BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

JIMMY R. LYNCH & SONS, INC

RESPONDENT.

DOCKET NO. OSHANC 98-3743
OSHA INSPECTION NO. 302463690
CSHO ID NO. W4302

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 14th day of December, 1999 in Room 124, First Floor, old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by J. B. Kelly Chairman, Robin E. Hudson and Henry Whitesides, Board Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Marion G. Follin, III, Attorney At Law, of Follin & Overfield, L.L.P. Greensboro, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Complainant meets its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a willful serious violation of 29 C.F.R. §1926.652(a)(1) for failing to protect employees in an excavation by sloping the excavation at an angle steeper than 1 and ½ horizontal to 1 vertical (34degrees measured from the horizontal)?

2. Did Complainant meets its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. 1926.651(k)(1) for the failure to have a "Competent Person"on site to make daily inspections?

3. Did Complainant meets its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. 1926.651(j)(2) for the failure to protect employees from equipment that could pose a hazard by falling or rolling into the excavation?

STATUTES AND REGULATIONS AT ISSUE

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. N.C.G.S. § 95-138(a) which states the following with respect to a willful violation:

> Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the

Commissioner a civil penalty of not more than seventy thousand dollars ($70,000) and not less than five thousand dollars ($5,000) for each willful violation.

3. 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.

4. 29 C.F.R. §1926.652(b) which provides in part:

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.

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

"Type C" means:

(i) Cohesive soil with an unconfined compressive strength of 0.5 tsf (tons per square foot) (48 kPa) or less; or

(ii) Granular soils including gravel, sand, and loamy sand; or

(iii) Submerged soil or soil from which water is freely seeping; or

(iv) Submerged rock that is not stable, or

(v) Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H:1V) or steeper.

"Unconfined compressive strength" means the load per unit area at which a soil will fail in compression. It can be determined by laboratory testing, or estimated in the field using a pocket penetrometer, by thumb penetration tests, and other methods.

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

(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.

7. 29 C.F.R. 1926.651(k)(1) which provides:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

8. 29 C.F.R. 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 a combination of both if necessary.

Having reviewed and considered the record and the briefs of the parties and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby AFFIRMS the decision of the hearing examiner, 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 Respondent, Jimmy R. Lynch & Sons, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. Respondent timely filed a notice of contest and on April 15, 1999 a Hearing was held before the Honorable Ellen R. Gelbin in Winston-Salem, North Carolina.

6. On April 21, 1999, the Hearing Examiner issued her order; the items of her order which are the subject of this appeal are as follows:

a. Citation 1, Item 1 was affirmed as a willful serious violation of 29 C.F.R. §1926.652(a)(1) with a penalty of $17,500.00

b. Citation 2 Item 1 was affirmed as a serious violation of 29 C.F.R. 1926.651(k)(1) with a penalty of $1,750.00

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c. Citation 2, Item 2 was affirmed as a serious violations of 29 C.F.R. 1926.651(j)(2) with a penalty of $1,750.00.

7. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 61.

8. The Respondent possessed a state of mind that showed intentional disregard of 29 C.F.R. §1926.652(a)(1), the trenching standard in that:

a. Despite its knowledge of the standard and knowledge of its violation, respondent continued its operations until September 28, 1998, after the pouring and curing of concrete had been accomplished. Thus, respondent deliberately violated the standard for seven days after it knew of the violation and for three days after it had been informed by the SCO that it was being cited for the OSHA violation. (HE finding of fact 36(c)).

b. . . .The reason respondents gave DOT employees for its failure to properly slope the walls of the pit prior to pouring the concrete is because the sloping operating would cause dirt to fall into the concrete forms and cause respondent delay in cleaning out the forms or in ripping out the forms and reconstructing them. Thus, respondent deliberately exposed its employees to the hazard of a cave-in in the excavation pit for seven days in complete disregard for their safety and for purposes only of completing the job as quickly as possible and saving money. (HE finding of fact 36(d)).

9. The lack of a competent person on the worksite created the hazard that the sides of the excavation could cave in.

10. Respondent knew or should have known that it did not have a competent person on site at all times.

11. The location of the excavator or backhoe within 2 feet of the edge of the excavation created the hazard that the excavator or backhoe could roll or fall into the pit on top of employees.

12. The penalty of $17,500.00 for Citation 1, Item 1, $1,750.00 for Citation 2, Item 1 and $1,750.00 for Citation 2, Item 2 was calculated according to the Field Operations Manual and after giving due consideration to the size of the business, the gravity of the violation, the good faith or lack thereof of the employer and the record of

violations within the previous three years, the Board finds that the penalty is fair, reasonable in amount, and assessed equitably and uniformly.

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 the Board.

3. The Commissioner has proven by the preponderance of the evidence and by substantial evidence that the Respondent committed a willful serious violation of 29 C.F.R. §1926.652(a)(1) for failing to protect employees in an excavation by sloping the excavation at an angle steeper than 1 and ½ horizontal to 1 vertical (34degrees measured from the horizontal).

4. The Commissioner has proven by the preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. 1926.651(k)(1) for the failure to have a "Competent Person"on site to make daily inspections.

5. The Commissioner has proven by the preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C.F.R. 1926.651(j)(2) for the failure to protect employees from equipment that could pose a hazard by falling or rolling into the excavation.

DISCUSSION

I. <u>The willfulness of the violations.</u>

Willful is not defined by the North Carolina Occupational Safety and Health Act but has been defined by the North Carolina Supreme Court in a 1996 case as follows:

> This Court has said that a violation is deemed willful when there is shown " ' <u>a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another</u>.' " <u>Brewer v. Harris</u>, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971) (quoting <u>Foster v. Hyman</u>, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929)) (emphasis added)

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<u>Associated Mechanical Contractors, Inc. v. Payne</u>, 342 N.C. 825 at 833, 467 S.E. 2d 398 (1996).

The Board follows the current view of the majority of the federal Circuit Courts of Appeals and has adopted the Commission-<u>Intercounty</u> definition of willful as an Act done voluntarily with either an intentional disregard of or plain indifference to the Act's requirements. <u>See</u>, Mark A. Rothstein, <u>Occupational Safety and Health Law</u> § 315, (3d ed. 1990); <u>Intercounty Construction Co. v. OSHRC</u>. 1974-1975 OSHD 23,638, 522 F. 2d 777 (4th Cir. 1975), <u>certiorari denied</u>, 423 U.S. 1072, 96 S.Ct. 854, 47 L.Ed. 2d 82 (1976)); "What Constitutes 'Willful' Violation for Purposes of §§ 17(a) and (e) of Occupational Safety and Health Act of 1970 (29 USC §§ 666(a) and 666(e))", 31 ALR Fed 551.

The Board has consistently held that a willful violation <u>may</u> be proven by showing the following:

1. Employer knowledge of the standard, rule, regulation or Act:

2. Knowledge of the violative condition;

3. A subsequent violation of that standard and

4. A state of mind that evokes either "intentional disregard of" the standard or "plain indifference to" the requirements of the Act.

The North Carolina Supreme Court examined these four elements in Associated Mechanical, supra, and held that "The definition and elements used by the Review Board are consistent with the definitions of willfulness expounded by this Court and quoted above". Associated Mechanical, supra, at 834. Proof of a bad intent or venial motive is not required. Prior citations for the same or similar standards may be used to prove employer knowledge, although employer knowledge of a standard may be proven by other methods.

A willful violation may also be proven by careless disregard of or plain indifference to employee safety and health. In the City of Mt. Airy, OSHANC # 91-2077, the Board stated:

> The Board adopts the view that a willful violation can be proven by conduct marked by intentional disregard of or plain indifference to employee safety and health. . . .

In reaching that conclusion the Board cited the following with approval:

> . . . the early decisions of the Commission required that the employer have knowledge that he was violating the Act but that later decisions allowed a finding of willful if the employer exhibited conduct that showed "careless disregard of employee safety". Once careless disregard of employee safety was shown there was no need to prove that the employer knew that it was violating the Act. Rothstein, supra, at 341, quoting John W. Eshelman & Sons, 9 OSHC 1396, 1981 OSHD ¶ 25,231 at 31,187 (1981).

City of Mt. Airy, OSHANC # 91-2077.

The Hearing Examiner found the following in finding of fact numbered 36:

> Respondent's violation of 29 C.F.R. §1926.652(a)(1) was willful in that it showed a deliberate purpose not to discharge its duty under OSHANC or under the OSHA Standards for the Construction Industry, in reckless disregard for the safety of its employees as follows:
>
> a. Respondent had knowledge of the violation as early as September 21, 1998, when DOT employees informed it that its excavation slopes were inadequate. Respondent was also informed by the SCO on September 25, 1998, that its slopes were inadequate and needed to be increased. Thus, respondent had knowledge of its violation.
> b. Respondent had knowledge of the appropriate sloping standard. Jimmy R. Lynch, Mark Lynch and Delma Hutchens are all experienced in excavation work and knew or should have known the proper sloping standard. Even if they did not know the standard, they were informed of the proper slope for its excavation walls by DOT employees on September 21, 1998 and by the SCO on September 25, 1998. In addition, respondent had been cited for violation of the sloping standard in 1988, 1989 and 1992. Thus, respondent knew or should have known the appropriate sloping standard.
> c. Despite its knowledge of the standard and knowledge of its violation, respondent continued its operations until September 28, 1998, after the pouring and curing of concrete had been accomplished. Thus, respondent deliberately violated the standard for seven days after it knew of the violation and for three days after it had been informed by the SCO that it was being cited for the OSHA violation.
> d. Respondent's violation of the standard was done voluntarily with an intentional disregard of the requirements of the sloping standard. The reason Respondent gave DOT employees for its failure to properly slope the walls of the pit prior to pouring the concrete is because the sloping operation would cause dirt to fall into the concrete forms and cause respondent delay in cleaning out the forms or in ripping out the forms and reconstructing them. Thus, respondent deliberately exposed its employees to the hazard of a cave-in in the excavation pit

for seven days in complete disregard for their safety and for purposes only of completing the job as quickly as possible and saving money.

These findings are supported by overwhelming evidence in the record and meets and goes beyond the requirement that the Complainant prove its case by a preponderance of the evidence and that the Hearing Examiner's findings be supported by substantial evidence in the record. These same findings show that the Respondent possessed a state of mind that showed an intentional disregard of the trenching standard and the requirements of the Act. Placing employees in the trench to pour concrete in order to save money after being warned of the dangers by the Department of Transportation employees and the Compliance Officer shows a reckless disregard for employee safety and health and meets and goes beyond the requirement that a willful violation may be proven by a careless disregard of or plain indifference to employee safety and health.

II. The Seriousness of the Violations

In order to prove a serious violation of a specific standard, the following elements must be proven:

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 would be death or serious physical injury and

5. the employer knew or should have known of the condition or conduct that created the hazard. (applying the reasonable man test developed by the Court of Appeals in Brooks v. Daniel Construction Company, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984).

Pursuant to Brooks v. McWhirter in order to prove a serious violation it must be shown by substantial evidence "that the violation created a possibility of an accident a substantially probable result of which was death or serious physical injury." Brooks v. McWhirter Grading Co., INC., 2 NCOSHD 115, 303 N.C. 573 (Supreme Court 1981). In addition, G.S. 95-127(18) which gives the definition of a serious violation requires an element of employer knowledge: " A 'serious ' violation shall be deemed to exist in 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."

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 NCOSHD 299, at 305 (RB 1981), affirmed, 2 NCOSHD 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 NCOSHD 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 finds substantial evidence that all of the contested violations were serious. There is a preponderance of the evidence and substantial evidence in the record to prove that a hazard existed, employees were exposed, there was a possibility of an accident, the substantially probable result of the accident was serious injury or death and the employer knew or should have known of the conditions that created the hazard for each of the contested citations.

In summary, there is substantial evidence in the record to support the Hearing Examiner's findings that the Respondent committed a willful serious violation of 29 C.F.R. §1926.652(a)(1) for failing to protect employees in an excavation by sloping the excavation at an angle steeper than 1 and ½ horizontal to 1 vertical (34 degrees measured from the horizontal), a serious violation of 29 C.F.R. 1926.651(k)(1) for the failure to have a "Competent Person"on site to make daily inspections and a serious violation of 29 C.F.R. 1926.651(j)(2) for the failure to protect employees from equipment that could pose a hazard by falling or rolling into the excavation.

The Complainant has met its burden of proving by a preponderance of the evidence each of the contested citations.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's April 21, 1999 Order in this cause is, **AFFIRMED** in all respects and Respondent is found to have committed a willful serious violation of 29 C.F.R. §1926.652(a)(1) for failing to protect employees in an excavation by sloping the excavation at an angle steeper than 1 and ½ horizontal to 1 vertical (34 degrees measured from the horizontal) as alleged in Citation 1, Item 1, a serious violation of 29 C.F.R. 1926.651(k)(1) for the failure to have a "Competent Person"on site to make daily inspections as alleged in Citation 2, Item 1 and a serious violation of 29 C.F.R. 1926.651(j)(2) for the failure to protect employees from equipment that could pose a hazard by falling or rolling into the excavation as alleged in Citation 2, Item 2; and Respondent is **FURTHER ORDERED** to pay the total contested penalty of $21,000.00 within 30 days of the date of this order.

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