

Secretary of Labor,

Complainant,

v.

Complete General Construction Company,

Respondent.

OSHRC Docket No. 02-1896

Appearances:

Mary L. Bradley, Esq., Mary Ann Garvey, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio
For Complainant

Michael S. Holman, Esq., Maureen Taylor, Esq., Bricker & Eckler, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Complete General Construction Company (CGCC) is a general contractor specializing in building highways and bridges, and in installing storm and sewer pipe systems (Tr. 106). On September 20, 2002, one of CGCC's employees was injured while working at the site of a storm drainage project in Dublin, Ohio. Occupational Safety and Health Administration (OSHA) compliance officer Gerald Miller investigated the accident that same day, and on October 16, 2002, the Secretary issued a two-item citation to CGCC.

Item 1 alleged a serious violation of § 5(a)(1) for failing to properly secure an excavator bucket. Prior to the hearing in this case, the Secretary withdrew item 1 (this will be reflected in the Order at the end of this Decision) (Tr. 6).

Item 2, the only item at issue in this case, alleges a serious violation of § 1926.652(a)(1) for failing to protect employees in an excavation from the hazards of a cave-in.

A hearing was held in this case on April 30, 2003. The parties have filed post-hearing briefs and CGCC has filed a reply brief. CGCC concedes that its employee was standing in an area of an excavation in soil that was greater than 5 feet in depth and where there was no adequate protective system. CGCC asserts the affirmative defense of unpreventable employee misconduct, unusually, not on the part of the employee who entered the excavation, but on the part of its foreman who allowed the employee to enter.

For the reasons set out below, CGCC's affirmative defense of employee misconduct is rejected and item 2 is affirmed. A penalty of \$2,500.00 is assessed.

Background

In July 2002, CGCC began a storm drainage project for the City of Dublin, Ohio. The project was completed on schedule in October 2002 (Tr. 169-170).

On September 20, 2002, CGCC had a five-man crew working along the south side of Martin Road (the pipeline along the north side of Martin Road had already been installed). The crew included foreman William Redoutey and pipelayer Louis Royce Ford. CGCC had hired Redoutey the previous month, in August of 2002 (Tr. 175, 177). Ford was also a new hire, having started at CGCC on September 10, 2002 (Tr. 74).

On the morning of September 20, the crew was preparing to continue the installation of the storm pipeline. It had installed pipe along the south side of Martin Road the day before, and had left an approximately 25-foot long trench open overnight (Tr. 187). Cecil Storts, the excavator operator, had brought the excavator around to begin sloping the area of the trench where the crew would be working that day (Tr. 188-190). Sometime before 9:00 a.m. Ford entered the trench. He had been in the trench approximately 15 to 20 minutes and had just moved some fiber-optic cable on top of the previously-installed storm pipe, when the bucket of the excavator suddenly detached and struck Ford on the head (Tr. 15, 84-85, 133). He was knocked unconscious and was taken to the hospital, where he regained consciousness 2 days later (Tr. 99-100).

Someone at the site notified OSHA's Columbus Area Office, which dispatched compliance officer Miller to investigate the accident. He arrived at the site after Ford had been taken to the hospital. The bucket was still in the trench and the excavator had not been moved (Tr. 14-17).

Using an engineering rod, Miller took several measurements and determined that the trench was approximately 6 feet deep on the north side and 6 feet, 2 inches, deep on the south side where Ford was standing when the bucket fell on him. Miller did not enter the trench to measure the width of the bottom, or toe, of the trench, but he estimated it to be 8 feet wide. He measured the width at the top of the trench and found it to be 14 feet (Exh. C-2; Tr. 22).

Redoutey stated that he was the competent person on the site. He had classified the soil as Type B, which requires a 1:1 slope, if sloping is the protective system chosen (Tr. 28). Miller took samples from the spoil piles and sent them to OSHA's laboratory in Salt Lake City. The results showed that the soil on

the south side of the trench was Type B and the soil on the north side of the trench was Type C (Exh. C-4, Tr. 25).

As a result of Miller's investigation, the Secretary issued the instant citation to CGCC on October 16, 2002).

The Citation

The Secretary alleges that CGCC committed a serious violation of § 1926.652(a)(1). She has the burden of proving this violation by a preponderance of the evidence.

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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 2: Alleged Serious Violation of § 1926.652(a)(1)

Section 1926.652(a)(1) provides:

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) Excavation 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.

Applicability

As noted in the previous section, the excavation was not in stable rock and the excavation was greater than 5 feet in depth. It is undisputed that § 1926.652(a)(1) applies to the excavation at issue.

Noncompliance with Terms of the Standard

At the hearing and in its post-hearing brief and reply brief, CGCC disputed various aspects of Miller's excavation measurements. Miller testified regarding his estimation of the width of the toe of the trench (Tr. 22):

I wasn't going down in the trench to measure the toe, but talking to Mr. Tambini [CGCC's safety director] and Mr. Redoutey and stuff, we came up with that the toe of the trench was 8 feet across the bottom. And, when I measured across the top, it was 14 feet across the top where the sloping was there.

Miller recorded his measurements immediately after taking them (Exh. C-2).

According to “Appendix A to Subpart P of Part 1926–Soil Classification,” excavations over 5 feet deep must be sloped 1:1 on both sides for Type B soil and 1½:1 for Type C soil.¹ Using Miller’s measurements, the trench in this case would have had to have been 20 feet wide across the top to be properly sloped for even Type B soil (Tr. 42).

Tambini denied that he agreed with Miller that the toe of the trench was 8 feet wide. He stated that it was not CGCC’s policy for its supervisory personnel to discuss the specifics of an inspection with OSHA (Tr. 134-135): “I did not get into a discussion with it. Mr. Miller told me what his findings were. . . I didn’t do anything [to confirm or deny the measurements] because when it comes to that, our policy is we’re not supposed to, you know, get into an argument with OSHA.”

Ford did not measure the trench toe while he was in the trench, but he estimated that it was 5 feet, 10 inches, wide based on how far he could stretch out his arms in the trench without touching the sides (Tr. 79). Redoutey estimated that the trench toe was 5 feet, 8 inches, wide. He calculated this estimate using the outside diameter of the pipe (44 inches) and allowing 1 foot clearance on each side of the pipe (12 inches plus 12 inches) (Tr. 183-184).

Tambini testified that Miller did not measure the width of the top of the trench at the same place where Ford was standing when he was struck by the bucket. Rather, Tambini stated that Miller measured the width of the trench behind the backhoe, which was not where Ford stood. After Miller left, Tambini measured the width of the top of the trench where Ford had been standing and found the measurement to be “between 16 and 17 feet” (Tr. 136).

Three different measurements are given for the maximum width of the toe of the trench (Miller: 8 feet; Ford: 5 feet, 10 inches; and Redoutey: 5 feet, 8 inches) and two different measurements for the maximum width at the top of the trench where Ford was standing (Miller: 14 feet, and Tambini: 17 feet). The parties agree that the sides of the trench were 6 feet high. As previously noted, if Miller’s measurements are correct, then the top of the trench should have been 20 feet across to be properly sloped

¹ The hazard of engulfment exists when *either* side of an excavation gives way. The fact that the north wall of the excavation was dug in Type C soil, and that part of the soil was “previously disturbed” (and by definition Type C soil) was not emphasized by either party. Because it is found that the excavation was improperly sloped even for Type B soil, it is unnecessary to discuss whether any part of the excavation required sloping for Type C soil.

(6 feet deep + 6 feet deep + 8 feet wide = 20 feet). If Redoutey's estimate of the width of the trench toe is used, the trench, properly sloped, would have been 17 feet, 8 inches wide at the top (6 feet deep + 6 feet deep + 5 feet, 8 inches, wide = 17 feet, 8 inches). Using Ford's estimate of the trench toe of 5 feet, 10 inches, the trench should have been 17 feet, 10 inches wide across the top (6 feet deep + 6 feet deep + 5 feet, 10 inches wide = 17 feet, 10 inches). Even if Miller's measurement of 14 feet is rejected (which it is not), the longest measurement recorded for the width of the top of the trench is 17 feet. Using the narrowest estimate for the width of the trench toe, the top of the trench is still 8 inches short of being properly sloped for Type B soil.

Despite CGCC's objections to Miller's measurements, CGCC ultimately concedes that it failed to comply with the terms of the cited standard even if the soil is classified as Type B (CGCC's post-hearing brief, pp. 9-10):

The trench in question was adequately sloped to provide protection in all but one location. There is no disagreement that at one end the excavation in question was more than five feet and was not in stable rock. At that end, the excavation should have been sloped one-to-one, which would have required a top opening between 17 and 18 feet wide. In one spot near the end of the pipe—where Mr. Ford was standing—the sloping was admittedly inadequate.

The Secretary, as CGCC concedes, has established that the company was not in compliance with the terms of the cited standard.

Employee Access to Violative Condition

The issue of employee access to the violative condition is not contested. The excavation was located next to a public road. It was left open overnight. Employees began arriving at the site between 7:00 and 8:00 a.m. (Tr. 77). The improperly sloped area of the excavation was directly at the location where the pipelayer would have to position himself to take up where he left off work the day before. The record establishes that CGCC's employees had access to the unprotected trench and that Ford was exposed to the hazard of a cave-in.

Employer Knowledge

The Secretary contends that foreman Redoutey instructed Ford to enter the unprotected trench, and thus had actual knowledge of the violation. Redoutey testified that he was planning to adequately slope the trench before any employees entered it. When asked when he found out that Ford had entered the trench, Redoutey responded, "When the flag person motioned, I knew there was something wrong when

she was pointing and by the time I got back down to the trench where the bucket was in the trench is when I knew that it had happened. . . . I was surprised because I didn't direct [Ford] to go into the trench at that time" (Tr. 213).

Ford (who is suing CGCC) implied that he was following Redoutey's instructions when he entered the trench, but a review of his testimony shows that Ford could not state that Redoutey specifically instructed him to enter the trench on the morning of September 20 (Tr. 79-80):

Q: Did anyone instruct you to enter the trench to perform your duties?

Ford: Every day I was there, Bill would show up, we would hook up. I would set the transit and everything up, and he would say, "let's lay pipe."

Q: Who would hook up?

Ford: When I would show up, Bill, the foreman, would set up the transit, get everything shot in, set the transit up, the laser up, and he would say, "let's lay the pipe."

Q: Who instructed you to enter the trench?

Ford: Well, that was my job. Bill told me, you know, when I got to the job my first day he said, "You're the pipelayer. You will be laying pipe."

Ford is speaking in generalities about how he routinely went about his work. He avoids stating that on the actual morning of the accident Redoutey personally instructed him to enter the trench. Redoutey and Ford were the only two witnesses who testified regarding why Ford entered the trench. Redoutey stated emphatically that he did not instruct Ford to enter it. Ford declined to state categorically that Redoutey did so. Redoutey's testimony is accepted on this point. The Secretary has not shown that CGCC, through its supervisor, had actual knowledge that an employee was working in an unprotected trench.

The record does establish, however, that CGCC had constructive knowledge of Ford's presence in the unprotected trench. Constructive knowledge is imputed when the employer, with the exercise of reasonable diligence, could have known of a violative condition.

Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

Precision Concrete Construction, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001).

Redoutey was the certified competent person on the site (Tr. 172). At the time of the accident, there was approximately 36 feet of open trench (Tr. 39) (Redoutey estimated that the trench was 20 to 25 feet long (Tr. 187)). Redoutey was present on the site and supervising only four employees. Ford had been in the trench for approximately 15 minutes when the excavator bucket fell on him. Under these circumstances, reasonable diligence required Redoutey to anticipate that Ford might enter the trench, which was how he routinely began each workday. Reasonable diligence also required Redoutey to observe Ford in the trench. Redoutey was supervising a relatively small area with few employees. Ford was in the trench (in the area where he was assigned to work) for at least 15 minutes. The flagger was able to spot him from the street where she was working. As supervisor and competent person, it was Redoutey's responsibility to anticipate that Ford would enter the trench and know where his employees were located when the excavator operator moved the excavator into position.

It is determined that Redoutey had constructive knowledge that Ford was in the unprotected area of the trench. "The knowledge of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing the knowledge." *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39 (No. 85-531, 1991). CGCC has not put forward any grounds for not imputing Redoutey's knowledge to itself, and concedes that there was a violation of § 1926.652(a)(1) (which CGCC attributes to employee misconduct).

Unpreventable Employee Misconduct Defense

CGCC states that Ford's presence in the unprotected trench "would be an OSHA violation, unless it can be shown to be an incidence of isolated employee misconduct based on the idiosyncratic conduct of the foreman, Mr. Redoutey" (CGCC's post-hearing brief, p. 10). In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997). However, "[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent

the accident, including adequate instruction and supervision of its employee.” *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 19).

Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors’ duty to protect the safety of employees under his supervision. A supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax. *United Geophysical Corporation*, 9 BNA OSHC 2117, 2122-2123 (No. 78-6265, 1981).

**Did CGCC Have an Established Work Rule
Designed to Prevent a Violation of § 1926.652(a)(1)?**

CGCC issues a copy of its safety manual to each new employee (Exh. R-4). Redoutey and Ford each received copies of the safety manual (Exh. R-3; Tr. 75, 175).

The safety manual contains a section entitled “Trenching and Excavating Policy” (Exh. R-4). The section specifically refers to § 1926.652 and lists the requirements of that standard. Appendix D to the Trenching section, entitled “Sloping and Benching,” contains specifications for sloping and benching in accordance with § 1926.652(b)(2). Table D-1 shows that Type B soil requires a slope of 1:1 and Type C of 1½:1. Figure D-1.2 is a diagram showing slope configurations for excavations made in Type B soil.

CGCC has established that it had a written work rule designed to prevent a violation of § 1926.652(a)(1).

Did CGCC Adequately Communicate this Work Rule to Its Employees?

CGCC’s communication of its work rules to its employees was inadequate. Ford testified that he was hired by CGCC on September 10 and given a copy of the safety manual (Tr. 74-75). He stated that CGCC did not otherwise train him. No one reviewed the safety manual with him, no one quizzed or tested on the contents of the safety manual or the specific rule at issue (Tr. 75-76).

CGCC holds weekly “tool box” meetings that the company considered safety training. Ford testified that he did not consider these meetings to be safety training “[b]ecause the only time it happened was on Fridays, and the only time we really talked about was how the day went, what we was doing the next day, and ‘Sign this paper to receive your check’” (Tr. 91-92).

CGCC holds an annual safety meeting for its supervisors (Exh. R-5; Tr. 119). Over a 3 month period, at least one of the tool box meeting topics included trench safety (Exh. R-6; Tr. 29, 123). However,

Redoutey had been with CGCC approximately 1 month at the time of Ford's accident and had not attended the annual supervisors' safety meeting. Trench safety was not a tool box topic during the time Redoutey worked before Ford's September 20 accident. He did not receive any training from CGCC from the time he was hired (Tr. 149-150). Redoutey was given a copy of the safety manual and he "looked it over and signed" that he had received it (Exh. R-11; Tr. 175).

The testimony of Redoutey and Ford demonstrates that CGCC failed to adequately communicate the work rule. It is noted that the safety manual is approximately 200 pages long (the pages are not numbered). It contains extensive sections on various topics, complete with appendices, tables, and diagrams. The section on trenching and excavating is the next-to-last section. It would take several hours for an average reader to completely read the safety manual. Part of CGCC's daily activities involves excavating. CGCC did nothing to highlight the protections needed against the hazards inherent in excavating and working in trenches. "Effective communication requires more than handing a new employee a thick safety manual and telling him or her to look it over and then sign the "Safety Manual Release Form" (Exh. R-3, R-11).

CGCC has failed to establish that it effectively communicated its work rules to its employees. Its defense of employee misconduct must, therefore, fail.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

CGCC employs approximately 600 employees (Tr. 106). The Secretary had cited CGCC for a serious violation within the previous three years (Tr. 33). The record establishes that CGCC acted in good faith. It had a good written safety program and an annual supervisors' safety meeting.

The gravity of the violation is high. To quote CGCC's safety manual (Exh. R-4):

Cave-ins cause death and injuries by suffocation, crushing, loss of circulation, and falling objects. One cubic foot of soil can weigh between 90 and 140 pounds. More workers are killed or seriously injured in and around excavations than in any other phase of construction.

It is determined that a penalty of \$2,500.00 is appropriate.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing 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 upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation, which was withdrawn by the Secretary, is vacated, and no penalty is assessed; and
2. Item 2 of the citation is affirmed, and a penalty of \$2,500.00 is assessed.

_____/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: July 30, 2003