

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 99-3859
OSHA INSPECTION NO. 302971106
CSHO ID NO. B7902

v.

PRECISION CONTRACTING INC.

ORDER

RESPONDENT.

APPEARANCES

Complainant:

Ralf F. Haskell
Special Deputy Attorney General
North Carolina Department of Justice

Respondent:

Frank P. Graham
Anthony Alan Coxie
Roberts & Stevens, P.A.
Asheville, North Carolina

BEFORE

Administrative Law Judge: Charles R. Brewer

THIS CAUSE came on for hearing and was heard before the undersigned Charles R. Brewer, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on July 25, 2001, at the Buncombe County Courthouse, Room 204, 60 Court Plaza, in Asheville, North Carolina.

The Complainant was present and represented by Mr. Ralf F. Haskell, Special Deputy Attorney General, North Carolina Department of Justice. The Respondent was present

and represented by Mr. Frank P. Graham and Mr. Anthony Alan Coxie of Roberts & Stevens, P.A., attorneys in Asheville, North Carolina.

DISCUSSION

Following the completion of the evidence the undersigned received a copy of the transcript of the hearing prior to entering this order. Further, the undersigned has received proposed findings of fact and conclusions of law and supporting briefs from each of the parties. After having reviewed the foregoing there appears to be no significant contention that OSHA standards were not violated. The approach of the Respondent both in the presentation of the case and in its proposed findings simply suggests that the violation occurred as a direct result of the conduct of the Town of Mars Hill and its employees. While this may have great relevance in some wrongful death case civil action, it does not appear to the undersigned to be in any way dispositive of this OSHA citation. The undersigned could find as a fact most, if not all, of the proposed findings of the 143 proposed findings of fact included in the Respondent's proposed order; however, in the opinion of the undersigned the adoption of those findings would not overcome the essential problem from the Respondent's standpoint, that is to say, that there was a clear violation of OSHA standards at a site for which the Respondent was a general contractor with employees on the site and with knowledge of the violation. The fact that the worker who was killed was not an employee of the Respondent is not controlling. Indeed, even if no one had been injured at all the violation would still exist and under the facts of this case the Respondent would be in violation of the standards. Respondent argues that the Complainant has failed to establish that Richard Jones was exposed to a hazard and further argues that under the multi-employer worksite defense that Respondent made reasonable efforts to detect and abate any violation of safety standards. The undersigned having carefully considered these contentions concludes that they are without merit.

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 which followed a citation issued 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, a North Carolina Corporation with its principle office located at 796 Riverside Drive, Asheville, North Carolina, 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. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).

5. On August 2, 1999, William R. Best, a Compliance Safety Officer (CSO) with the North Carolina Department of Labor, began an Occupational Safety and Health (OSH) inspection of Respondent's Town of Mars Hill construction worksite. The inspection was initiated as a result of a news media report of an accident (fatality) having occurred at the site.

6. On August 2, 1999, prior to beginning his inspection, CSO Best conducted an opening conference with Mr. Ronnie Ray, President of Precision Contracting Inc., and members

of the Town of Mars Hill. During the opening conference CSO Best presented his credentials and explained the scope and purpose of the inspection. Approval for conducting the inspection was granted by Mr. Ray and the Town officials.

7. During the inspection, CSO Best took photographs, interviewed witnesses, made notes, prepared a diagram, received an investigation report, photographs and diagram from Chief Eddie Fox of the Mars Hill Fire Department, interviewed engineers and other persons familiar with the water utility industry, and reviewed and obtained other documents and information.

8. On September 20, 1999, as a result of the inspection, Complainant issued to Respondent Citation Number One, Item 1a alleging a serious violation of N.C.G.S. 95-129(1) and item 1b, alleging a serious violation of 29 CFR 1926.21(b)(2), with a proposed penalty of \$2,100.00. Citation Number One, Item 1a alleges a serious violation of N.C.G.S. 95-129(1) in that the Respondent "... did not furnish to each of his employees conditions of employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees: Watershed Road - the employer (Respondent) did not follow the industry standard for testing water lines on July 30, 1999, when a Town of Mars Hill employee was killed when he was struck by a reducer which was blown from a water line by air pressure."

9. Respondent timely filed its Notice of Contest. This Board has jurisdiction over the subject matter and the parties to the action.

10. On June 18, 1999 Respondent was awarded the contract for the construction of the Carter Grove Water Line Project for the Town of Mars Hill. The project consisted of laying approximately 2,500 feet of ductile iron pipe (water line) from the Town's water treatment plant to, and connecting with, an existing water line. Each piece of ductile iron pipe making up the water line was approximately 18 feet long.

11. Pursuant to the terms of the contract, Respondent was the general contractor for the entire project. Mr. Ronnie Ray, President, acted as superintendent for the project. Richard Jones, an employee of Respondent, acted as foreman for Respondent and was in charge of the construction site.

12. Prior to July 16, 1999, Respondent had laid almost the entire length of the water line from the lower end of the project (the end toward the existing line to be connected with) toward the upper end (the end near the water treatment plant). The water line, which was laid in an excavation, had been backfilled from the lower end toward the upper end, with only the end of the pipe at the upper end exposed. A gate valve was attached to this upper end of the water line.

13. On or about July 16, 1999, Respondent began filling the water line with a garden-type hose. One end of the hose was connected to a water supply at the water treatment plant and the other end was run into the open end of the gate valve on the water line. Respondent began filling the 2,500 foot water line with water in order to test the line for leaks. After attempting

to fill the line for one and one-half to two days, it was determined that there might be a leak in the line.

14. On or after July 16, 1999, Ronnie Ray, President, observed the water hose laying in the open end of the gate valve. Mr. Ray suggested to Richard Jones that something should be placed on the valve end of the line to keep mud, varmints and other contaminants from getting into the line. As a result of this suggestion, Mr. Jones connected a 12 inch nipple or stub-out (nipple) to the water treatment plant side of the gate valve, a reducer to the stub-out, and a plug to the 6 inch opening on the reducer. A 3/4 inch fitting (nipple) was connected to the plug so that the garden hose could be connected..

15. Respondent continued trying to fill the water line with the garden hose, which was now connected to the 3/4 inch fitting on the plug attached to the reducer. After approximately one and one-half to two more days of attempting to fill the water lines,

Respondent began to test for leaks. Dye was introduced into the water line, and a float device placed inside, in an effort to find any leaks. Additionally, Respondent uncovered several hundred feet of the water line. None of these efforts, however, were successful in locating any leaks.

16. Late in the day on July 29, 1999, Richard Jones talked with Dale Hylemon, operator for the Town of Mars Hill's water treatment plant, about the difficulties Respondent was having in trying to locate leaks in the water line. Mr. Hylemon casually mentioned during their discussion the possibility of putting air into the water lines in order to check for leaks. Mr. Hylemon offered to see if Precision could borrow one of the Town's compressors. Richard Jones accepted this offer.

17. Mr. Hylemon did not supervise Richard Jones, nor did he have the authority to order or instruct Richard Jones to use air to test for leaks in the water line. Further, he could not instruct Richard Jones on safety and health, and could not stop Respondent's work for safety and health reasons. Dale Hylemon merely acted as an observer on behalf of McGill and Associates, periodically observing the work to assure that respondent was using the proper material, that the excavation in which the water line was being laid was dug to the appropriate depth, and that the excavation was backfilled with the proper type material. On the other hand, Richard Jones was foreman on the project for Respondent and, pursuant to the terms of the contract, as Respondent's representative, had the authority and responsibility over safety and health at the construction site.

18. Later in the evening on July 29, 1999, or early the next morning, Dale Hylemon contacted Darhyl Boone, the Mars Hill Town Manager, to ask if respondent could borrow one of the town's compressors. Mr. Boone agreed to loan a compressor to Respondent.

19. On the morning of July 30, 1999, Mr. Boone called Robert Sams, Public Works Director for the Town of Mars Hill, and asked him to send someone to the water line project site with a compressor for Respondent to use. Mr. Sams then asked Roger Moore, a Mars Hill employee, to deliver the compressor to Respondent. In doing so, he instructed Mr. Moore to come back if the Respondent was going to use the compressor for an hour or more. Mr. Sams did not anticipate that Mr. Moore would operate the compressor.

20. Roger Moore arrived at the water line construction project at approximately 8:00 a.m. on July 30, 1999, driving a pickup truck pulling a large commercial type Ingersol-Rand compressor. Upon arriving at the site, Mr. Moore parked the truck and compressor between the upper end of the water line and the water treatment plant.

21. After a brief discussion with Richard Jones, Roger Moore began to hook- up an air hose to the compressor. Richard Jones asked Roger Moore if he wanted him to attach the other end of the hose to the 3/4 inch fitting on the plug attached to the reducer. Mr. Jones then got into the excavation and attached the air hose to the fitting.

22. During their discussion Richard Jones mentioned to Roger Moore that they should place something against the reducer in case it should blow off. Mr. Jones was concerned that the reducer might blow off the stub-out end of the pipe as a result of air pressure being introduced into the water line. Concerned that what they were doing was dangerous, Richard Jones went to his truck to look for some 3/4 inch rods which could be used to secure the reducer to the check valve. He was unable to find any.

23. A minute or two after Richard Jones attached the air line to the plug, Roger Moore started the compressor. At the time the compressor was started, Richard Jones was standing within 10 to 15 feet of the end of the water line where the air hose had been attached. He then began to walk the water line looking for leaks. The theory behind putting air into the system was that the compressed air would force any leaking water to the surface so that the leak could be located.

24. Richard Moore had walked approximately 100 to 150 feet when he heard a loud "boom." Upon hearing this noise he ran back toward where the compressor was located and found Roger Moore lying on the ground with a wound to his head. Mr. Jones noticed that the reducer had been blown off the end of the water line and that it was located across the road and down the embankment. Mr. Moore died as a result of being struck by the reducer.

25. The water line was partially full of water at the time the compressed air was being introduced into it through the air hose attached to the reducer. Further, both ends of the water line were closed. Additionally, the air release valve located on the check valve was also closed. The compressed air, therefore, was being introduced into a closed system which was partially full of water.

26. Ronnie Ray, President of Respondent, was aware that air should not be introduced into a water line system to check for leaks. He was further aware that the reason air should not be introduced into a water line is that, it is dangerous.

27. Richard Jones, Respondent's foreman, was aware that introducing compressed air into the water line could be hazardous. In fact, he expressed his concern to Richard Moore that the reducer might blow off the end of the stub-out. Further, Richard Jones considered using long rods and bolts to secure the reducer to the gate valve, but could not find any in his truck. Despite his concern, and his failure to attempt to secure the reducer, and with the understanding and intent on his part that compressed air would

be introduced into the water line, Richard Jones hooked the air hose from the air compressor to the 3/4 inch nipple on the plug attached to the reducer.

28. The contract signed by and awarded to Respondent for the construction of the Town of Mars Hill Carter Grove Water Line project specifically references to American Water Works Association (AWWA) standard, AWWA C-600, as being applicable to the installation of the ductile iron pipe and appurtenances used on the project, including the testing of water lines. The AWWA, which sets standards for installing water lines, is recognized, followed and relied upon by the water line utility industry, of which Respondent is a part. AWWA C-600.

specifically prohibits the use of air to test water lines for leakage because it would create a hazard.

29. Keith Webb, an engineer with Webb and Associates, the consulting engineering firm for the Carter Grove water line project, testified that introducing compressed air into a water line partially filled with water would create a hazard.

30. As explained by Keith Webb, air is compressible while water is not. Therefore, by introducing compressed air into the partially water filled water line, Respondent created a serious hazard, including the possibility that the reducer and attachments, which were affixed to the stub-out by a compression fitting only (rubber compression ring), could blow off the end of the stub-out and hit someone, such as Richard Jones, killing or seriously injuring them.

31. CSO Best testified that a hazard was created by Respondent's introducing air into the water line in that, as a result of its not properly being secured, the reducer could blow off and possibly strike someone. CSO Best further testified that the hazard is recognized. Further, CSO Best testified that an engineer with the City of Asheville water department, as well as a representative of the manufacturer of the iron ductile pipe used by Respondent at the Carter Grove project, stated that air should never be introduced into a water line to test for leaks in that it would be dangerous.

32. Respondent's putting compressed air into the water line created a hazard that was recognized by both Respondent and the water utility industry, of which Respondent is a member.

33. As a result of Respondent's introducing compressed air into the water line to check for and locate any leaks, the 110 pound reducer blew off the end of the stub-out, flew

6 to 8 feet and struck the bottom of the excavation toward the water treatment plant, ricocheted at a 45

degree angle and struck Richard Moore on the head, killing him, and traveled another 63 feet over the road and down an embankment. The reducer was still attached to the rubber air hose when found down the embankment.

34. As illustrated by the incident which occurred, Respondent's introducing of compressed air into the water line created a serious hazard likely to result in death or serious bodily injury. One serious hazard created was the possibility that the reducer could be blown off the end of the stub-out with great force, and that it could strike and seriously injure or kill someone.

35. Respondent's employee, Richard Jones, was exposed to this hazard. Mr. Jones was within 10 to 15 feet of the end of the water line where the reducer was located at the time the compressor, which was set at 120 psi, was started. The reducer was blown approximately 70 feet. There was nothing to keep Richard Jones from either remaining within, or returning to, the zone or area of danger. Even with precise information as to the amount of air pressure being introduced into the water line, the amount of water in the line, and other similar data, one could not have accurately predicted just when the reducer would be blown off the end of the stub-out. There was a possibility, therefore, that the reducer could have blown off the end of the stub-out at a time that Richard Jones was in the area.

36. The suspected water leak was found and located by Respondent with the use of a listening device. Other methods for locating the water leak, such as digging up the line, could have been used to find and locate the leak. None of these methods presented the hazard associated with introducing compressed air into the water line.

37. CSO Best testified that there are no occupational safety and health standards applicable to the hazard of using of compressed air to test for and find leaks in a water line. Further, Respondent has not contended that there is such a specific standard applicable.

38. Respondent stipulated that proposed penalty of \$2,100 has been properly calculated in accordance with the field operations manual.

39. Item 1b of Citation One was voluntarily dismissed by Complainant following an informal conference prior to the Notice of Contest filed by Respondent herein.

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. The Review Board has jurisdiction of this case and the parties are properly before the Board;
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. On the morning of July 30, 1999, Respondent agreed to and assisted in introducing compressed air into the Carter Grove Water Line;
5. Introducing compressed air into the water line created a hazard causing or likely to cause death or serious physical harm;
6. The hazard associated with introducing air into the water line was recognized by Respondent, as well as by the water line utility industry of which Respondent is a part, and thus, constitutes a recognized hazard;
7. The hazard created was the possible blowing off of the reducer with great force from the stub-out, which would likely result in death or serious bodily injury;
8. There was a feasible means by which Respondent could have abated the hazard;
9. There is no specific standard applicable to either the process of checking water lines for leaks, or the introduction of compressed air into water lines for any purpose. The general duty clause is appropriately applicable to both the process and hazard, and was appropriately cited;
10. Respondent violated the general duty clause by using compressed air in the water line to test for and locate any leaks in the water line.
11. The proposed penalty of \$2,100 was calculated in accordance with the Department of Labor's field operations manual, and is appropriate.
12. Item 1b of Citation Number One is dismissed.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that

1. Citation One, Item 1a, alleging a serious violation of N.C.G.S. § 95-129(1) is hereby affirmed; and,
2. The proposed penalty of \$2,100.00 is affirmed and shall be paid within ten (10) days of the filing date of this Order.
3. Citation One, Item 1b is hereby dismissed.

This the 30th day of January, 2002.

Charles R. Brewer
Administrative Law Judge Presiding