

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

B. S. Carter Construction Co., Inc.,

Respondent.

OSHRC Docket No. **02-0088**

EZ

Appearances:

Marsha L. Semon, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama
For Complainant

Bobby S. Carter, President, Merrill S. Carter, Office Manager, B. S. Carter Construction Co., Inc., Prattville, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsh

DECISION AND ORDER

B. S. Carter Construction Co., Inc. (BSCC), is a small commercial construction contractor primarily engaged in asphalt paving and underground utility installation. On August 2, 2001, BSCC was replacing an underground drainage pipeline with new 54-inch concrete drainage pipe for the City of Prattville, Alabama, when the excavation collapsed, seriously injuring one employee. Based on media news regarding the cave-in and a subsequent complaint, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Frankie Brock initiated an inspection of the worksite on August 3, 2001. As a result of the inspection, BSCC received a serious citation on December 11, 2001. BSCC's January 8, 2002, letter to OSHA is considered a timely notice of contest of all the alleged violations and proposed penalties.

Citation 1, Item 1, alleges a serious violation of 29 C. F. R. § 1926.21(b)(2) for failing to instruct employees in the recognition and avoidance of unsafe conditions in the workplace; Item 2 alleges a serious violation of 29 C. F. R. § 1926.651(c)(2) for failing to provide a stairway, ladder, ramp, or other safe means of egress from the excavation; and Item 3 alleges a serious violation of 29 C. F. R. § 1926.652(a)(1) for

failing to have an adequate protective system to protect employees from cave-ins of the excavation walls. The total proposed penalty is \$5,100.

The case was designated for E-Z trial procedures under 29 C. F. R. § 2200.200, *et seq.* The hearing was held on April 9, 2002, in Montgomery, Alabama. BSCC is represented *pro se* by Bobby S. Carter, president and owner, and by his wife, Merrill S. Carter, office manager. BSCC stipulates that it is an employer engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act (Act) (Tr. 8-9). The parties filed post-hearing written statements.

BSCC denies that it violated the standards because it provided safety training by videotape to all employees, the excavation was sloped in compliance with § 1926.652(a)(1), and the sloped walls were accessible for egress.

For the following reasons, the serious violations of failure to instruct (item 1) and failure to have an adequate protective system (item 3) are affirmed and total penalties of \$3,000 are assessed. The serious violation of failure to provide a safe means of egress (item 2) is vacated.

Background

BSCC is a small commercial construction company in Prattville, Alabama. At the time of the accident, BSCC had six employees including Bobby S. Carter, owner and president; his wife, Merrill S. Carter, office manager; and his son, Steve Carter, foreman and equipment operator. Bobby Carter started the company over 30 years ago and incorporated it about 20 years ago (Tr. 124).

On July 31, 2002, BSCC began work on an emergency job for the City of Prattville that involved replacing underground, corrugated metal drainage pipe that had collapsed with new concrete pipe under Bridge Street near Gin Shop Hill Road. The pipeline was positioned parallel to Gin Shop Hill Road (north to south) and perpendicular to Bridge Street (east to west) (Exh. C-11). The crew consisted of four employees: foreman Steve Carter and three laborers, Lanny Mullis, who had worked off and on for BSCC for eight years, and Anthony Moore and Chris Morris, who had worked for BSCC for less than three weeks (Tr. 68, 76, 107). Foreman Carter was in charge of the job (Tr. 103, 118).

On the first day, the new concrete pipe was unloaded by foreman Carter, who operated a trackhoe that had a 25-30 foot arm and a bucket approximately one and one-quarter yards wide (Tr. 44, 93, 136). The trackhoe was located on Bridge Street (Exh. C-11).

On the second day, August 1, 2001, the excavation was opened. Foreman Carter dug out the dirt and the old metal pipe and lowered the new concrete pipe into the excavation one section at a time with the trackhoe. Each section of the concrete pipe was 8 feet long with an inside diameter of 54 inches. The other three employees worked inside the excavation leveling the dirt for the new section of pipe, cleaning dirt out of the pipe already laid, and guiding the new section of pipe into place. Once the new section of pipe was in place, the employees in the excavation would fill in dirt around the bottom of the newly laid pipe (Tr. 112). Then, foreman Carter would cover it with a few bucketfuls of dirt to secure it (Tr. 109).

That morning Bobby Carter visited the site to inspect the work. BSCC's office is located less than two miles from the excavation site (Tr. 65). While he was there, Bobby Carter was accidentally hit in the head with the bucket of the trackhoe, knocked to the ground, and suffered a concussion. He was taken to the hospital by emergency medical personnel (Tr. 81). As a result of the accident, he has short-term memory loss (Tr. 141).

Prior to the accident, there is no dispute that the excavation was at least 13½ feet deep. According to CO Brock, based on her observations and interviews, the excavation was approximately 14-15 feet deep, and approximately 25 feet long at the top (Tr. 34-35). The width of the excavation at the top was measured to be 20 feet, which measurement was made along Gin Shop Hill Road because of the unstable conditions of the excavation (Tr. 60). CO Brock was unable to measure the bottom of the excavation (Tr. 64). Employees Anthony Moore and Chris Morris stated that the excavation was about 10–11 feet long at the bottom (Tr. 84, 110-111). The bottom width dimension was not provided. Both employees stated that the walls were not sloped (Tr. 84, 111). Owner Bobby Carter testified that the excavation was 13½ feet deep, 51 feet long at the top, and 10 feet wide at the bottom (Tr. 127). His length measurement was made after the excavation was filled in, approximately a week before the hearing. He measured the depth by measuring from the road to the bottom of the new concrete pipe that was not covered with dirt (Tr. 127).

It is also undisputed that a trench box was not used in the excavation and that there was no ladder in the excavation. In order to access the bottom of the excavation, employees walked down a slope to the north of the excavation to the beginning of the recently laid new pipe and walked through the new pipe into the excavation (Tr. 88, 112). Both Anthony Moore and Chris Morris stated that there was no other way to get in or out of the excavation (Tr. 89, 113).

On August 2, 2001, the third day of the job, immediately prior to the collapse, foreman Carter was operating the trackhoe removing dirt from the excavation. Inside the excavation, Anthony Moore and Lanny Mullis were leveling the floor of the excavation with shovels. Chris Morris, who was inside the concrete pipe already laid in the excavation, was cleaning out the dirt in that pipe so the joints of that pipe would seal tightly with the incoming section of pipe. At approximately 4:00 p.m., the north side of the excavation wall, adjacent to the newly laid pipe, caved in burying Anthony Moore completely and covering Lanny Mullis up to his chest (Exh. C-11; Tr. 60, 91). Both employees were rescued by the fire department and taken to the hospital (Exh. C-16, C-18). Anthony Moore had a broken pelvis (broken in four places), broken knee and leg, shattered ankle, and a back injury (Exh. C-14; Tr. 93). Lanny Mullis had minor injuries. Chris Morris, who was inside the pipe, escaped injury.

After watching the evening television news regarding the cave-in, CO Brock inspected the worksite on the morning of August 3, 2001 (Tr. 17). No one from BSCC was at the worksite. Because of her other work commitments, CO Brock did not hold an opening conference with Bobby and Merrill Carter until August 8, 2001. CO Brock also interviewed the other employees and the fire department medics. CO Brock observed Bobby Carter at the excavation while he took soil samples which were sent to the OSHA laboratory in Salt Lake City, Utah, for analysis. Her photographs of the site show how it looked after the cave-in and after the city placed metal sheeting on the east and west walls of the excavation (Exhs. C-1 through C-10; Tr. 42, 70).

DISCUSSION

Alleged Violations

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i. e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Part 1926 construction training and excavation standards apply to BSCC's replacement of underground drainage pipes. BSCC does not dispute applicability of these standards. Also, it is undisputed that three employees were exposed to the violative conditions inside the excavation, which was at least 13½ feet deep.

With regard to employer knowledge, it is noted that “[b]ecause corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). “[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

BSCC knew or should have known of the unsafe conditions of the excavation. BSCC's knowledge of the violative conditions is imputed to it through its foreman, Steve Carter. Carter, as foreman on this job site, was responsible for the condition of the excavation and he directed the other three employees in their work activities.

Alleged Serious Violation of 29 C.F.R. § 1926.21(b)(2)

The citation alleges that BSCC failed to instruct employees working in the excavation about the hazards of the job they were performing. Section 1926.21(b)(2) provides:

(b) *Employer responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

To establish a violation of § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on “(1) how to recognize and avoid unsafe conditions they may encounter on the job, and (2) the regulations applicable to those hazardous conditions.” *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd. without published opinion*, 158 F.3d 583 (5th Cir. 1998). An employer's instructions must be modeled on the applicable standards and must be “specific enough to advise employees of the hazards associated with their work and the ways to avoid them.” *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425, nn. 6 & 7 (No. 90-1106, 1993). Employers must provide more than “weak admonitions” or “vague advice” for safety training and hazard recognition in order to give

its employees the opportunity to protect themselves. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997).

BSCC contends that it required its employees to watch a 20-minute videotape on safety, and the employees had to sign a statement that they had seen the videotape (Exh. R-1; Tr. 101). Merrill Carter testified that the videotape was the only training given to the employees (Tr. 157). This videotape was prepared by International Paper Company, which had a contract with BSCC for pulp clean-up and installation of small PVC pipe for in-ground irrigation that was no more than one foot in depth (Tr. 76, 77). International Paper Company required BSCC employees to watch the videotape before they could work on site at its paper mill (Tr. 76). The videotape was not offered into evidence.

According to the employees, the videotape dealt with safety at the paper mill (chemical spills and waste) and did not have anything on excavation safety (Tr. 101, 115). Both Anthony Moore and Chris Morris stated that they watched the videotape (Tr. 101, 115). They further testified that they never received instructions on the hazards of excavations or the OSHA standards applicable to excavations from anyone at BSCC (Tr. 79, 101-102, 108, 115). Until this job, neither Anthony Moore nor Chris Morris had ever done any excavation work (Tr. 100,107).

The record establishes that the employees did not receive any instructions or training in the recognition and avoidance of excavation hazards. A violation of 29 C. F. R. § 1926.21(b)(2) is affirmed.

Serious Classification

Under § 17(k) of the Act a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition and the employer knew or should have known, with the exercise of reasonable diligence, of the presence of the violation. 29 U. S. C. § 666(k).

BSCC's violation of § 1926.21(b)(2) is serious because an employee's lack of knowledge necessary to avoid unsafe conditions in an excavation could result in death or serious injury. The likely result of an excavation collapse on employees is death or serious injury. In this case, an employee was completely buried by the excavation collapse and suffered multiple injuries and was unable to work for approximately eight months. BSCC knew its employees were in an excavation at least 13½ feet deep without training them in the recognition of excavation hazards.

Alleged Serious Violation of 29 C.F.R. § 1926.651(c)(2)

The citation alleges that BSCC did not provide a stairway, ladder, ramp or other safe means of egress from the excavation, which was at least 13½ feet deep. Section 1926.651(c)(2) provides:

(2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

It is undisputed that there was no stairway, ladder, or ramp to access the excavation. The employees stated that the only means of access to and from the excavation was through the newly laid 54-inch concrete pipe. Employees stated that they had to walk down a slope that was not part of the excavation and enter the newly laid concrete pipe and walk through it to get into the excavation. Other than the obvious fact that an employee would have to walk bent over or crouched down in the 54-inch pipe, there was no testimony that walking through the pipe was difficult¹.

BSCC maintains that the side wall of the excavation was sloped enough for egress because the excavation was 51 feet long at the top and 10 feet wide at the bottom. Since Bobby Carter took excavation measurements more than seven months after the excavation was filled in, his measurements are unreliable. Additionally, the measurements are inconsistent with other evidence in the case (*see infra*).

The Secretary argues that the newly laid pipe was not a safe means of egress since it might be completely covered with dirt in a cave-in.

In the event of a cave-in, any safe means of exit from the excavation might be covered over with dirt. In this case the cave-in occurred right next to the newly laid pipe and dirt did not cover its opening (Exh. C-2, C-11). The new concrete pipe provided a safe means of escape, as evidenced by the fact that the pipe protected Chris Morris, who was inside it, when the excavation caved in.

The Secretary failed to show that the 54-inch concrete pipe was not a safe means of egress from the excavation. Also, there is no showing that entrance to the pipe required more than 25 feet of lateral travel for employees. Accordingly, the violation of 29 C. F. R. § 1926.651(c)(2) is vacated.

¹ One fire department rescue team (Team E-2), who rescued the buried employees, accessed the excavation through the newly laid pipe and another rescue team (Team T-14) used its ladder to access the excavation (Exh. C-16).

Alleged Serious Violation of 29 C. F. R. § 1926.652(a)(1)

The citation alleges that BSCC did not provide protective sheeting to prevent collapse of the walls of the excavation, which consisted of Types B and C soils. Section 1926.652(a)(1) provides:

(a) *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 methods for protecting employees from cave-ins in an excavation not in stable rock or more than five feet deep are sloping, benching, shoring, shielding, or other protective systems to support the walls of the excavation. 29 C. F. R. § 1926.652. It is undisputed that the excavation in this case was not in stable rock and was not benched, shored, protected by a trench box, or protected by use of some other system to support the walls of the excavation as required for the type of soil.

The Secretary contends that the excavation was not properly sloped. Section 1926.650 defines sloping:

Sloping (Sloping system) means a method of protecting employees from cave-ins by excavating to form sides of an excavation that are inclined away from the excavation so as to prevent cave-ins. The angle of incline required to prevent a cave-in varies with differences in such matters as the soil type, environmental conditions of exposure, and application of surcharge loads.

According to CO Brock, the soil in the excavation was sandy with some clay and gravel (Tr. 58). The soil also had been previously disturbed and was subject to vibrations from the heavy equipment parked next to the excavation and traffic on one of the roads (Gin Shop Hill Road) adjacent to the excavation (Exh. C-11; Tr. 45). The soil samples from the excavation, analyzed by OSHA's Salt Lake City laboratory, were classified as Type B soil ("silty, gravelly sand") and Type C soil ("gravelly sand"), the least stable soil category (Exh. C-17). Part 1926, Subpart P, Appendix B, requires a 1 horizontal to 1 vertical slope (45 degree angle of incline) for Type B soil and a 1½ horizontal to 1 vertical slope (34 degree angle of incline) for Type C soil in an excavation.

BSCC did not test the soil in the excavation in accordance with Appendix A of Subpart P, Part 1926, to determine what type of protective system to utilize. Owner Bobby Carter stated that based on his visual inspection, the soil was sandy clay, that is, marginally Type B (Tr. 134). There is no evidence that

Bobby Carter conducted a manual test of the soil. He was not shown to have OSHA or other training in soil classification.

BSCC argues that the excavation was properly sloped. Bobby Carter measured the top of the excavation more than seven months after it was filled in and he found it to be 51 feet long. He claims that the excavation was sloped 2½:1 based on his measurement of 51 feet long at the top and 13½ feet deep. Thus, Carter argues that the excavation was sloped more than the 1½:1 slope required for Type C soil.

This argument is unreliable. Bobby Carter's testimony at the hearing was unclear and his measurement of 51 feet is rejected since it was made after the excavation was filled in. At one point, Carter states that the measurement might have been the overall length of the newly laid pipe "where the pavement started to where it stopped" and not the size of the actual excavation opening (Tr. 128, 129). Due to his short-term memory loss, he does not remember if he was at the excavation and saw it after digging had begun (Tr. 141-143). Thus, Bobby Carter has no personal knowledge of the excavation when it was open (Tr. 141-143). It is noted that Steve Carter, who had personal knowledge of the size and shape of the excavation, did not testify.

Furthermore, Bobby Carter's argument is inconsistent with the evidence. The two employees in the excavation stated that the walls of the excavation were vertical, straight up, and that there was no slope to the walls of the excavation (Exh. C-14; Tr. 84, 111). They stated that the only way to get into the excavation was through the newly laid pipe because the excavation was too deep to jump into and the only way to go down the excavation walls would be with a ladder (Tr. 89, 104, 113). Because they worked in the excavation and had first-hand knowledge of the conditions of the excavation, their testimony regarding the inadequate sloping of the walls is credible.

Moreover, their testimony is supported by the observations of CO Brook, who visited the site immediately after the collapse. Based on the 8-foot length of pipe in the excavation, it does not appear from the photographs taken by CO Brock that the top of the excavation was anywhere near 51 feet (Exhs. C-1 through C-7). CO Brock found the excavation to be 20 feet wide by 25 feet long at the top (Exh. C-11).

The record, therefore, establishes that BSCC's excavation was not adequately sloped. It is not necessary to decide whether the soil in the excavation was Type B or Type C soil. In order for the

excavation to meet the standard's sloping requirements, it should have been at least 37 feet across the top for Type B soil, instead of 25 feet. For Type C soil, it needed to be at least 50½ feet instead of 25 feet.

Since the excavation was not properly sloped to protect employees from a cave-in, a violation of 29 C. F. R. § 1926.652(a)(1) is established. Also, failure to have a protective system in an excavation is a serious violation. Serious injury, as occurred in the instant case, is the probable result of a cave-in.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

BSCC is a very small corporation with six employees. Four employees were involved in the pipe replacement work. BSCC is entitled to credit for size.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In this case, the gravity is high. Three employees were in the excavation off and on for two days. The excavation did cave-in, seriously injuring one employee.

BSCC exhibited good faith. It was cooperative through the inspection. Subsequent to the inspection, BSCC hired a safety professional to design a new safety program and to provide training for its employees. Credit is given for good faith.

BSCC has no prior history of OSHA violations or any previous contact with OSHA. Credit is given for good history.

Based on these factors, a penalty of \$1,000 is reasonable for Citation 1, Item 1, and a penalty of \$2,000 is reasonable for Citation 1, Item 3.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The preceding decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the preceding decision, it is ORDERED:

1. Citation 1, Item 1, alleging serious violation of 29 C. F. R. § 1926.21(b)(2), is affirmed and a penalty of \$1,000 is assessed.
2. Citation 1, Item 2, alleging a serious violation of 29 C. F. R. § 1926.651(c)(2), is vacated and no penalty is assessed.
3. Citation 1, Item 3, alleging a serious violation of 29 C. F. R. § 1926.652(a)(1), is affirmed and a penalty of \$2,000 is assessed.

/s/

KEN S. WELSCH
Judge

Date: May 16, 2002