



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

A.E.Y. ENTERPRISES,

Respondent.

OSHRC Docket No. 06-0224

APPEARANCES:

Howard M. Radzely, Solicitor; Joseph M. Woodward, Associate Solicitor; Michael P. Doyle, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Litigation; Lee Gabel, Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Michael G. Young, *pro se*, President; A.E.Y. Enterprises, Walworth, NY
For the Respondent

DECISION AND REMAND

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

On July 6, 2006, Administrative Law Judge G. Marvin Bober vacated a citation issued to A.E.Y. Enterprises ("AEY") under 29 C.F.R. § 1926.652(a)(1). The Secretary petitioned for review of the judge's decision that the Secretary failed to meet her burden of proving that AEY violated the standard.

For the following reasons, we remand the case to the judge for further proceedings in a manner consistent with this opinion.

Background

On July 15, 2005, at the request of Postler and Jaeckle Corporation (“P&J”), AEY constructed a shoring system in an excavation at the University of Rochester in Rochester, New York. Following an inspection from October 13, 2005 to January 6, 2006, OSHA issued AEY a citation under 29 C.F.R. § 1926.652(a)(1) for failing to construct an adequate shoring system.¹ AEY, appearing *pro se*, timely contested the citation, and the case was designated for Simplified Proceedings pursuant to Commission Rule of Procedure 203, 29 C.F.R. § 2200.203. At the hearing, five witnesses – the OSHA compliance officer (CO) and four employees of P&J – testified. Based solely on his assessments of the witnesses’ credibility, the judge concluded that the Secretary failed to prove a violation of the standard because she failed to show that the trench was more than five feet deep. The judge failed to determine whether the cited standard was violated. The judge’s holding instead turned on the Secretary’s failure to disprove an exception to the standard’s requirements.

Discussion

The issue before us is whether AEY’s shoring system violated § 1926.652(a)(1). The judge made no factual findings on this issue. Although the Commission has the authority to make the factual findings necessary to resolve a case where the administrative law judge did not, the judge ordinarily resolves the factual issues first. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). This allows the Commission to exercise its review function and is particularly beneficial in cases involving close questions of fact. *Cf. Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1269-71 (11th Cir. 1991) (employer suffered actual prejudice because, due to absence of all Review Commission members, its petition for review of a factual finding did not receive Commission’s preponderance of the evidence review but was instead subject to 11th Circuit’s more stringent substantial evidence review of the administrative law judge’s order).

¹ On July 20, 2005, the trench collapsed after one of P&J’s subcontractors removed the shoring system for an unspecified reason. The collapse resulted in an injury to an employee of a subcontractor. That employee later died after suffering cardiac arrest while in the hospital. However, according to the OSHA compliance officer, the citation was not based on this employee’s exposure but on that of two P&J employees who entered the trench on July 15, 2005, prior to the shoring removal.

Because this case presents a number of technical factual issues involving the shoring system in the cited trench, we conclude that the appropriate course is to remand this case back to the judge rather than to decide it here. On remand, in deciding whether the Secretary proved a violation of § 1926.652(a)(1), the judge shall determine whether AEY's shoring system was adequate, focusing on whether AEY's shoring system was properly designed in accordance with § 1926.652(a)(1). The judge shall also make findings on whether the tabulated data AEY used to design its shoring system was proper. When determining whether AEY meets the exception to § 1926.652(a)(1), the judge shall place on AEY the burden of proving that (1) the excavation was less than five feet, *and* (2) an examination of the ground by a competent person provided no indication of a potential cave-in. *See C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756, 1996 CCH OSHD ¶ 31,129, p. 43,476 (No. 93-3177, 1996) (A party seeking "the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for the exception.")

Order

Accordingly, we remand this case for further proceedings in a manner consistent with this opinion.

SO ORDERED.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
Thomasina V. Rogers
Commissioner

/s/ _____
Horace A. Thompson, III
Commissioner

Dated: September 6, 2006



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: :
A.E.Y. ENTERPRISES, INC., :
: :
Respondent. :

Appearances:

Esther D. Curtwright, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Michael G. Young, President
A.E.Y. Enterprises, Inc.
Walworth, New York
For the Respondent, *pro se*.

Before: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, §§ 651-678 (1970) (“the Act”), to review a one-item citation alleging a serious violation of the Act. The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site in Rochester, New York, from October 13, 2005 to January 6, 2006. As a result of the inspection, on January 10, 2006, OSHA issued to A.E.Y. Enterprises, Inc., (“Respondent” or “A.E.Y.”), a Citation and Notification of Penalty (“Citation”) alleging a serious violation of 29 C.F.R. § 1926.652(a)(1). Respondent contested the Citation, and this case was designated for the Commission’s Simplified Proceedings pursuant to Commission Rule of Procedure 203, 29 C.F.R. 2200.203. The administrative trial was held on May 2, 2006 in Rochester, New York. Both parties have filed post-trial briefs.

The Citation

The Citation, which proposes a penalty of \$1,500.00, alleges as follows:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or (c):

a) On or about 7/15/05, in excavation at the east end of Lovejoy Hall on the University of Rochester Campus, Rochester, NY: Employees entered an excavation that was approx. 8 ½ ft. deep x 11 ft. wide x 26 ½ ft. long to repair a leaking pipe. The west side of the excavation was the concrete foundation of the building and the south end was also concrete. The north end of the excavation was sloped such that employees could use it to enter and exit the excavation. The east bank of the excavation was vertical. A.E.Y. Enterprises Inc. had installed a shoring system in the excavation comprised of two sheets of ¾" x 4ft. x 8ft. plywood, two 4"x6" x 8 ft. timbers, and two "Air Shore" trench jacks. However, this shoring system was not an adequate protective system designed in accordance with 29 CFR 1926.652(c).

The Accident

On July 15, 2005, Michael Edwards, a foreman with Postler and Jaekle Corporation ("P&J") telephoned Respondent A.E.Y. to request that it install shoring in an excavation located at the University of Rochester ("University"). A.E.Y. installed the shoring that same day. Five days later, on July 20, the excavation collapsed, resulting in the death of an employee of a subcontractor at the site.¹ (Tr. 12-13, 18-19, 22, 56, 99).

The Relevant Testimony

Kenneth Peck

Mr. Peck, the safety director for P&J in July 2005, has been a safety consultant for at least 26 years. He testified that in July 2005,² Michael Edwards, a P&J foreman, telephoned A.E.Y. and requested that it install shoring in an excavation at the University. He further testified he observed the trench on July 15, and that while he believed it could have been 5 feet or more in depth, this was "just a visual observation" and he "did not put a tape measure to it." On July 15, Mr. Peck instructed two P&J plumbers who were going to work in the trench "not to enter the excavation without shoring" because it was around 5 feet in depth and because it had flooded and contained some water;

¹The shoring was apparently removed just hours before the collapse. *See* footnote 5, *infra*.

²Hereinafter, all dates will refer to the year 2005 unless otherwise indicated.

in addition, the soil had a “sandy consistency.”³ Mr. Peck did not see the trench after it had been shored. On July 20, he received a telephone call that there had been an accident; the excavation had collapsed, and the worker in it was an employee of a subcontractor, Ferguson and Hall (“F&H”). Mr. Peck did not observe the accident, as he had been in a meeting, and he did not recall the exact conversation he had later with Robert Upton, an OSHA compliance officer (“CO”), or that he had stated a specific depth of the excavation to the CO. (Tr. 11-14, 18-19).

Michael Edwards

Mr. Edwards, a P&J foreman at the site, testified he had received training in excavations, including training in recognizing soil types, and that he was the competent person at the site. He further testified that he had observed the trench and the soil on July 15. Mr. Edwards said that on July 15, Mr. Peck directed him to have A.E.Y. shore the trench, and, upon examining Exhibit C-1,⁴ he estimated the plywood above the trench to be 3 feet and the depth of the trench to be about 5 feet. However, he also said he did not measure the trench; it could have had a depth of 5 feet or 4 feet 10 inches, and he could not accurately state that its depth was 5 feet or more. Mr. Edwards recalled having a phone conversation with CO Upton. He stated it was possible he told the CO the excavation was 6 feet deep but if he did “it was only an approximat[ion].” He also stated that he did not recall telling the CO that the soil was “Type B.” Mr. Edwards noted that as to the shoring that was installed, he had no concerns about its safety. (Tr. 21-26, 36-37).

David Haight

Mr. Haight, a plumber/pipe fitter with P&J on July 15, testified upon examining C-1 that he had worked “on the pipe that’s shown at the bottom of the excavation.” He further testified that although he told CO Upton the excavation was about 6 feet deep, he had not measured it and could not say under oath that his estimate was accurate. Mr. Haight said it was possible the trench was less than 5 feet deep, and he noted that because he had to dig out the pipe when he went in to work on

³The testimony of the plumbers, David Haight and Andrew Murawski, is set out *infra*.

⁴C-1 was a photograph which, according to the Secretary, was taken on July 18, 2005, by “someone at the University.” Mr. Edwards said it was a “fair and accurate representation of how the excavation looked after it was shored, on July 15, 2005.” (Tr. 23-24).

it, the trench would have been a little shallower when A.E.Y. shored it; he also said that after it was shored, he had no concern as to the safety of the excavation. (Tr. 40-43).

Andrew Murawski

Mr. Murawski, a plumber with P&J, testified that he had worked in the cited excavation after A.E.Y. had shored it; upon examining C-1, he said he had hand dug around and under the soil to the pipe. He also testified that when he spoke to CO Upton, the CO had told him, and he had agreed, that the depth was between 6 and 7 feet. Mr. Murawski stated that it was possible that the excavation was less than 5 feet deep and that it could have been 4 feet 11 ½ inches deep. (Tr. 47-48, 51-53).

Robert Upton

CO Upton testified that after a referral from the police department of an excavation collapse at the University and an employee's injury,⁵ he visited the site on July 20; he met with Mr. Peck and viewed and measured the subject trench, which was 8 ½ feet deep and had no shoring in it. The CO stated that during August, he received C-1 from the University;⁶ C-1 showed the subject trench with shoring in it, and it also showed the shoring did not "comply with the OSHA excavation standards." After seeing C-1, the CO called the University, as he "wanted to find out if there [was] anybody that had worked in that excavation in [that] condition;" however, he was unable to obtain that information then, and in October, when he was on his way to the University again, he phoned Mr. Peck, who told him that A.E.Y. had installed the shoring, that two P&J employees had worked in the trench after it was shored, and that the trench's depth was more than 5 feet. The CO then phoned Michael Young, A.E.Y.'s president, who told him that two of his employees, Shane O'Connor and a helper, had installed the shoring on July 15. The CO next phoned Mr. O'Connor, who corroborated Mr. Young's statement and said that "he had been trained by Mr. Young in the [OSHA] shoring

⁵According to Exhibit R-2, the OSHA-1A from the CO's inspection, the F&S employee who was injured in the collapse died later in the hospital from a cardiac arrest. Exhibit R-2 also states that the shoring had been removed from the trench just hours before the accident. Thus, as the CO indicated at the trial, the employee's death was not related to the Citation herein. (Tr. 99).

⁶The CO testified that a Mr. Goodwin from the University sent him C-1 and an e-mail. The CO did not indicate when C-1 was taken or what the e-mail said; however, Exhibit R-3, the OSHA-1B from the CO's inspection, states that C-1 was taken by Mike LaPoint, a University project manager, on July 19. (Tr.57).

requirements;" Mr. O'Connor identified the materials he used to shore the excavation, and he indicated that the depth on July 15 was about 7 feet and that he had not shored the excavation in conformance with the OSHA requirements.⁷ (Tr. 56-67).

CO Upton further testified that he spoke to Mr. Haight and Mr. Murawski and showed them C-1; the two did not agree on whether C-1 represented the excavation's condition on July 15, and while the former indicated the trench's depth was about 6 feet, the latter indicated that it was 6 to 7 feet. The CO also spoke to Mr. Edwards, who told him that he was the competent person at the site, that the trench was about 6 feet deep on July 15, and that the soil was "Type B."⁸ CO Upton said he recommended the Citation based on C-1 and the statements of the individuals with whom he had spoken, and he accepted Mr. Edwards' statement of the trench's depth as he was the competent person at the site.⁹ The CO said he did not believe the trench was less than 5 feet in depth or that there was no potential for a cave-in. However, he admitted he had measured the trench on July 20, not July 15, and that the trench was not in the same condition as it had been on July 15. He also admitted, upon examining C-1, that the excavation was not 8 ½ feet deep and that that number appeared in the Citation only because of his own measurement. He noted that the plywood shown in C-1 was 8 feet high, that the plywood was about 3 feet above grade level, and that although he could not tell if it did, if the plywood went to the bottom of the excavation, then the excavation's depth could have been less than 5 feet.¹⁰ The CO acknowledged it was possible that, after A.E.Y. installed the shoring, the P&J employees "hand dug around the pipe and made it down even a couple more inches." The CO conceded that the excavation could have been 4 feet 10 ½ inches deep; he

⁷According to the CO, Mr. Young told him he had heard the trench was about 8 feet deep, but, while questioning the CO at the administrative trial, Mr. Young indicated that it was the CO who had told him that the trench's depth was about 8 feet. (Tr. 65, 84-85).

⁸The CO took soil samples at the site, and the OSHA lab results confirmed that the soil was in fact "Type B." (Tr. 67).

⁹The CO explained why the shoring in the trench did not meet OSHA's requirements. In particular, he said the shoring required either wales, which are horizontal supports, or two more air jacks to provide support; he also said that both Mr. Peck and Mr. O'Connor indicated there were two air jacks in the trench on July 15, as shown in C-1. (Tr. 68-80).

¹⁰The CO said he was told the plywood was 8 feet high. (Tr. 86).

also conceded that if the excavation was in fact less than 5 feet deep, then there was no violation. (Tr. 65-69, 82-99, 104-07).

DISCUSSION AND CONCLUSION

The cited standard provides as follows:

Protection of employees in excavations. (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: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The term “competent person” is defined by the excavations standard at 29 C.F.R. 1926.650(b) as follows:

Competent person means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Based on the language of the cited standard, and the testimony of CO Upton that there was no violation if the excavation was less than 5 feet deep, the issue to be determined is whether the Secretary has met her burden of proving that the excavation was 5 feet or more in depth. In this regard, I note that the CO himself admitted that the excavation could have been less than 5 feet deep. (Tr. 89-91, 105-06). However, in view of the CO’s testimony as to his own measurement of the excavation and what others told him about the depth, as well as the testimony of the other witnesses about the depth, I conclude that credibility determinations are necessary.

In Commission proceedings, the Judge’s findings of fact must resolve the conflicting testimony of the witnesses. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No.14249, 1978) (“[i]t is the policy of the Commission to ordinarily accept an Administrative Law Judge’s evaluation of the credibility of witnesses, for it is the Judge who has lived with the case, heard the witnesses, and observed their demeanor”). *Accord, E.L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2132 (No. 87-0008, 1991). Further, while the Commission has the authority to make factual findings where the Judge has not, it ordinarily will prefer that the Judge make such determinations. *E.g., Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066, (No. 98-866, 2000); *Able Contractors, Inc.*, 5 BNA OSHC 1975, 1978, 1977-78 (No.12931, 1977). The Judge has the obligation of fairly considering the entire

record and adequately explaining his or her findings. *Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1953-1954, (No. 16162, 1978).

In making my credibility determinations in this case, I have considered the testimony of all of the witnesses. While CO Upton appeared to be a sincere witness, I have determined that his testimony was less reliable than the testimony of the on-site witnesses.¹¹ I have therefore decided to give more weight to the testimony of those witnesses, namely, Messrs. Peck, Edwards, Haight, and Murawski. Each of these employee witnesses testified that he was at the excavation site at the University on July 15 and actually viewed the excavation. Although Mr. Peck indicated his belief that the trench could have been 5 feet or more in depth, he also testified that it was hard to tell the depth since he did “not put a tape measure to it;” Mr. Peck also testified that he did not recall telling the CO that the trench was more than 5 feet deep. (Tr. 13). Mr. Edwards testified that he could not accurately state that on July 15, the “depth of this excavation, as shown in [C-1], [was] 5 feet or more;” he further testified he did not measure the trench and that it could have been 5 feet or 4 feet 10 inches deep. He said that if he did tell the CO it was 6 feet, it was just an “approximat[ion].” (Tr. 25-26, 36). Mr. Haight testified that while he did tell the CO the excavation was 6 feet deep, he could not affirm this under oath; he also testified that he did not measure the trench and that it could have been less than 5 feet in depth. (Tr. 40-43). Mr. Murawski testified that the CO told him, and he had agreed, that the trench was between 6 and 7 feet deep; he further testified that the excavation could have been less than 5 feet in depth. (Tr. 47-48, 51-53).

I observed the demeanor of each of the foregoing employee witnesses, including their facial expressions and their body language as they testified, and I found all four to be sincere and credible witnesses. I therefore credit their testimony indicating that the excavation could have been less than 5 feet in depth. I also credit their testimony concerning what they told the CO about the depth of the trench. I find, accordingly, that even if Mr. Peck and Mr. Edwards did indicate a depth to the CO it was just an estimate or approximation and was not a statement of the actual depth. I further find that

¹¹While I have considered the CO’s testimony about what Mr. O’Connor told him, I give that testimony little weight because of my credibility determinations in this matter and because of the fact that Mr. O’Connor did not testify.

Mr. Haight was honestly not able to affirm under oath the accuracy of what he told the CO and that Mr. Murawski simply agreed when the CO told him what the depth was.

There are other reasons for crediting the testimony of the four on-site witnesses over that of the CO: (1) each employee witness had first-hand knowledge of the condition of the trench as each was at the work site on July 15, while the CO did not observe the trench or the shoring that day; (2) each employee witnesses was sequestered, and, as indicated *supra*, each employee witness testified consistently and under oath that the excavation on July 15 could have been less than 5 feet in depth; and (3) the CO interviewed the employee witnesses (who were not sworn at the time) several months after the collapse, when their memories the events of July 15 were no longer fresh and were likely hazy. (Tr. 52, 58-60, 65-68). In addition to these factors, as has already been noted, the CO admitted he measured the depth of the excavation on July 20 and that the condition of the trench then was not the same as it was on July 15; further, and most importantly, the CO admitted that the excavation could have been less than 5 feet deep and that if it was there was no violation. (Tr. 57-58, 89-91, 105-06).

For all of the foregoing reasons, the Secretary has not met her burden of proving the alleged violation. Item 1 of Citation 1 is accordingly VACATED.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is VACATED.

/s/

G. MARVIN BOBER
Judge, OSHRC

Dated: July 6, 2006
Washington, D.C.