



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

Complainant,

v.

NORTH TEXAS CONTRACTING, INC.,
and its successors,

Respondent.

OSHRC DOCKET NO. 05-0330

APPEARANCES:

For the Complainant:

Charles R. Hairston, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Robert Farrow, Jay Louy, North Texas Contracting, Inc., Keller, Texas

Before: Administrative Law Judge: Robert A. Yetman

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, North Texas Contracting, Inc. (North Texas), at all times relevant to this action maintained a place of business at the intersection of Randall and McKinnon St., in Dallas, Texas, where it was engaged in the installation of a box sewer line (Tr. 27, 184). North Texas admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 8).

On September 8, 2004, the Occupational Safety and Health Administration (OSHA) conducted an inspection at North Texas' Dallas worksite. As a result of that inspection, OSHA issued a citation alleging violations of the excavation standards at §1926, Subpart P. By filing a timely notice of contest North Texas brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On September 7, 2005, a hearing was held in Arlington, Texas. The parties have submitted briefs on the issues, and this matter is ready for disposition.

The Inspection

When Compliance Officer (CO) Teresa Renee Salazar arrived at North Texas' Dallas worksite on September 8, 2004, Chris Holiday, North Texas' foreman, was standing on top of the second of two sections of sewer drain in the trench. Another employee, Thomas Comargo, stood in the trench itself, aligning a third section of the 4x4 box sewer drain as the excavator operator lowered it into the trench (Tr. 28, 32, 33, 39-40; Exh. C-9). The trench was 69 feet long, measured from east to west (Tr. 34). CO Salazar inserted a 25-foot engineering rod into the trench from the south wall, and read it while it was as near to vertical as possible. She found the trench to be approximately 10 feet deep and 14.4 feet wide in the area where Comargo was working (Tr. 35, 95-99). Salazar classified the soil as Type B. The trench was located in downtown Dallas and the soil appeared to have been previously disturbed (Tr. 123). Water lines ran perpendicular to and actually extended into the trench (Tr. 52-55). North Texas employees told Salazar that a water line had been installed parallel to the north side of the trench two or three weeks earlier (Tr. 102-03, 122-25). In addition, water from the existing pipes had accumulated in the east and west ends of the trench (Tr. 52-55; Exh. C-4, C-7). Finally, a portion of the north wall had sloughed into the east end of the trench (Tr. 50; Exh. C-8).

OSHA cited North Texas for failing to take protective measures required under §§1926.650-652 for employees working in trenches, in particular, for failing to provide a protective system adequate for excavations dug in Type B soil.

Alleged Violation of §1926.652(a)(1)

Serious citation 1, item 2b alleges:

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(c).

On or about September 8, 2004, employees were working in a 10-foot trench that was not adequately protected from a cave in.

The cited standard provides:

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 Testimony

Michael Bradford, a utility superintendent with North Texas, was at the Dallas work site in the morning on the day of the inspection (Tr. 135-36). Bradford disputed CO Salazar’s measurements, testifying that the profile elevations for the project called for a seven and one half foot trench. Robert Farrow, North Texas’ vice president, testified that the plan documents called for a flow line of 8.4 feet from the top of the paving (Tr. 171, 185). However, Farrow was not on site the day of the inspection (Tr. 169) and neither Farrow nor Bradford measured the trench at the time of or after the inspection (Tr. 160-161). Moreover, Bradford admitted that, judging from the photographs, it appeared “they might have over-excavated a little bit” (Tr. 138, 143, 160-61).

According to Bradford, the area to the north of the trench had not been previously disturbed, and was paved over prior to the beginning of work on the box culvert (Tr. 145-47). He further stated the soil in the east end of the trench had not collapsed, but was simply excavated material that had not yet been removed from the trench (Tr. 160). Bradford classified the soil as Type A (Tr. 147).

Nonetheless, North Texas had been using a trench box earlier in the job. It had pulled the box from the trench when they encountered an existing electrical pole (Tr. 137). At the time of the inspection the muddy trench box was lying on its side behind the trench hoe to the north of the trench (Tr. 44-45). According to Farrow, after pulling the trench box, the trench was cut back at three and one half feet, and benched, resulting in a 45° slope (Tr. 210). In support of his assertion, Respondent introduced one of Complainant’s photographs, on top of which Farrow had drawn in his recollection of the trench dimensions. (Tr. 168, 209-10; Exh. R-2).

Discussion

APPENDIX A TO SUBPART P OF PART 1926–SOIL CLASSIFICATION states that:

Type A means cohesive soils with an unconfined compressive strength of 1.5 tons per square foot (tsf) (144kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases, silty clay loam and sandy clay loam. Cemented soils such as caliche and hardpan are also considered Type A. However, no soil is Type A if:
. . . (iii) The soil has been previously disturbed;

* * *

Type B means . . . (iii) Previously disturbed soil except those which would otherwise be classed as Type C soil.

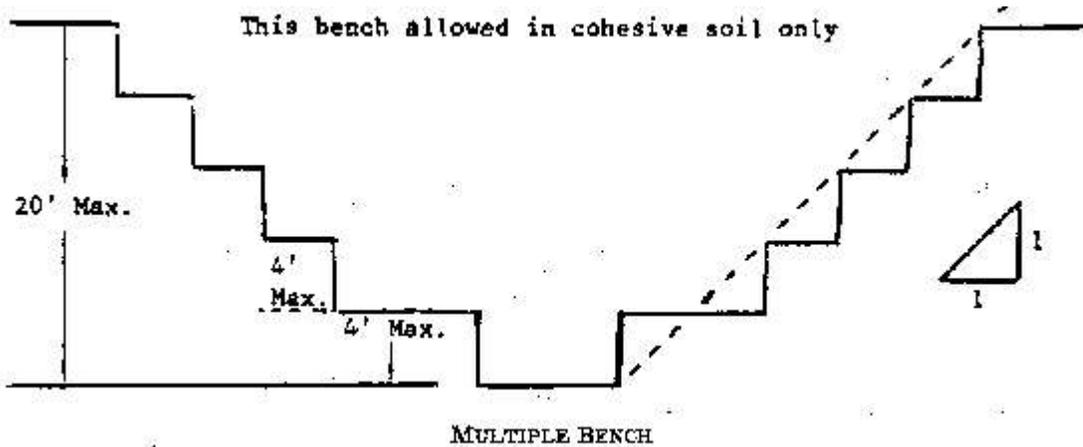
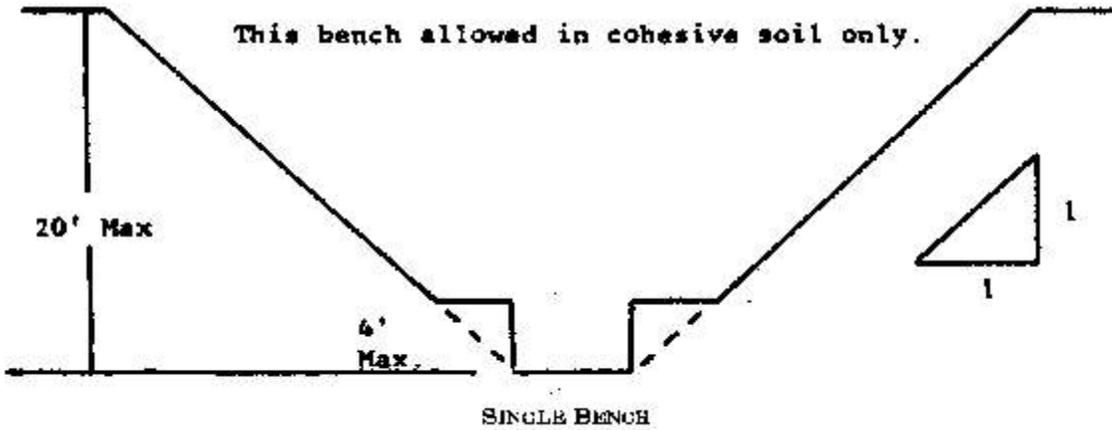
The evidence establishes that the cited trench was excavated in Type B soil. Bradford’s testimony was neither convincing nor supported by the evidence, which shows pre-existing water lines running through the line of the cited trench both to the east and to the west of the installed box sewer drains. The testimony of the Compliance Officer is credited.

Table B-1 APPENDIX B TO SUBPART P OF PART 1926-SLOPING AND BENCHING sets forth the maximum allowable slopes for the various soil types. Type B soil must be sloped a 1:1 ratio, or 45° in excavations less than 20 feet deep.

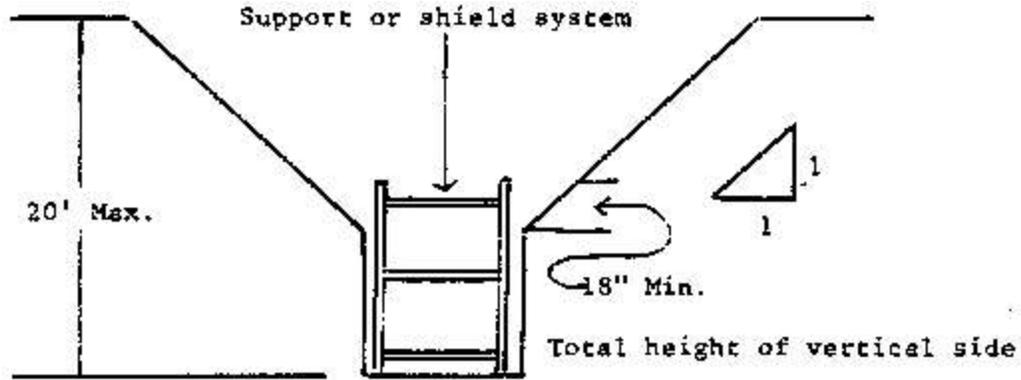
* * *

B-1.2 Excavations Made in Type B Soil . . .

2. All benched excavations 20 feet or less in depth shall have a maximum allowable slope of 1:1 and maximum bench dimensions as follows:



3. All excavations 20 feet or less in depth which have vertically sided lower portions shall be shielded or supported to a height at least 18 inches above the top of the vertical side. All such excavations shall have a maximum allowable slope of 1:1.



VERTICALLY SIDED LOWER PORTION

The cited trench was neither sloped nor benched to a 1:1 ratio (Tr. 58). Respondent's assertions regarding the trench dimensions are based, not on actual measurements, but on the project plans and Farrow's "recollection" of the trench configuration. The numbers used on its Exhibit R-2 were calculated after the fact and are contradicted by the actual measurements taken by CO Salazar, and by the other photographic evidence. It is true that Salazar took only a few measurements and approximated her results. Nonetheless, it is clear from her testimony, her contemporaneous field notes and her photographs, that the south wall rose vertically for approximately 7.2 feet before it was cut back (Tr. 59, 154-55, 187; Exh. C-8, C-9, R-3, R-6). Appendix B clearly requires the use of a shield whenever the vertically sided lower portion of the trench exceeds 4 feet. On this basis alone the violation has been established.

Penalty

A combined penalty of \$4,000.00 was assessed for this violation and the alleged violation of §1926.651(h)(1), as discussed below.

Alleged Violation of §1926.651(h)(1)

Serious citation 1, item 2a alleges:

29 CFR 1926.651(h)(1): Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation:

On or about September 8, 2004, employees were working in a 10-foot trench installing a storm drain that had water accumulated at the bottom of the trench:

The cited standard provides:

Protection from hazards associated with water accumulation. (1) Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

Facts

Approximately 6 inches of water had accumulated in both the east and west ends of the trench from existing water lines that were leaking from the north wall into the bottom of the trench (Tr. 43, 46, 48-49; Exh. C-4, C-6, C-7, C-8). Salazar testified that the presence of water affects the integrity of the soil, causing it to loosen (Tr. 43, 74). The water level remained constant during the course of the OSHA inspection (Tr. 119). Bradford did not feel that the water in the trench constituted a hazard, and testified that any accumulation of water was under control. Because the trench sloped towards the west, additional accumulations of water would have flowed under the gravel bedding below the sewer drain (Tr. 140-43; Exh. C-10). Moreover, Bradford testified it was impractical to use the pump on site to remove the water from the trench (Tr. 141-42). Bradford did not know whether he could prime a pump in the amount of water accumulated in the bottom of the trench (Tr. 142-43).

Discussion

It is clear from the evidence that employees were working in a trench in which water had accumulated, in violation of the cited standard. The water was not draining from the cited trench, despite the alleged sloping, and North Texas made no attempt to remove the accumulated water, so cannot argue that the use of a pump would have been infeasible. Mr. Comargo was working next to a vertical wall without the benefit of the trench shield that had been in the trench earlier in the job. Not only did North Texas fail to take additional precautions to protect employees from cave-in hazards, it had removed the protection previously provided. The violation has been established.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Gravity factors to be considered include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against

injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The gravity of the combined violations is high. Respondent exacerbated its failure to provide adequate protection for employees in the trench by allowing water to accumulate there. It is clear that should an employee be buried under a collapsed trench wall, the injuries he would sustain would be serious. Two employees were exposed for a limited period, as North Texas had a trench box on site during the installation of the first two sewer drain sections. The Secretary originally proposed a gravity based penalty of \$5,000.00. Salazar testified that North Texas was entitled to a 20% reduction in the proposed penalty based on its size (Tr. 75-76). North Texas should have been given an additional deduction of 10%, as they had no serious OSHA violations within the past three years (Tr. 77). Accordingly a penalty of \$3,600.00 will be assessed.

Alleged Violation of §1926.651(c)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require more than 25 feet (7.62m) of lateral travel for employees:

On or about September 8, 2004, employees were not provided proper egress while working inside of a trench that measured approximately 10-feet deep and 69-feet long.

The cited standard provides:

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 (7.62m) of lateral travel for employees.

Facts

A ladder was placed in the cited trench between the second box and south trench wall approximately 47 feet from the west end of the trench (Tr. 35-36). It is admitted that employees would not be able to access the ladder in the event of an emergency; North Dallas states that the ladder was not intended as a means of egress (Tr. 35; North Dallas' closing statement p. 1). The only other egress from the trench was through the box culvert and out the sloped west end (Tr. 80, 82).

Discussion

North Dallas contends that employees could reach the sloped west end of the trench through the 4x4 box drain, and that the three segments of box drain were, at most, 24 feet long (Tr. 82). There is no

evidence, however, suggesting that the ramp leading out of the trench was located within a foot of the west end of the sewer drain. Salazar testified that the ramp was not within 25 feet of the employees working in the trench (Tr. 80). The photographic evidence confirms that there was a substantial section of flat, muddy trench bottom at the west end of the first section of box drain (Exh. C-7). The violation has been established.

Penalty

A penalty of \$2,000.00 was proposed for this item. The evidence establishes that the gravity of the violation was high. Two employees could have been crushed by collapsing trench walls as they worked on the third section of sewer drain, or as they attempted to exit the trench on the west side of the sewer drain. As discussed above, North Texas is entitled to an addition 10% reduction in the proposed penalty because of its good history. A penalty of \$1,800.00 is assessed.

Alleged Violation of §1926.651(j)(2)

Serious citation 1, item 3 alleges:

29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations:

On or about September 8, 2004, employees were exposed to struck-by hazards due to spoil piles and excavation equipment being at the edge of the trench.

The cited standard provides:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary.

Facts

North Texas' track hoe extended approximately four feet over the edge of the north wall at the east end of the trench while it was lowering the third section of box culvert (Tr. 60-61; Exh. C-5). Bradford testified that the front of the track was 19½ feet from the third section of box culvert (Tr. 144). Salazar believed that the placement of the track hoe caused the cave-in she observed in the east end of the trench (Tr. 64).

Excavated dirt was located in spoil piles directly at the edge of the north wall (Tr. 64). The spoil piles were located along the length of the wall including the area where Mr. Comargo was working, and the area of egress at the west end of the trench (Tr. 65-66, 121; C-10).

Discussion

North Texas maintains that the evidence does not establish that the presence of the excavator had any impact on the stability of the trench. In addition it maintains that none of its employees were working beneath the excavator. However, most occupational safety and health standards include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered. These standards are predicated on the existence of a hazard when their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978).

The cited standard states that employers “shall” keep equipment and spoils at least two feet from the edge on excavations, or use retaining devices to protect employees in the trench. Because North Texas did neither, it is in violation of the standard.

Penalty

A penalty of \$4,000.00 was proposed for this item. The gravity of the violation is high. Respondent exacerbated its failure to provide adequate protection for employees in the trench by storing spoil piles along the edge of the trench, and by allowing its excavator to operate at the edge of the cited trench. It is clear that should an employee be buried under a collapsed trench wall, the injuries he would sustain would be serious. As discussed above, two employees were exposed to the cited hazard while they installed the third section of drain. Taking into account North Texas’ size, history and good faith a penalty of \$3,600.00 is deemed appropriate, and will be assessed.

Findings of Fact

All findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. North Texas is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. North Texas, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, North Texas was in violation of 29 CFR §1926.651(c)(2), and said violation was serious within the meaning of the Act.
4. At the time and place alleged, North Texas violated the provisions of 29 CFR §1926.651(h)(1), and said violation was serious within the meaning of the Act.
5. At the time and place alleged, North Texas was in violation of 29 CFR §1926.652(a)(1), and said violation was serious within the meaning of the Act.
6. At the time and place alleged, North Texas was in violation of 29 CFR §1926.651(j)(2), and said violation was serious within the meaning of the Act.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1926.651(c)(2) is AFFIRMED and a penalty of \$1,800.00 is ASSESSED.
2. Citation 1, items 2a and 2b, alleging violations of 29 CFR §§1926.651(h)(1) and 652(a)(1) are AFFIRMED and a combined penalty of \$3,600.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of 29 CFR §1926.651(j)(2) is AFFIRMED and a penalty of \$3,600.00 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: December 7, 2005