

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.
Decker Construction,
Respondent.

OSHRC Docket No. **06-1106**

Appearances:

Linda Hastings, Esquire, Cleveland, Ohio
For Complainant

Corey Crognale, Esquire, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Decker Construction is an asphalt paving contractor. The Occupational Safety and Health Administration (OSHA) conducted an inspection of Decker's jobsite in Columbus, Ohio, on June 8, 2006. As a result of this inspection, respondent was issued a Citation. Decker filed a timely notice contesting the citation and proposed penalties. A hearing was held in Columbus, Ohio, pursuant to Simplified Proceedings on September 20, 2006. At the hearing the parties settled Citation No. 1, Item 2. Remaining at issue are Citation No. 1, Items 1a and b, 3, 4, and 5. For the reasons that follow Item 1b is vacated and Items 1a, 2, 3, 4, and 5 are affirmed. Total penalties for Items 1a, 2, 3, 4 and 5 of \$5,625.00 are assessed.

Background

Respondent had a jobsite near the intersection of Bonus and Chatterton Roads in Columbus, Ohio. This job involved the relocation of fire hydrants as part of a road widening project. On June 8, 2006, the Secretary's compliance officer, Karen Preskar, conducted an inspection of that part of respondent's jobsite involving an excavation where Decker employees were in the process of relocating a fire hydrant. When Ms. Preskar arrived, the hydrant was being placed, and about 75% of the relocation was completed. Moe Rapp was respondent's site superintendent, foreman and competent person.

Ms. Preskar observed employees in the excavation placing the fire hydrant. The parties agreed at the hearing that the excavation was dug in Type B soil. The compliance officer measured the excavation and determined that the depth was 7 feet to 7 feet 8 inches, the bottom width was 7 feet in the area of the employee in the excavation, the top width of the excavation was 12 feet and the length of the excavation was 12 feet. Respondent took no independent measurements of this excavation.

Discussion

The Secretary has the burden of proving the violation:

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 constructive knowledge of the violation (i.e., the employer 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).

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

The Secretary in Citation No. 1, Item 1a alleges that:

The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

On the site, the employer did not ensure employees were clear on the requirements for cave-in protection, spoil pile placement and safe means of egress while working in a trench.

The standard at 29 C.F.R. § 1926.21(b)(2) provides:

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.

This standard is clearly applicable to the working conditions at issue. Respondent is involved in construction including road widening and hazards encountered in trenching and excavation.

The Secretary argues that one employee, Brian Kraeft, received no training and the training of employees Rapp, Sowers and Hanning was not adequate. At the hearing, respondent presented evidence that it provided a competent person course for its foremen. Rapp, however, did not attend this course. Respondent did produce some evidence that Rapp, Sowers and Hanning observed a training video on Trench and Shoring Safety on May 10, 2006. (Exh. R-2, R-3). Ryan Schasteen, respondent's project manager, testified that all members of this crew attended the video training on trench safety. A careful review of Exhibits R-2 and R-3, however, reveals that Brian Kraeft did not sign the sheets signed by those employees that received the training. Also, Mr. Kraeft told the compliance officer, Ms. Preskar, that he had past training with the city, but not with Decker. The Secretary has established that at least Mr. Kraeft was not instructed by Decker in the recognition and avoidance of unsafe conditions and regulations applicable to work in excavations. Respondent failed to comply with the terms of the standard.

Mr. Kraeft was working at the top of the trench, holding the hydrant. He clearly had access to the hazardous conditions of the excavation and therefore, was exposed to those conditions.

Respondent had knowledge of this violation. It maintained sign-in sheets showing the names of employees that attended the trench safety video in May, 2006. It knew, through its foreman, that Mr. Kraeft was working in this excavation. Decker made no attempt to train Mr. Kraeft in the recognition of the hazards of excavations prior to allowing him to work in one on the day of the inspection. It made no attempt to determine whether Mr. Kraeft had attended the video training or had received other instruction or training on trench and excavation safety before allowing him to work in this excavation. Respondent had constructive knowledge of the violation. The Secretary has established a violation of 29 C.F.R. § 1926.21(b)(2).

The violation was serious. Failure to instruct each employee in the recognition of hazards of working in a trench can result in serious injuries or death.

Alleged Serious Violation of 29 C.F.R. § 1926.651(k)(1).

The Secretary in Citation No.1, Item 1b alleges that:

Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions:

On the site, the employer did not ensure the trench had been inspected by a competent person prior to employees working in the trench.

The standard at 29 C.F.R. § 1926.651(k)(1) provides:

(k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The term “Competent Person” is defined in 29 C.F.R. § 1926.650(b) as follows:

Competent person means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

This standard is clearly applicable. Respondent is engaged in construction work involving excavations. It is undisputed that Decker employees worked in the excavation on June 8, 2006. Remaining at issue is whether, on the day of inspection, respondent’s excavation was inspected by a competent person prior to entry by its employees.

Moe Rapp, Decker’s foreman and job superintendent, was respondent’s designated competent person at this site authorized by the respondent to make daily inspections and correct hazardous conditions. Decker provided competent person training for its superintendents, but Mr. Rapp was on vacation and did not attend the course. He did receive annual general safety training from Decker for the past seven years. He took the OSHA 10-hour course prior to working for Decker. Some of his training included classification of soils, placement of spoil piles and how the trench is to be excavated depending on depth.

Mr. Rapp testified regarding his method of inspection of excavations. He stated that he performs a thumb test and visual inspection of the soil to determine whether the soil is virgin soil or previously disturbed. He checks for rock size, cracks in walls and water seepage. He decides whether to use a trench box or slope the sides of the excavation. He testified that he inspects the site every morning before work begins. Mr. Rapp testified that he inspected this site on the day of the inspection. He did a thumb test and visual test. He determined this to be virgin soil. He saw no problems with the sidewalls, and saw nothing out of the ordinary on that trench.

On cross examination, Mr. Rapp testified that the soil at the location of the excavation was Type - B. He stated that he did not complete an inspection checklist for this excavation. He attended a course to become a competent person in trenching and excavation at some unstated time in the past, but did not receive a competent person certificate.

The evidence relating to the alleged violation of this standard is limited at best. The Secretary has the burden of proving that an inspection by a competent person was not made prior to the start of work on June 8, 2006.

Mr. Rapp testified that he did make an inspection of the site before work on June 8, 2006. The issue before me is whether Mr. Rapp was a competent person for Decker on that site on that day. Mr. Rapp and Mr. Schasteen, Decker's Project Manager, testified regarding the question of whether Mr. Rapp was the competent person on-site. Their testimony established that Mr. Rapp was authorized to act as the competent person for Decker, to make daily inspections and to take prompt corrective measures to eliminate hazards to employees. Mr. Rapp was at this excavation at all times when employees were in the trench. The Secretary presented insufficient evidence to prove that Mr. Rapp was not capable of identifying existing and predictable hazards in this excavation. The record is unclear as to the extent of Mr. Rapp's ability to act as a competent person. The Secretary, therefore, has presented insufficient evidence to establish that Decker did not comply with the terms of 29 C.F.R. § 1926.651(k)(1).

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

The Secretary in Citation No. 1, Item 3 alleges that:

A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were four feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

On the site, the employer did not ensure the employees working in the trench were provided with a safe mean of egress.

The standard at 29 C.F.R. § 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 (1.22m) or more in depth so as it require no more that 25 feet (7.62m) of lateral travel for employees.

A "ramp" is defined in 29 C.F.R. § 1926.650 as follows:

Ramp means an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood.

The standard clearly applies. Respondent is engaged in construction including work in an excavation. It is undisputed that respondent had no stairway or ladder as a means of egress from the excavation where its employees worked while relocating a fire hydrant.

The depth of the trench exceeded 4 feet. Karen Preskar, the Secretary's compliance officer, directly measured the depth and determined that the trench depth ranged between 7 feet and 7 feet 8 inches. Respondent took no measurement of this excavation. Ms. Preskar's determinations as to the trench depth are accepted.

At issue is whether employees had a ramp or other safe means of egress from this excavation. The evidence shows that respondent did not construct a ramp or other means of egress to allow employees to safely exit the trench.

Respondent required its employees to scramble up one side of the excavation to exit the trench. That side was covered with loose gravel. Ms. Preskar testified that she saw an employee, Mr. Kraeft, exiting the trench. She stated that he was using a spud bar to assist him in getting out of the trench. She also observed gravel rolling into the trench while he was trying to walk out of the excavation. The photograph in Exhibit C-10 is consistent with Ms. Preskar's testimony. It appears to depict Mr. Kraeft climbing out of the trench with his left hand on his left knee and the iron spud bar held vertically behind his torso on his right side. The logical inference from the testimony and the photograph is that Mr. Kraeft was using the bar for assistance in climbing up the side of the excavation. I find Ms. Preskar's testimony credible on this point.

The testimony of Mr. Rapp and Mr. Frost that Mr. Kraeft could walk out of the excavation upright without difficulty is totally inconsistent with Exhibit C-10. I find their testimony on this point not credible. The Secretary established that respondent failed to comply with the terms of 29 C.F.R. § 1926.651(c)(2) by not providing its employees a safe means of egress from this excavation.

Respondent's employee, Brian Kraeft, was exposed to this hazard. He was observed exiting the 7 foot deep trench using the side of the excavation. Decker, through its foreman, knew of this condition. Rapp was present during the entire job and knew that no ladder or ramp was provided. He was present and saw Mr. Kraeft climb up the trench side to exit the excavation. The Secretary has established a violation of 29 C.F.R. § 1926.651(c)(2). The violation was serious. Without a safe means of egress from a 7 foot deep trench, an employee could sustain serious injury or death from cave-in of the excavation walls.

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

The Secretary in Citation No. 1, Item 4 alleges that:

Protection was not provided by placing and keeping excavated or other materials or equipment at least two feet (.61m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary:

On the site, the employer did not ensure the spoil pile was placed at least 2 feet away from the edge of the trench to protect employees working in the trench.

The standard at 29 C.F.R. § 1926.651(j)(2) provides:

(2) 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.

Ms. Preskar, the compliance officer, testified that two piles of excavated material were at the top edge of the excavation with no retaining devices to prevent the excavated material from rolling or falling into the excavation. This testimony is consistent with the photographic evidence (Exhibits C-1, C-11 and C-12). I find her testimony credible and consistent on this point.

There is potential for these materials to fall or roll into the trench. Respondent's employees, Kraeft and Hanning worked in the trench, exposed to the excavated materials. Mr. Rapp, Decker's foreman, was present at this trench throughout the job. He observed these employees working below the excavated materials at the top edge of the trench.

Ryan Schasteen, respondent's project manager, testified he saw no problem with the spoil piles. He was not at the site on June 8, 2006, and based his testimony on a review of the photos and hearsay from his crew. His testimony is not credible since he did not view the site on the day of the inspection. The testimony of Ms. Preskar is more credible since she observed the trench condition directly on-site during the inspection.

The testimony of employees Rapp, Frost and Sowers is inconsistent with the photographic evidence and inconsistent with the testimony of Ms. Preskar. Each of these employees gave a different estimate of the location of the spoil pile in relation to the edge of the trench. Their collective inconsistent testimony is not credible on this point.

The Secretary has established a violation of 29 C.F.R § 1926.651(j)(2). The violation is serious. Falling material from the edge of an excavation could cause death or serious physical injury.

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

The Secretary in Citation No. 1, Item 5 alleges that:

Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R 1926.652(c):

On the site, the employer did not ensure employees working in the trench were provided with cave-in protection.

The standard at 29 C.F.R. § 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 standard is clearly applicable. The Secretary has alleged that an employee in an excavation at this site was not protected from cave-ins by shoring or sloping. Paragraphs (b) and (c) describe the design and configuration requirements of shoring and sloping systems. The cited standard incorporates by reference paragraphs (b) and (c) and requires that employees be protected by a system designed in accordance with one of those two paragraphs. The standard is applicable where, as here, the violative condition alleged is allowing an employee to work in a excavation without an adequate protective system. The reference to paragraphs (b) and (c) is sufficient notice to an employer as to how systems must be designed to provide adequate protection.

Karen Preskar, the Secretary's compliance officer, determined the dimensions of respondent's trench during her inspection on June 8, 2006. Respondent made no independent measurements. Mr. Rapp, Decker's foreman, did not dispute Ms. Preskar's measurements during the inspection. The compliance officer determined that the depth was 7 feet to 7 feet 8 inches, the width at the bottom of the trench was 7 feet, the width at the top was 12 feet and the length of the trench was 12 feet.

It is undisputed that the excavation was dug in Type B soil. The standard requires shoring or sloping of the sides of the trench at a ratio of 1 to 1, that is, at a 45 degree angle. The side of the trench next to the sidewalk or bike path was vertical. The wall on the opposite side of the excavation was vertical with only a six inch to one foot wide bench, about 4 feet above the trench bottom. To comply with the requirements of the standard, an excavation 7 feet wide at the bottom must be sloped so the width at the top is at least 21 feet. This would provide a 45 degree angle from the toe of the trench wall to the top edge of the excavation. Here the top width of the excavation was only 12 feet. An alternative means of compliance would be the use of a trench box or other shoring. Decker failed to use either a trench box or other shoring to protect its employees in this 7 foot deep excavation.

While some testimony of Decker employees Rapp, Frost and Sowers corroborated the measurements of Ms. Preskar, other testimony by these individuals was inconsistent with her determination of dimensions of the excavation. Their testimony was inconsistent with prior statements during the inspection, inconsistent with the testimony of each other and even internally inconsistent during their own testimony. After observing the demeanor of these witnesses, listening to their testimony and fully reviewing all evidence submitted in this case, I find the testimony of these employees not credible as to the dimensions of this excavation. Ms. Preskar's determinations and testimony are supported by measurements and other evidence discussed above. Her testimony is found to be credible regarding conditions and dimensions of this excavation. The Secretary has established that respondent failed to comply with the terms of the standard.

Respondent's employees were exposed to the hazards of cave-in. Jarrod Hanning, Decker's laborer, was in the bottom of the 7 foot deep excavation bolting the fire hydrant. Another employee Brian Kraeft, was near the top of the excavation holding the hydrant in place while Hanning was making the connection.

Decker had requisite knowledge of this violative condition through its job superintendent and foreman, Moe Rapp. Mr. Rapp directly supervised this work and was designated as Decker's competent person for this excavation. During the inspection, Ms. Preskar told Mr. Rapp that she would like the employees to exit the trench. Ms. Preskar testified that Mr. Rapp then stated: "We only have one piece to finish to install them" and then they would leave. (TR 60.) Even after being advised of the continuing employee exposure to this hazardous condition, respondent's job superintendent exhibited no urgency in removing employees from the excavation and abating the violation.

The Secretary has established a violation of 29 C.F.R. § 1926.652(a)(1). The violation was serious in that a cave-in could result in death or serious physical harm.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 176 (No.88-237, 1994).

Respondent is an employer with approximately 150 employees, and 5 employees at this trench. Respondent did not immediately abate or correct the violative conditions, showing a lack of good faith during the inspection.

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 likelihood that any injury would result." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (no. 87-2059, 1993).

This was a five person crew. One employee was observed working in the bottom of this 7 foot deep excavation. One employee was observed exiting it. The walls of the excavation were improperly sloped and unshored. The job superintendent was the competent person and foreman for this site. He directed the work to be done in the manner actually performed.

Based on these factors, appropriate penalties for the violations found are as follows:

For the violation of 29 C.F.R. § 1926.21(b)(2) the appropriate penalty is \$400.00

For the violation of 29 C.F.R. § 1926.100(a) the appropriate penalty is \$1,100.00

For the violation of 29 C.F.R. § 1926.651(c)(2) the appropriate penalty is \$1,375.00

For the violation of 29 C.F.R. § 1926.651(j)(2) the appropriate penalty is \$1,375.00

For the violation of 29 C.F.R. § 1926.652(a)(1) the appropriate penalty is \$1,375.00

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:

Citation No.1, Item 1a is affirmed as a serious violation and a penalty of \$400.00 is assessed,

Citation No.1, Item 1b is vacated,

Citation No.1, Item 2 is affirmed as a serious violation and a penalty of \$1,100.00 is assessed.

Citation No.1, Item 3 is affirmed as a serious violation and a penalty of \$1,375.00 is assessed.

Citation No.1, Item 4 is affirmed as a serious violation and a penalty of \$1,375.00 is assessed.

Citation No.1, Item 5 is affirmed as a serious violation and a penalty of \$1,375.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: November 3, 2006