

5. Appendix B to §1926 subpart P-Sloping and Benching which provides in part:

(c)(4) Configurations. Configurations of sloping and benching systems shall be in

accordance with Figure B-1.

TABLE B-1

MAXIMUM ALLOWABLE SLOPES

SOIL OR ROCK TYPE	MAXIMUM ALLOWABLE SLOPES (H:V)(1) FOR EXCAVATIONS LESS THAN 20 FEET DEEP(3)
STABLE ROCK	VERTICAL (90 Deg.)
TYPE A (2)	3/4:1 (53 Deg.)
TYPE B	1:1 (45 Deg.)
TYPE C	1 1/2:1 (34 Deg.)

Footnote(1) Numbers shown in parentheses next to maximum allowable slopes are angles expressed in degrees from the horizontal. Angles have been rounded off.

Footnote(2) A short-term maximum allowable slope of 1/2H:1V (63 degrees) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth. Short-term maximum allowable slopes for excavations greater than 12 feet (3.67 m) in depth shall be 3/4H:1V (53 degrees).

Footnote(3) Sloping or benching for excavations greater than 20 feet deep shall be designed by a registered professional engineer.

6. 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.

Having reviewed and considered the record, the briefs and the arguments of the parties, 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(10).

4. The employer (Respondent) Clancy & Theys Construction Co., is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. The Occupational Safety and Health Division of the Department of Labor inspected Respondent Clancy & Theys Construction Company's jobsite on March 27, 1997 as part of a general scheduled inspection.

6. The Division issued a citation on April 28, 1997 alleging two serious violations of the North Carolina Occupational Safety and Health Act.

7. One serious citation was settled by the parties and the second one, Citation 1, Item 2 which is the subject of this appeal alleged a serious violation of 29 CFR 1926.652(a)(1) for failure to provide adequate protective systems in an excavation.

8. Clancy & Theys timely contested the citation.

9. This matter was heard before the Honorable R. Joyce Garrett, Hearing Examiner, on December 16, 1998.

10. The Hearing Examiner issued an order dated August 13, 1999 affirming the citation alleging a serious violation of 29 CFR 1926.652(a)(1) along with the penalty of $1,625.00.

11. On September 17, 1999, Respondent filed a Petition for Review seeking a review of the Hearing Examiner's decision and that Petition was granted.

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

13. The issues on appeal were heard by the full Board on March 13, 2000.

14. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 13, 15, 18, 19 and 21 through 27.

15. There was no water in the bottom of the trench and no water seeping through the sides of the trench; there were no cracks in the side of the trench and no dirt falling into the trench.

16. The hazard existed that a portion of the south wall 98 inches in length and 5.4 to 5.8 feet deep could slough off and fall into the trench. (T p 28).

17. Two employees were exposed to the hazard for the approximate 2 minutes that they were in that portion of the trench cleaning out the loose dirt. (T p 90).

18. The hazard created the possibility of an accident in that a portion of the south wall could fall onto the employees while they worked in the trench. (T p 34).

19. 40 inches of the 98 inch length of the south side of the trench had a concrete drain extending all the way to the bottom of the trench. (T p 30).

20. The portion of the south wall 98 inches in length and 5.4 to 5.8 feet deep created the hazard that some of the clay dirt from the sides of the south wall could fall into the trench but the substantially probable result of that clay dirt falling into the trench was not death or serious bodily injury.

21. The Respondent knew or should have known about the condition that created the hazard in that its foreman, Mr. Strickland was on site and knew that employees were in the trench and knew that the portion of the south wall was over 5 feet in depth.

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 1926.652(a)(1).

4. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a nonserious violation of 29 CFR 1926.652(a)(1) in that the employees in the excavation were not protected from cave-ins by an adequate protective system..

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.

A review of the record reveals that the Commissioner has proven by a preponderance of the evidence and by substantial evidence elements 1 through 3 and element 5 above. However, the Commissioner has failed to prove by a preponderance of the evidence element numbered 4, above, that the substantially probable result of an accident could be death or serious physical injury. The only findings of fact made by the hearing examiner that support a conclusion that the trenching violation is serious was the opinion of the compliance officer that the probable result of a cave in would be that soil would fall on the legs and pelvis of the employee and break bones. This was based on his opinion that 7 cubic feet of clay soil weighing 700 pounds could fall from above the level of the waist in the area of the concrete drain and his opinion that soil weighed 100 pounds per cubic foot. A review of the record reveals that this opinion was based on speculation. The Compliance Officer did not measure the length of the concrete drain or the width of the soil against the concrete drain. The estimate that 7 cubic feet of clay soil could fall in that area is not based on any direct measurements other than the depth of the trench and in order to compute volume of earth, a measurement of the length and width must also be taken.

The substantially probable result of an accident can be proven by the opinion evidence of the compliance officer but that opinion must be based on something other than mere speculation to rise to the level of substantial evidence. However, the record does support a finding that Respondent committed a non-serious violation of the trenching standard. 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). In Dillard-Eastland Mall, OSHANC No. 96-3518, 7 NCOSHD ____ (RB 1999) the Board stated:

> The Board adopts the definition of a nonserious violation announced by the Court of Appeals in Associated Mechanical, supra, and holds that a nonserious violation exists where "there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." Mark A. Rothstein, Occupational Safety and Health Law § 312, at 332 (3rd ed. 1990) (hereinafter Rothstein); Stephen A. Bokat & Horace A. Thompson III, Occupational Safety and Health Law 263 (1988).

Dillard-Eastland Mall, OSHANC No. 96-3518, 7 NCOSHD ____ (RB 1999). See, Associated Mechanical Contractors, Inc., 118 N.C. App. 54 (1995). The Board finds that Commissioner has shown by the preponderance of the evidence and by substantial evidence that there is a direct and immediate relationship between the violative condition of the unprotected portion of the trench that was over 5 feet and occupational safety and health but not of such a relationship that a resultant injury could be death or serious physical harm.

After considering the statutory requirements of N.C.G.S. 95-138 , the size of the business, the gravity of the violation, the good faith of the employer, and the record of previous violations the Board finds that no penalty should be assessed for the non-serious violation of 29 CFR 1926.652(a)(1).

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's August 13, 1999 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 non-serious violation of 29 CFR 1926.652(a)(1) with no penalty.

This the 20th day of September, 2000.

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J. B. KELLY, CHAIRMAN

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ROBIN E. HUDSON, MEMBER

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HENRY M. WHITESIDES, MEMBER