

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA**

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 98-3735
OSHA INSPECTION NO. 302352190
CSHO ID NO. A4624

v.

NC NATURAL GAS CORPORATION

ORDER

RESPONDENT.

APPEARANCES:

Complainant:

Daniel S. Johnson
Associate Deputy Attorney General
North Carolina Department of Justice

Respondent:

Jim Wade Goodman
MCCOY, WEAVER, WIGGINS, CLEVELAND & RAPER, PLLC
Attorneys for Respondent

BEFORE:

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on May 14, 1999, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Mr. Daniel S. Johnson, Associate Deputy Attorney General. The Respondent was represented by its Attorney, Mr. Jim Wade Goodman of McCoy, Weaver, Wiggins, Cleveland & Raper, Attorneys from Fayetteville, North Carolina.

Complainant first Moved the Court to Amend Citation No. 1, Item No. 1, as set forth in Complainant's written Motion to Amend filed on May 11, 1999. Without

opposition from Respondent, Complainant Motion to Amend was allowed. It is therefore ORDERED that Citation No. 1, Item No. 1, be and it is hereby Amended to include, in the alternative, an allegation of a violation of Construction Industry Standard 29 CFR 1926.95(a).

It was announced in open Court that Citation No. 2, Item No. 1, was not contested leaving only Citation No. 1, Item No. 1, as the sole issue to be decided.

Based upon the evidence presented at the hearing, and with due consideration of the arguments and contentions of all parties, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest received by the Complainant, North Carolina Department of Labor, on or about November 6, 1998, contesting a citation issued October 9, 1998, to Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of the Act (N.C.G.S. § 95-133).
3. Respondent is a corporation doing business in North Carolina with an office in Fayetteville, North Carolina. Respondent had three employees at the work site.
4. 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).
5. On September 23, 1998, Safety Compliance Officer LaFayette Atkinson was driving on Highway 701 at Clarkton, North Carolina. Highway 701 is the main road through the City of Clarkton with a speed limit at this location of 35 miles per hour. There he observed a construction site in which Respondent was engaged in installing a 3 ½ inch natural gas service line to a house at that location.
6. Respondent had three employees at the site, Mr. Norman Borden, Mr. Andy Perry and Mr. Travis Larkin as foreman. The work area was cordoned off with 30 day glow cones for a distance of 120 feet. There were also three warning signs on each end of the work site at various distances warning of the work site. One day glow cone at each

end of the work site had a "SLOW" sign stuck in the top of the cone. The weather on the day of the inspection was clear and sunny.

7. The workers were required to bore under the highway 701 to tap onto the main gas line and then run the connection to the house. This operation required them to dig four holes. The operation was nearly complete and the employees were sealing the hole with cold patch asphalt at the time Officer Atkinson arrived.

8. At the time Officer Atkinson arrived, he observed two individuals at the site in the vehicular traffic area not wearing orange safety vests. This is shown in Complainant's Exhibit 1 and 2. Officer Atkinson took these pictures as he arrived. He then proceeded to the work site and held an opening conference with Travis Larkin, the on site foreman. There were three workers at the site only one of which was wearing a safety vest. All three workers were wearing hard hats.

9. The purpose of the day glow cones is to warn and isolate the work area from vehicular traffic and to act as a barrier to vehicular traffic. The purpose of the orange safety vests is to warn vehicular traffic of the location of the individual worker.

10. During the course of the inspection, Officer Atkinson made photographs, diagrams and interviewed employees.

11. Norman Barden and the foreman, Travis Larkin, did not have their orange safety vests on at the time of the inspection. Respondent's Employee Safety Handbook requires employees to wear safety vests while working in traffic areas. Respondent did provide the safety vests and they were available on site. Travis Larkin testified that he had been welding the 2 inch T to the main gas line. The vest dangled when he bent over to perform the welding operation and presented a danger. He took off the vest to perform the welding and had forgotten to put it back on. He had had the vest on most of the day.

12. Travis Larkin and the other employees had vests supplied to them by Respondent and were aware that their safety manual required their use. Respondent enforced the use of the vests by written notices placed in the employee's file which are then used for employee performance evaluations. They are also the subject of safety meetings where employees are instructed to use the vests while in traffic areas.

13. All the employees were wearing light blue reflective helmets. The area was cordoned off by the day glow cones and warning signs. The weather was clear and bright and there was a truck parked next to the work site.

14. Although the Court finds that Respondent does require its employees to wear the orange safety vests and enforces that requirement, Mr. Larkin was the supervisor at the site and was not wearing his orange safety vest the entire time he was in the traffic area.

15. The Court cannot find from the facts however that the violation should be "serious" under all the circumstances considering that the area was cordoned off by day glow cones, there were warning signs at both ends of the site, the workers were wearing reflective hardhats, the work was taking place next to a parked truck and the vests had been worn most of the day. In addition, the roadway was wider than normal, the traffic area was light and the speed limit was thirty-five miles per hour in the area.

Based upon the foregoing Findings of Fact, the undersigned Hearing Examiner concludes as a matter of law the following:

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 1910.132(a) by failure of its job site foreman to require the use of the orange safety vests by employees while in vehicular traffic areas. The Court finds that this is a technical violation and is "other than serious" for the reason that there is not substantial evidence that the violation created the possibility of an accident.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Citation No. 1, Item No. 1, alleging a serious violation of 29 CFR 1910.132(a), is hereby affirmed as a non-serious violation together with a penalty of \$100.00 which shall be paid within 10 days of service of this Order.

This the 28th day of September, 2000.

Carroll D. Tuttle
Administrative Law Judge Presiding