

**SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

HICKS UTILITIES, INC.,

RESPONDENT.

DOCKET NO. OSHANC 97-3617
OSHA INSPECTION NO. 301960308
CSHO ID NO. P9873

ORDER

THIS CAUSE coming on for hearing and being heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety & Health Review Board of North Carolina, on the 26TH day of August, 1998, at the Old YWCA Building, Raleigh, North Carolina.

The Complainant is present and represented by Mr. John Sullivan, Associate Attorney General, North Carolina Department of Justice. The Respondent is present and represented by its Attorney, Mr. Jay M. Wilkerson of Bugg & Wolf, P.A., Attorneys.

Complainant first Moved the Court to amend the penalty proposed in Citation No. 1, Item No. 1, in order to take into account the ten (10%) percent adjustment for good faith such that the penalty will be reduced from \$2,800.00 to \$2,100.00. Without objection, the Motion was allowed.

After assessing all evidence presented by all parties and following closing arguments, the Court makes the following:

Findings of Fact

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC).
2. The Commissioner of Labor is responsible for enforcing OSHANC.
3. Respondent exercised its right to contest the Complainant's enforcement actions.

4. Respondent is an underground utility contractor engaged in the installation of a waterline under Duraleigh Road, Raleigh, North Carolina, and tapping into a force water main. One sub-contractor was also on site, Rogers Tapping, Inc., who was engaged in the actual tapping of the water line into the force main. Respondent has ten employees overall with one employee on site.

5. The Inspection was conducted on September 5, 1997, by Edwin S. Preston, III, a Safety and Health Compliance Officer at the time of the inspection. Officer Preston drove by the work site and observed the work in progress and stopped to inspect pursuant to the National Emphasis Program on trenches.

6. An opening conference was conducted with Mr. Larry Hicks, the foreman on the job site who gave permission for the inspection. During the course of the inspection, Officer Preston took notes, made drawings, interviewed employees and took pictures. Based upon the inspection, Officer Preston recommended citations which were issued on October 3, 1997.

Citation No. 1, Item No. 1

7. Citation No. 1, Item No. 1, charges a violation of 29 CFR 1926.652(a)(1) alleging that employees working in the excavation were not protected by an adequate protective system.

8. At the time Officer Preston arrived on site, two workers were actually in the excavation. These workers were Mr. Perez, an employee of Respondent, and Mr. Rogers with Rogers Tapping, Inc., the subcontractor. The work was being supervised by Mr. Larry Hicks, the supervisor for Respondent on site.

9. The conditions observed by Officer Preston were that the excavation was seven feet deep on the north side and 9.7 feet deep on the south side. The width of the excavation at the top was 16.42 feet wide. The distance from the edge of the excavation to Duraleigh Road was two feet. Duraleigh Road is a busy roadway including dump truck traffic from a nearby construction site. This traffic is a vibration source for the work site. These conditions are illustrated by Complainant's photographic exhibits of the work site.

10. Officer Preston performed two tests to determine the soil type, a thumb test and a ribbon test. Based upon the tests, the soil type was type B soil.

11. The soil had previously been excavated in order to install the force main that the water line was tapping into at the work site. The soil away from the roadway was harder than the soil over the force main which had been previously excavated.

12. Determining the correct sloping of the excavation requires determining the width of the excavation at the top and the bottom of the excavation. Here, the excavation was 16.42 feet wide at the top and 16 feet wide at the bottom. Based upon this, the correct sloping would have made the excavation 32.75 feet wide at the top or one foot horizontal for each foot vertical. Respondent could also have used a trench box instead of sloping. Evidently, Rogers Tapping, Inc., acting through Mr. Rogers, caused some of this problem by arriving early and being in a hurry. Because of this, Larry Hicks allowed his employee to get into the excavation for a short time to assist Mr. Rogers with the tap.

13. The above conditions created the possibility of an accident, the substantially probable result of which would be death or serious bodily injury. One or more employees were exposed to the hazard created by these conditions. Respondent was aware of the conditions described above and in fact, was the operator of the back hoe digging the excavation. The proposed penalty was properly calculated in accordance with the Field Operations Manual.

14. Respondent had a previous Citation for this same or similar standard in OSH Inspection Number 111116117 which was closed August 2, 1995, and was within three years of this inspection.

Citation No. 2, Item 1a

15. Citation No. 2, Item No. 1a, charges a serious violation of 29 CFR 1926.651(j)(2), alleging that protection was not provided employees by placing and keeping excavated materials at least two feet from the edge of the excavation.

16. Officer Preston testified and Complainant's Exhibit 7 shows a small amount of dirt near the edge of the excavation and beside the excavator. Respondent's evidence indicates that the spoil pile had been moved by the excavator and what is shown in the photograph is the remainder of the spoil pile. The Court is inclined to give Respondent the benefit of the doubt in this citation since there is conflicting evidence concerning the spoil pile.

17. The same penalty calculations apply to this Citation as in Citation No. 1. The Calculations were made in accordance with the Field Operations Manual.

Citation No. 2, Item No. 1b

18. Citation No. 2, Item 1b, charges a serious violation of 29 CFR 1926.651(k)(2), alleging that a competent person failed to remove workers from the hazard area.

19. At Respondent's work site, Mr. Larry Hicks was the competent person on site. Mr. Hicks testified that the soil was very hard except directly over the force main. Mr. Hicks has more than twenty years experience installing water lines and has been a licensed utility contractor for fifteen years.

20. Mr. Hicks operated the excavator and observed the soil as his employee dug the excavation. He did not conduct any specific tests on the soil. Officer Preston did conduct soil tests and determined and the Court finds that the soil over the water line was Type B soil. It was acknowledged however that the soil on the back side of the excavation was harder soil as evidenced by the teeth marks in the soil made by the excavator.

21. Mr. Hicks further testified and the Court finds that he did not observe any spoil or other material falling into the excavation. However, Mr. Hicks did direct his employee to get into the excavation to assist Mr. Rogers with the tap believing that it would be only a short time and that the excavation was safe. This belief was based upon his observations of the soil type and his many years of experience.

22. The same penalty calculations apply to this Citation as in Citation No. 1. The Calculations were made in accordance with the Field Operations Manual.

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

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. This Court has jurisdiction of this cause and the parties are properly before the Court.
3. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
4. Respondent violated 29 CFR 1926.652(a)(1) by failing to provide an adequate protective system for workers in the excavation in accordance with 29 CFR 1926.652(c). Respondent had a same or similar violation within three years of this inspection.
5. The Court cannot find from a preponderance of the evidence that Respondent

violated 29 CFR 1926.651(j)(2).

6. Respondent violated 29 CFR 1926.651(k)(2) by allowing an employee to enter an excavation which was not sloped correctly and without a trench box in place.

7. All penalty calculations were done in accordance with the rules set forth in the Field

Operations Manual.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. Citation No. 1, Item No. 1, charging a repeat serious violation of 29 CFR 1926.652(a)(1) is hereby affirmed together with the proposed penalty of \$2,100.00.

2. Citation No. 2, Item 1a, charging a serious violation of 29 CFR 1926.651(j)(2), is hereby dismissed.

3. Citation No. 2, Item 1b, charging a serious violation of 29 CFR 1926.651(k)(2), is hereby affirmed together with a penalty of \$350.00.

4. All penalties shall be paid within ten (10) days of service of this Order.

This 25th day of August, 2000.

Carroll D. Tuttle
Administrative Law Judge Presiding