



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

MARIO SINACOLA & SONS EXCAVATING,
INC., and its successors

Respondent.

OSHRC DOCKET NO. 06-0390

APPEARANCES:

For the Complainant:

Carlton C. Jackson, Esq., Madeleine T. Le, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas Texas

For the Respondent:

Michael A. Miller, Esq., Miller & McCarthy, P.C., Dallas, Texas

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").

At all times relevant to this action, Respondent, Mario Sinacola & Sons Excavating, Inc. (Sinacola) was installing an 8" water line at the intersection of Teel Parkway and High Shoals Drive in Frisco, Texas. Sinacola admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On October 17, 2006, the Occupational Safety and Health Administration (OSHA) was notified of a fatality at Sinacola's Frisco worksite, and initiated an inspection of that incident. As a result of its inspection, OSHA issued a citation alleging violation of §5(a)(1) of the Act. By filing a timely notice of contest Sinacola brought this proceeding before the Occupational Safety and Health Review Commission

(Commission). A hearing was held in Dallas, Texas on December 5, 2006. Briefs have been submitted on the issues, and this matter is ready for disposition.

Alleged Violation of §5(a)(1)

Serious Citation 1, item 1 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970:

The employer did not furnish employment and a place of employment free from recognized hazards that were causing, or likely to cause, death or serious physical harm to employees. On or about October 17, 2005 at a construction site located at and/or near the southwest corner of Teel Parkway & High Shoals in Frisco, TX, the employer failed to implement adequate measures/procedures to ensure that personnel working near and or in close proximity of earth moving equipments, i.e., a Caterpillar 345C Excavator, were accounted for prior to the movement of the machine and/or its related components., i.e., boom/bucket. A worker installing an 8-inch water line in a trench approximately 4.5 feet deep was fatally injured when he was crushed/struck-by the bucket/boom assembly of the excavator and pinned against the side wall of the trench.

Among other means, some feasible and acceptable abatement methods to correct this hazard are:

1. Develop and effectively implement procedures to ensure that all personnel working near moving equipment are accounted for and positioned a safe distance away from the danger area of the machine and its related components prior to allowing it to be moved.
2. Develop a written job hazard analysis on the safe work practices of installing pipes/utilities in trenches/excavations and to include the roles and responsibilities of those individuals involved in this process.
3. Develop a method(s) that would effectively allow employees to remain in constant contact with one another during the installation of underground utilities and/or other various operations, more importantly in areas and/or instances where visual and oral communication is difficult and/or obsolete.
4. Appoint a safety monitor/signalman during the process of installing underground utilities to ensure workers do not access the work area and that all personnel are positioned a safe distance away from the danger area of the machine and its related components prior to allowing a machine to be moved.
5. Develop and implement signals that are consistent and understood by all personnel and that only one signalman is utilized at a time. In the event there is a transfer from one signalman to another, this action needs to be understood by all parties involved, including the original person giving the hand signals.

FACTS

On October 17, 2006, a Sinacola crew was laying pipe in a north/south running trench at the Frisco worksite. The crew consisted of an excavator operator, Ramon Ruiz-Hinojosa, and two pipe-layers in the

trench, Jesus San Juan and Primitivo Martinez. Immediately prior to the accident, San Juan was positioned in the trench to the north of the excavator, next to the female end of the previously installed pipe. Martinez was in the trench on the south side of the back hoe acting as signal man for Ruiz-Hinojosa, who had limited visibility and could not see that section of the trench where the pipes were to be fitted together. At Martinez' signal, Ruiz-Hinojosa lifted the pipe section with a 3/8" choker attached to the excavator's arm and lowered it into the trench. Martinez then signaled Ruiz-Hinojosa to stop, and walked under the bucket to the north end of the trench in order to help San Juan maneuver the male end of the new section of pipe into the female end of the previously installed section (Tr. 24-29, 31-33, 43-45, 205, 214). At no time could Ruiz-Hinojosa see Martinez once he moved north in the trench to help San Juan make the connection (Tr. 29, 37).

At this point, Mark Harig, the foreman, came up to the south side of the back hoe. Martinez signaled to Harig, who, seeing that Martinez and San Juan had the two pipe sections lined up, signaled Ruiz-Hinojosa to move the excavator's bucket northward to drive the new pipe into the joint (Tr. 29, 92, 202, 214-15; Exh. C-29). Harig could see that Martinez and San Juan were approximately six to ten feet to the north of the connection (Tr. 185, 196, 216-17). According to Harig, Ruiz-Hinojosa then backed off slightly, a foot or so, to take the pressure off the chain, and stopped (Tr. 30, 218, 220). Ruiz-Hinojosa also testified that, as soon as he was told the pipe was connected, it was his practice to "automatically" move the bucket back slightly to take tension off the chain (Tr. 31, 46). Harig testified that at no time did Martinez attempt to get around the bucket as it moved away from him, back towards the south end of the trench (Tr. 220). After the task was complete and there was nothing left to do but remove the cable from the pipe, Harig turned his attention to a second crew that was backfilling an area to the south of the trench at issue (Tr. 30, 220). While Harig's attention was elsewhere, Martinez apparently attempted to return to his position to the south of the excavator (Tr. 31, 221). When Harig turned his attention back to the trench, he saw the bucket bearing down on Martinez, who was subsequently crushed against the west side of the trench (Tr. 31, 221).

Ruiz-Hinojosa testified that he was still taking the tension off the chain when Harig shouted at him to stop and he realized Martinez had moved between the trench wall and the excavator bucket (Tr. 48-49).

Delmar E. Talley, a safety consultant and former OSHA Compliance Officer, agreed that it is dangerous to operate an excavator without ensuring that employees are a safe distance away from the boom or bucket (Tr. 251). He further agreed that it is a safe practice to make sure that all employees are out of the path of the boom or bucket before moving such equipment (Tr. 251). The Association of Equipment Manufacturers (AEM) Safety Manual for Operating and Maintenance Personnel admonishes excavator

operators to “Remember the Other Person. . . Always look around before you back up, hook up or swing an attachment. Be sure that everyone is in the clear.” (Tr. 95-96; Exh. C-11), and to “Make sure the area is clear of all persons before you start operating.” (Tr. 97; Exh. C-11).

Talley also testified that a reasonable employer should follow manufacturer’s recommendations when operating such equipment (Tr. 251). The Caterpillar Operation and Maintenance Manual states “Make sure that no personnel will be endangered before you move the machine.” (Tr. 98-99; Exh. C-13, p. 24).

Finally, Caterpillar’s operator’s manual states: “Accept hand signals from one person only.” (Tr. 98-99; Exh. C-13, p. 17). The 1999 S.A.F.E. Systems of America, Inc.’s Basic Safety Rules for Construction include the warning: “Don’t distract the crane operator. Only one signalman at a time.” (Exh. C-12, p. 20). Talley testified that the use of a single signalman at any given time is considered a recommended practice when the operator’s view is obstructed (Tr. 252). Talley maintained that it is common for the signaling duties to change based on changing conditions in the worksite (Tr. 253-56).

Discussion

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

Recognized hazard. A recognized hazard may be a practice, procedure or condition under the employers' control that is known to be hazardous either constructively, i.e., by the industry in general, or actually, by the cited employer in particular. *Pelron Corporation*, 12 BNA OSHC 1833, 1986 CCH OSHD ¶27,605 (No. 82-388, 1986). *See also; Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991) [Advisory (ANSI) standards may establish industry recognition].

It is clear on this record that the construction industry recognizes that personnel working in too close proximity to heavy equipment, such as the subject excavator, are exposed to the hazard of being struck by the bucket of the excavator if the operator moves the boom. Compliance Officer Benito Mercado testified, and the AEM Safety manual states that death or serious injury may be sustained by personnel working within the swing radius of an excavator (Tr. 111; Exh. C-11, p. 22). That the hazard of being struck by the movement of an excavator’s boom/bucket is likely to cause death or serious physical harm is clearly demonstrated by the fatality in this case. The record also demonstrates that Sinacola recognized

the cited hazard. Its employees, Ruiz-Hinjosa and San Juan, testified that they were instructed not to work or walk around moving machinery (Tr. 41, 198). Ruiz-Hinjosa was aware that personnel needed to be cleared from the area in front of the excavator before he moved the boom/bucket, and testified that he was trained to receive hand signals because, as the operator's view is generally obstructed, he must rely on a signal man to tell him when the area is clear and it is safe to move the boom/bucket (Tr. 58-60).

Means of Abatement. The Secretary suggests a number of abatement measures which she claims will eliminate or materially reduce the hazard. The citation lists five "feasible abatement measures." Only two of those measures were tried and briefed. The others are deemed abandoned. First, the Secretary suggests that Sinacola ensure that personnel are accounted for and positioned a safe distance away from the excavator's danger zone prior to allowing the operator to move the boom/bucket. Second, the Secretary suggests that Sinacola utilize only a single signalman, and require that signaling responsibilities be formally transferred.

In essence, the first abatement method merely restates the recognized hazard, and suggests that Sinacola develop and implement additional procedures to eliminate it. The Commission has long held that under §5(a)(1) a recognized hazard may not be defined in terms of the absence of appropriate abatement measures. *See, Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1245 (No. 76-4807 & 76-4808, 1981). Likewise, appropriate abatement measures cannot be described merely as the elimination of a hazard inherent to the cited working conditions. Where, as here, the Secretary alleges that the employer's existing work rules or safety program are not adequate to eliminate a recognized hazard, then the burden is on the Secretary to indicate the additional steps the employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of these measures. *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1267-68 & n. 40 (D.C. Cir.1973); *Cerro Metal Products Div., Marmon Group, Inc.*, 12 BNA OSHC 1821, 1822, 1986-87 CCH OSHD ¶ 27,579, at p. 35,829 (No. 78-5159, 1986). The Secretary must further establish that such precautions are recognized by "knowledgeable persons familiar with the industry as necessary and valuable steps for a sound safety program in the particular circumstances existing at the employer's worksite." *Id.*

The Secretary's only specific proposal is that Sinacola use a single signalman in circumstances where the operator's line of sight is obstructed and ensure that signaling responsibilities are transferred only with the understanding of all parties involved. The record establishes that Sinacola utilized a signalman. Ruiz-Hinjosa testified that he was trained to receive hand signals, and that, as his view was generally obstructed, he relied on a signalman to tell him when the area is clear and it is safe to move the boom/bucket (Tr. 58-60). On the day of the accident Ruiz-Hinjosa received hand signals from only one

signalman at a time. The decedent, Martinez, and subsequently the foreman, Harig, acted as Ruiz Hinjosa's signalmen. The Secretary introduced no evidence that a reasonable employer familiar with the conditions on Sinacola's work site would have found these safety precautions inadequate.

The Secretary argues that Harig's failure to *formally* relieve Martinez of his signaling duties may have caused him to believe he was in sole control of the excavator, and that it would not move except on his signal. This scenario, however, is not supported by the facts. Martinez, as an authorized signalman, must have known he had relinquished his signaling duties. Once he walked under the excavator's boom he could no longer see Ruiz-Hinjosa, and knew Ruiz-Hinjosa could not see him. Moreover, Harig testified, without contradiction, that Martinez motioned to him, indicating the pipe was in place and ready to be pushed into the previously installed line. As the excavator pushed the pipe into place, Martinez must have known Ruiz-Hinjosa was taking signals from Harig rather than from him. This judge cannot envision, and the Secretary has not explained, how the institution of formal procedures for handing off signaling duties would have materially altered what actually occurred at the Sinacola worksite.

The Secretary failed to establish what more a reasonable employer could have done to ensure that its signalman understands a transfer of signaling duties has occurred. Because she has not suggested a feasible means of abating the cited hazard, the cited violation must be dismissed.

ORDER

1. Serious citation 1, item 1, alleging violation of §5(a)(1) of the Act is VACATED.

/s/ _____
Benjamin R. Loye
Judge, OSHRC

Dated: March 2, 2007