

**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 99-3794
OSHA INSPECTION NO. 302354758
CSHO ID NO. W9889

v.

BELCHER UTILITIES, INC.,

ORDER

RESPONDENT.

APPEARANCES:

Complainant:

**Linda S. Kimbell
Assistant Attorney General
North Carolina Department of Justice**

Respondent:

**Noel S. Belcher
President
Belcher Utilities, Inc.**

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 September 30, 1999, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Ms. Linda Kimbell, Assistant Attorney General. The Respondent was represented by its President, Mr. Noel S. Belcher.

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 May 4th, 1999 contesting a citation issued March 31, 1999 to Respondent, Belcher Utilities, Inc., 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 North Carolina corporation performing underground utility work and maintains an office Angier, North Carolina. Respondent had one employee at the construction site and has six employees overall.
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. Area District Supervisor, Officer Jane Whitley, with the Occupational Safety and Health Division, North Carolina Department of Labor, conducted an occupational safety and health (OSH) inspection of multi-employer construction site located at Stewart Street, Fuquay-Varina, North Carolina ("the site"). Officer Whitley observed the site and saw that excavation and trenching was in progress and conducted an inspection pursuant to the National Emphasis Program on Trenching. The construction site was beside the public road and at the intersection of Stewart Street and Cardinal Drive, Fuquay-Varina.
6. Respondent was in the process of installing eight inch water line and boring under Stewart Street for connection to a water main. Mr. Noel Belcher was operating an excavator digging the bore pit.
7. Officer Whitley conducted a partial inspection of trenching excavation activities on site. The site was a multi-employer worksite. Donald Young Construction Co., was on site to perform the bore work under Stewart Street.
8. Officer Whitley first conducted an Opening Conference with Mr. Noel Belcher and Mr. Donald Young. Donald Young Construction had five employees on site. Permission was given to conduct the inspection. During the course of the inspection, Officer Whitley took pictures, interviewed employees and took notes, all of which are now contained in the case file.

Citation Number One, Item 1a

9. Citation No. 1, Item 1a, charges a serious violation of 29 CFR 1926.651(k)(2) alleging that Respondent failed to remove employees from a work area where conditions existed that could result in possible cave-in or failure of protective systems.

10. At the time Officer Whitley arrived on site and viewed the site from the public street, she observed four workers in the excavation determining if the base of the excavation was level. These workers had a transit set up to make this finding in order to perform the bore under the street. Complainant's Exhibit No. 1 shows these workers exiting the excavation.

11. Officer Whitley measured the excavation and determined that its length was approximately thirty feet long and a portion of the excavation was eight feet deep. Complainant's Exhibit No. 2 shows the measuring rod in the excavation. The bottom width of the excavation was eleven feet and the top width was twenty-five feet.

12. Officer Whitley conducted a visual test and a ribbon test of the soil and found that the soil was Type B soil.

13. The walls of the excavation were sloped in that the east wall was four to five feet vertically and then sloped back. The west wall was sloped at about forty-five degrees where the excavator was located. There was little if any sloping on the wall next to Stewart Street. Complainant's Exhibit No. 3 shows the excavation and the wall next to Stewart Street.

14. Mr. Noel Belcher was the competent person on site for Respondent and was the operator of the excavator digging the bore pit. As the site supervisor and competent person on site, Mr. Belcher had the authority to remove employees including those of Donald Young Construction. Mr. Belcher believed that if he sloped the sides of the excavation after reaching the five feet level, the excavation would be safe and within the rules. Complainant's Exhibit 6 shows the employees of Donald Young Construction next to the east wall of the excavation.

15. These conditions created the possibility of an accident being a cave-in of the excavation. The substantially probable result of such an accident would be broken bones, compression injuries or death. The employees of Donald Young Construction working in the excavation were exposed to these conditions.

16. Respondent knew or should have known of the conditions because Mr. Belcher as site superintendent was present and dug the excavation himself.

17. Officer Whitley, using the guidelines set forth in the Field Operations Manual, determined that the severity was "high" and the probability was "low" which indicated a gravity based penalty of \$1,750.00. After applying the maximum credits of 60% for size, 10% for good faith and 10% for history, there remained an adjusted penalty of \$350.00. The penalty assessments and credits were properly conducted pursuant to the guidelines set forth in the Field Operations Manual.

Citation No. 1, Item 1b

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

19. After conducting tests, Officer Whitley determined, as set forth previously, that the soil was a type B soil. Type B soil requires that the excavation walls be a one to one ratio or 45 degrees of slope.

20. The excavation wall at the north end near Stewart Street was less than 45 degrees of slope and was approximately 15 to 20 degrees of slope. The excavation was approximately 8 feet deep. The east and west walls of the excavation were vertical for 4 to 5 feet and then were sloped back.

21. These conditions created the possibility of an accident being a cave-in of the excavation. The substantially probable result of such an accident would be broken bones, compression injuries or death. The employees of Donald Young Construction working in the excavation were exposed to these conditions.

22. Respondent knew or should have known of the conditions because Mr. Belcher as site superintendent was present and dug the excavation himself.

23. The same assessments and credits were applied as in Citation No. 1, Item 1a. This citation was grouped with Citation No. 1, Item 1a.

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 1926.651(k)(2) by failing to remove employees from the excavation where conditions existed that could lead to a possible cave-in and Respondent's competent person was on site.
5. Respondent violated 29 CFR 1926.652(a)(1) by failing to protect each employee from cave-in by an adequate protective system in accordance with 29 CFR 1926.652(c).
6. The proposed penalties for the above citations were calculated in accordance with the North Carolina Operations Manual and are appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Citation No. 1, Item 1a, alleging a serious violation of 29 CFR 1926.651(k)(2) and Citation No. 1, Item 1b, alleging a serious violation of 29 CFR 1926.652(a)(1), as grouped, are hereby affirmed together with the proposed penalty of \$350.00 which shall be paid within ten days of service of this Order.

Entered this the 22nd day of September, 2000.

Carroll D. Tuttle
Administrative Law Judge Presiding