



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

ARBY CONSTRUCTION COMPANY, and its
successors,

Respondent.

OSHRC DOCKET NO. 03-0826

APPEARANCES:

For the Complainant:

Rafael B. Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Charles B. Palmer, Esq., Michael, Best & Friedrich, LLP, Waukesha, Wisconsin

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Arby Construction Company (Arby), at all times relevant to this action maintained a place of business along Highway 47 near Appleton, Wisconsin, where it was excavating a trench for a gas line. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Exh. J-1).

On March 13, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Arby's Appleton work site. As a result of that inspection, Arby's was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Arby's brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 8, 2003, a hearing was held in Milwaukee, Wisconsin. At the hearing the parties submitted a partial stipulation and settlement in which the Secretary agrees to reduce the proposed penalty for citation 1, item 1, alleging violation of §1926.651(c)(2) in return for Respondent's withdrawal of its notice of contest (Tr. 5-6). The partial stipulation and settlement is hereby adopted and made a part of this

Order. The parties have submitted briefs on the matters remaining at issue and this matter is ready for disposition.

Alleged Violations

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-in by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

(a) At the site, employees were working in a trench that was near 5 feet, 10 inches deep, 5-1/2 feet wide, and near vertical walls. The trench was not properly sloped, shored, nor was a trench box used.

Facts

OSHA Compliance Officer (CO) David Marx testified that he was driving down Country Highway 47 on March 13, 2003, when he noticed an employee in an unprotected trench by the side of the highway (Tr. 21). CO Marx photographed the top of the employee's helmet, which he could just see over the lower lip of the trench closest to the highway (Tr. 21, Exh. C-1). He also photographed the employee's foreman, Henry Vissers, who was standing on the lip of the trench (Tr. 21-23, 26; Exh. C-1). Marx then approached the site on foot in order to conduct an inspection. When Marx reached the trench, he found three employees inside, putting a sleeve on a gas line (Tr. 23-24; Exh. C-2, C-3). When CO Marx measured the trench at the point where the employees were working, he found that the trench was six feet deep, and between five feet and five feet two inches wide, with vertical¹ walls (Tr. 31-31, 61; Exh. J-1 at ¶17, C-5, C-6, C-7). Arby stipulated that the soil in the trench was Type B (Exh. J-1 ¶14). During his inspection, Marx saw soil sloughing off the side of the trench nearest to the highway just to the north of the area where the employees were working (Tr. 34-36, 64; Exh. C-3).

Arby has a work rule which prohibits employees entering trenches over 4'11" deep unless the trench is sloped shored, sheeted, braced or otherwise adequately supported (Exh. R-1, p. 21). Vissers, one of two "competent persons" on the site, told Marx that he did not believe that cave-in protection was necessary in this trench, because it should have been less than five feet deep (Tr. 27-28, 63, 85-87, 118, Exh. R-4; Exh. R-5). At the hearing, Vissers testified that the trench was no more than four feet deep when he left the trench area to "take care of some things at the other end of the job" (Tr. 120-22). However, Vissers stated, while he was gone the second competent person on site, Tony Christensen, continued hand digging around the gas line (Tr. 87, 120-22). According to Vissers, Christensen should have measured the trench

¹ CO Marx testified that the top lip of the trench may have been back five or six inches back from the trench wall (Tr. 58). It is clear from the photographs, however, that the sides of the trench were, in fact, vertical.

before he and the other employees went in, but he did not (Tr. 142). According to Vissers' testimony, Christensen had no means of measuring the trench in any event, as there was neither a trench rod nor tape measure near the trench (Tr. 125; Exh. J-1 ¶19). Vissers testified that when he returned to the site, he was standing on the high side looking down, and could not tell that the trench was more than five feet deep (Tr. 123).

Timothy Collins, Arby's director of safety, supervises a staff of five, all of whom are responsible for training Arby's 400 to 450 employees and inspecting Arby's 125-150 job sites to ensure that those employees are working safely (Tr. 78, 81). In addition, Collins testified, 11 area managers dedicate approximately 10% of their time conducting work site inspections (Tr. 103-04). According to Mr. Collins Arby provides all its new employees with training on trenching, shoring, and hazards associated with underground utilities (Tr. 79-80). Annually, Arby provides refresher training on "emphasis points" (Tr. 81). The 2003 training covered trenching and excavating (Tr. 81). The employees in Vissers' crew attended the 2003 training (Tr. 83-84, 117; Exh. R-3).

Collins stated that Arby has a progressive disciplinary policy which provides for written reprimands when employees violate company policy (Tr. 90). Employees who receive reprimands may be terminated if they violate safety rules a second time (Tr. 90). Arby produced disciplinary letters signed by Arby safety coordinators, Bruce Morton and Phil Hamilton, dated between March and September, 2000 (Exh. R-7). No disciplinary letters were issued in 2001 or 2002 (Tr. 106). The only other evidence of disciplinary action were the letters written to Vissers' crew following the 2003 OSHA inspection (Exh. R-7).

Members of Arby's safety department had previously inspected job sites where Henry Vissers was the crew leader (Tr. 88; R-6). Collins testified that his department found no violations involving Vissers' work sites or crews prior to March 2003 (Tr. 89). None of Collins' staff inspected the Appleton work site, however, though Arby crews worked in the area for six weeks prior to the OSHA inspection (Tr. 94, 101). At the hearing, Collins admitted that Arby took no steps to discover trenching violations at this work site, as it was training season, and none of his employees were available to conduct inspections (Tr. 102, 105).

Following the OSHA investigation, Arby inspected the Appleton work site, and found that the unprotected trench was deeper than five feet (Tr. 93, 113). As noted above, Mr. Vissers and his crew received disciplinary letters for violating Arby company policy, which requires that employees in trenches greater than 4' 11" inches shall be protected by a trench box, sloping, or benching (Tr. 82, 91, 101, 119, 134; R-7). Vissers was also disciplined for failing to provide a means of egress from the cited trench, the violation cited at citation 1, item 1 (Tr. 104).

Discussion

The cited standard 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) 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.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the standard applies to the conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171, 2000 CCH OSHD ¶32,137, p. 48,443 (No. 99-257, 2000).

Arby maintains that the Secretary failed to prove that the terms of the cited standard were not met, or to show that it either knew or could have known of the cited condition. Arby further argues that any violation was the result of unpreventable employee misconduct.

The Violation. The record clearly establishes that, at the point where the three employees were working in the cited trench, the trench measured six feet deep and was less than five and a half feet wide. The trench was neither sloped, benched nor shored as provided for by paragraphs (b) and (c) of §1926.652. Clearly, Arby was in violation of the cited standard.

Moreover, it is inconceivable that Arby's foreman, Vissers, was unaware of the cited condition. CO Marx photographed one of Vissers' crew members standing directly next to the offending trench wall, which is level with the top of his head. Vissers is pictured standing directly above him. Vissers' claim to have believed the trench was less than five feet deep is simply not credible. The Secretary has established her prima facie case.

Unpreventable employee misconduct. The knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. Specifically, the employer must establish that the failure of the supervisory employee to follow proper procedures was unpreventable. The fact that [the employer] may not have known of the specific instance of violative conduct at the time it occurred does not mean that the conduct could not have been prevented *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991). The employer must establish that it had relevant work rules which

were adequately communicated and effectively enforced. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).

The record in this case does not support Arby's contention that the misconduct in this instance was unpreventable. The evidence establishes that Arby has a work rule requiring that excavations over 4'11" be shored. It is also clear that Vissers received training and was aware of the rule. However, this judge cannot find that the rule was effectively enforced where, as here, not one but two competent persons on the work site failed to prevent employees from entering an unprotected trench which was clearly deeper than allowed either by the employer's work rules or OSHA regulations.

It is telling that one of the competent persons, Tony Christensen, entered the trench himself, and that Vissers, in addition to failing to protect employees in the trench from the cave-in hazard, also failed to provide them with a means of egress. Though the OSHA citation pertaining to the means of egress was settled prior to the hearing, Vissers was disciplined for failing to provide an exit ladder as required by Arby's work rules at Exhibit R-1, p. 21. Misconduct by multiple employees, including supervisory personnel, is strong evidence that an employer's safety program is lax. *See, Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996); *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991).

The unanimity of the misconduct on this work site, the absence of any evidence of employee discipline in all of 2001 and 2002, together with safety director Collins' admission that his staff was too busy with training to conduct inspections of this work site, demonstrate that Arby's safety program was ineffectively enforced. Arby has not established its affirmative defense.

Penalty

A penalty of \$2,625.00 was proposed for this violation. CO Marx testified that Arby was a large company, with more than 400 employees (Tr. 47). Arby has an adequate safety program on paper and has no history of OSHA violations in the prior three years (Tr. 48). Marx believed the gravity of the violation was "medium." The record shows that three employees were exposed to the cited hazard; the soil in the trench was sloughing from the walls; two of the employees were bent over in the trench as they placed the sleeve on the gas line. However, the record indicates that the probability of a cave in was small, in that the employees' exposure was short, and the trench was not uniformly deep. The Secretary stipulated that the north end of the trench was only four feet eight inches deep (Exh. J-1, ¶16), and it is clear from the photographic evidence that the lip of the trench wall on the highway side is significantly lower than the trench wall where CO Marx took his measurements. Taking into account the relevant factors, this judge

finds that the gravity of the violation is overstated. A penalty of \$1,500.00 is deemed appropriate, and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of 29 C.F.R. 1926.652(a)(1) is AFFIRMED, and a penalty of \$1,500.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: December 15, 2003