

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,
Complainant

v.

Griffin Contracting, Inc.,
Respondent.

OSHRC Docket No. **07-0788**

Simplified Proceedings

Appearances:

Kristina T. Harrell, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Luis A. Ramirez, Jr., Representative, Griffin Contracting, Inc., Savannah, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Griffin Contracting, Inc. (GCI) contracted to install the underground utilities at a construction site for a new CVS Pharmacy in Port Wentworth, Georgia. On March 27, 2007, while the GCI crew was working in an excavation near an existing underground junction box, Occupational Safety and Health Administration (OSHA) Compliance Officer Elizabeth Freeman who was driving to another inspection site, observed the excavation lacked cave-in protection along the “near” vertical north wall. She stopped and conducted an inspection. As a result of the OSHA inspection, GCI received a serious citation on April 20, 2007.

The citation alleges GCI violated 29 C. F. R. § 1926.652(a)(1) by failing to shore or slope the north wall of the excavation. A penalty of \$2,500.00 is proposed. GCI timely contested the citation.

The case was designated for Simplified Proceedings pursuant to Commission Rule 203(a). The hearing in Savannah, Georgia was held on August 1, 2007. GCI was represented by safety

consultant Luis A. Ramirez, Jr. (Tr. 5). The parties stipulated jurisdiction and coverage (Tr. 6-7). They filed post hearing statements of position.

GCI denies the violation. GCI claims the record fails to establish the north wall of the excavation was vertical (GCI's Statement of Position, August 28, 2007; Tr. 126-127). GCI, also, questions the competence of Freeman, an industrial hygienist, to recognize excavation hazards; Freeman's failure to conduct a manual test to determine the soil classification; and the accuracy of a tape measure to measure the depth of the excavation. GCI presented no witnesses and offered no exhibits of its own in support its arguments (Tr. 124).

As more fully discussed, a serious violation of § 1926.652(a)(1) is affirmed and a penalty of \$2,000.00 is assessed.

BACKGROUND

GCI is in the business of site preparation and the installation of underground utilities. Its office is located in Savannah, Georgia. GCI employs approximately 70 employees and has been in business for six years (Prehearing Conference Order; Tr. 55, 126).

In March 2007, GCI contracted with Fortney & Weygandt, a general contractor, to install the underground utilities including sanitation, storm drains and water pipelines at a construction site for a new CVS Pharmacy in Port Wentworth, Georgia. GCI utilized approximately nine employees on the project (Tr. 28, 61, 62, 64).

On March 27, 2007, a GCI crew of three employees under the supervision of foreman Wayne Conner was digging an excavation from an existing underground concrete junction box¹ to connect a new storm water drain pipe (Tr. 28, 41, 62). Using an excavator, Conner dug the excavation approximately 16 feet in length and 6 feet in depth east from an existing junction box (Tr. 23, 32). To assist in obtaining measurements for the new pipeline and to remove the loose dirt from around the junction box, two employees entered the excavation with shovels (Tr. 40, 41-42, 53). Foreman Conner was inside the junction box with surveying equipment to "grade out" the excavation (Tr. 75).

At approximately 1:30 p.m., while driving to another inspection site, OSHA compliance officer Freeman, an industrial hygienist, saw the excavation (Exhs. C-1, C-2; Tr. 14, 15-16, 29, 58).

¹The junction box had been installed a couple months earlier by Coastal Grading (Tr. 33, 63).

GCI had finished digging this portion of the excavation about 10 minutes prior to her arrival (Tr. 28-29). Because of OSHA's special emphasis program, Freeman parked her car and conducted an OSHA inspection of the excavation (Tr. 17, 61).

Upon entering the project, Freeman observed a GCI employee standing in the excavation near the junction box, within 18 inches of the north wall (Exhs. C-1, C-2, C-3; Tr. 74). From her observation, she considered the north wall to be "near vertical" (Tr. 20, 21). Foreman Conner was standing inside the uncovered junction box in the excavation (Tr. 16-17).

Freeman measured the depth of the excavation, using a metal tape measure in the location where she had observed the employee, to be 6 feet, 4 inches (Exh. C-5; Tr. 22-23). Foreman Conner agreed the excavation was 6 feet in depth (Tr. 23). Freeman estimated the excavation was 5 feet wide at the bottom based on the size of the junction box which was 4 feet square (Tr. 25, 70). After pacing the distance, she estimated the overall length of excavation to be 16 feet (Tr. 23). The first six feet from the junction box were level and the remaining 10 feet were sloped toward the excavator (Tr. 25-26).

Based on observing the soil, Freeman determined the excavation was dug in Type B soil (Tr. 19, 31). She described the soil as cohesive, clumpy and moist. Although the junction box had been installed previously and there was water in the excavation, Freeman was unable to classify the soil as Type C. She was unable to determine the extent of the previously disturbed soil when the junction box was built (Tr. 70, 118). Also, she understood the water in the excavation occurred only when the junction box was opened (Tr. 69). Freeman did not perform a manual test such as thumb penetration in classifying the soil (Tr. 68). Foreman Conner, who described the soil as sticky clay, did not disagree with Freeman's Type B classification (Tr. 26-27, 68-69).

From her observation, Freeman considered the south and east walls (faces) of the excavation to be adequately sloped for Type B soil. She determined the west wall which contained the concrete junction box could not pose a cave-in hazard (Tr. 20, 66-67).

Freeman believed, however, the north wall of the excavation provided inadequate cave-in protection because it was "near" vertical (Tr. 20, 35). Although she had a clinometer,² she did not

²A "clinometer" is an instrument for measuring the angle of elevation.

use it to determine the degree of the slope because she considered it unnecessary (Tr.21, 60). An excavation in Type B soil requires a 45-degree slope. The north wall lacked shoring or benching (Tr. 58).

Freeman's classification of Type B soil was confirmed by the soil analysis of OSHA 's Technical Center in Salt Lake City, Utah (Exhs. C-6, C-7, C-8; Tr. 77, 108). Although the cohesive strength test suggested Type A soil, the Technical Center classified the soil as Type B because of the fissures (cracks) observed in the soil sample (Exh. C-7; Tr. 118-119). Fissures in the soil indicate the soil is unstable and that it could fall apart or cave in (Tr. 88).

Before Freeman left the site, GCI adequately sloped the north wall. It took only a "minute or two" (Exh. C-4; Tr. 49-50). As a result of the OSHA inspection, GCI received a serious citation for violation of §1926.652(a)(1) because the north wall of the excavation in Type B soil was not properly sloped or shored (Tr.35).

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of a safety standard such as §1926.652(a)(1).

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

In this case, there is no dispute as to elements (a), (c) and (d) of the Secretary's burden of proof. The excavation standards at Subpart P, §1926.650 *et seq.*, applied to the excavation dug by GCI on March 27, 2007. GCI was installing utility pipelines for a new construction project (Tr. 28, 62-63). GCI does not dispute that employees were in the excavation exposed to the condition and its on-site foreman had actual knowledge of the excavation (Prehearing Conference Order, July 9, 2007; Exh. C-1). Foreman Conner told Freeman that he and two other employees had been in the excavation near the north wall (Tr. 41, 53). Conner was the senior employee on the site for GCI (Tr. 74).

Conner's belief the excavation was safe is immaterial (Tr. 27). Conner's knowledge of the physical conditions constituting the violation is sufficient. A foreman's understanding that the physical conditions were actually hazardous is not required. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995). Conner knew the employees were working in the excavation and the north wall lacked cave-in protection (Exh. C-1). He told Freeman the employees were in the excavation to assist him measuring for the new pipeline (Tr. 40). When a supervisory employee, such as Conner, has actual knowledge of the violative condition, his knowledge is imputed to the employer, and the Secretary satisfies her burden of proving knowledge without having to demonstrate inadequacy in the employer's safety program. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996). GCI has not asserted nor does the record show supervisory employee misconduct. See *Dover Elevator Co.* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

GCI's sole dispute involves element (b) of the Secretary's burden of proof; compliance with the terms of §1926.652(a)(1). GCI argues the record does not establish the north wall was near vertical because Freeman did not use a clinometer to determine the slope (Tr. 127). Also, GCI challenges the competence of Freeman to conduct excavation inspections, her failure to perform a manual test in determining the soil classification, and her use of a metal tape measure to measure the depth of the excavation (GCI's Statement of Position, August 28, 2007).

Item 1 - Alleged Violation of § 1926.652(a)(1)

The citation alleges GCI failed to utilize a cave-in protection system to protect employees in an excavation 6 feet in depth. Section 1926.652(a)(1) provides:

Each employee in an excavation shall be protected from cave-in 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 excavation in issue was not exempt from the cave-in protection requirements of § 1926.652(b) or (c). GCI does not assert and the record does not show the excavation was dug in stable rock or was less than 5 feet in depth.

The excavation's depth, width and length dimensions, the adequacy of the slopes of the east and south walls, and the lack of a cave-in hazard at the west wall are established by the record and not generally disputed. The excavation was approximately 16 feet long, 5 feet wide at the bottom, and 6 feet deep (Tr. 23, 25, 70).

GCI argument regarding the use of a metal tape measure to measure the excavation's depth is rejected. There is no evidence the tape measure was bent when taking the depth measurement. Foreman Conner was present during the measurement and agreed the excavation was 6 feet deep (Tr. 23). The requirement for cave-in protection is triggered by an excavation 5 feet or more in depth.

According to Freeman, the east and south walls of the excavation were adequately slopped for Type B soil (Tr. 20, 66). The west wall which consisted of the concrete junction box did not pose a cave-in hazard to employees (Tr. 67).

GCI's argument regarding the soil classification because of Freeman's failure to perform a manual test is rejected. Freeman classified the soil as Type B soil based on her observations. Type B soil is considered cohesive soil with an unconfined compressive strength of greater than 0.5 tons per square foot (tsf) but less than 1.5 tsf or granular cohesionless soils including angular gravel, silt, silt loam, sandy loam and in some cases silty clay loam and sandy clay loam and previously disturbed soil unless otherwise classified as Type C soil. Also, included in Type B soil is soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration. Appendix A, to Subpart P, § 1926.650 *et. seq.*

Freeman's Type B soil classification was confirmed by the soil analysis performed by OSHA's Salt Lake City Technical Center because the soil sample was fissured³ (Exhs. C-7, C-8; Tr. 19, 101, 106, 108, 119). Foreman Conner did not disagree with Freeman's Type B classification (Tr. 27, 68-69). The use of a manual test at the site to classify the soil was not necessary.

The issue in this case involves the north wall. GCI does not dispute the north wall lacked a cave-in protection system such as benching or shoring and that an employee was in the excavation within 18 inches of the north wall (Tr. 58, 74).

³Fissured means "a soil material that has a tendency to break along definite planes of fracture with little resistance, or a material that exhibits open cracks, such as tension cracks, in an exposed surface." Appendix A to Subpart P - "Excavation."

GCI's argument regarding the failure to use the clinometer is rejected (Tr. 127). Freeman testified the north wall was "near" vertical based on her observation (Tr. 20). The issue for compliance with the standard is not whether the wall was vertical but rather was the north wall sloped in accordance with the requirement for Type B soil. Type B soil requires a maximum slope of 1 : 1 (45 degrees) for compliance. At no place in the record, does GCI argue the north wall was adequately sloped for Type B soil.

Freeman's observation regarding the north wall as vertical is consistent with the photographs taken of the excavation (Exhs. C-1, C-2, C-3; Tr. 20-21). A reasonable person particularly a trained inspector is able to determine from observation whether an excavation's wall was closer to vertical (90 degrees) than adequately sloped (45 degrees) without the use of a clinometer. This record establishes a *prima facie* case that the north wall was not adequately sloped or shored in compliance with § 1926.652(a)(1). GCI offered no witnesses or exhibits to refute the observations of Freeman.

GCI's challenge to Freeman's competence as an industrial hygienist to conduct inspections of excavations is also rejected. Freeman has been employed by OSHA in excess of seven years (Tr. 10). She has conducted approximately 40 inspections a year; 50 per cent of which were safety inspections (Tr. 11, 14). Freeman estimated she has performed two excavation inspections a year (Tr. 11). Additionally, she has received informal OSHA training on excavations including classroom training and on the job training assisting senior compliance officers (Tr. 12-13). Prior to her employment with OSHA, Freeman worked for the Mine Safety and Health Administration where she received training on wall collapses in surface mining (Tr. 13). Her testimony regarding the excavation in issue is accepted as competent.

Although only the north wall lacked cave-in protection, a violation of § 1926.652(a)(1) is established. The standard contemplates that each wall of an excavation is protected from a cave-in hazard. The potential cave-in hazard exists from any wall of an excavation more than 5 feet in depth. See definition for "Cave-in" in § 1926.650(b). Also, see the definitions of "benching" "shoring," and "sloping," with the use of the plural "walls." The shoring and sloping diagrams show each wall with cave-in protection. See Appendix B. Prior judges' decisions consistently have found a violation even if only one wall of an excavation lacked cave-in protection. See, *Oklahoma Natural Gas Co.*, 16 BNA OSHC 1278 (No. 90-1330, 1993); *Southwestern Bell Telephone Co.*, 16 BNA

OSHC 1021, 1022 (No. 91-1421, 1992); *S & H Construction Co.*, 15 BNA OSHC 2094, 2096 (No. 91-0404, 1992); *Underground Construction Inc.*, 14 BNA OSHC 1795, 1796 (No. 89-0216, 1990); and *John R. Jurgensen Co.*, 13 BNA OSHC 1830, 1832 (No. 87-1249, 1988).

A violation of § 1926.652(a)(1) is established.

Serious Classification

The Secretary classified GCI's violation of § 1926.652(a)(1) as serious. A violation is serious under §17(k) of the Occupational Safety and Health Act (Act), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

GCI's foreman was present at the excavation and had actual knowledge of the lack of cave-in protection including the inadequate slopping of the north wall (Exh. C-1; Tr. 16-17). Foreman Conner dug the excavation, knew the employees were in the excavation, and participated in OSHA's inspection (Tr. 24, 53, 72). As a supervisor, foreman Conner's knowledge of the lack of cave-in protection along the north wall is imputed to GCI. The excavation was at least 6 feet in depth and the north wall was not sloped or shored. An employee was observed within 18 inches of the north wall (Tr. 74). If the wall collapsed, the employee was exposed to possible serious injury such broken bones or death from asphyxiation (Tr. 51).

A serious violation of §1926.652(a)(1) is established.

Penalty Assessment

Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). The gravity of the violation which is of primary consideration, "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The gravity in this case is moderate. Two employees were in the excavation for less than 10 minutes (Tr. 69). Freeman observed one employee in the excavation for less than one minute (Tr. 40). Only the north wall of the excavation was not adequately sloped or otherwise protected from cave in (Tr. 20, 58). Although properly classified as Type B soil, the soil compression strength test qualified the soil for Type A. It was the observed fissures in the soil sample sent to the Salt Lake City laboratory which classified the soil as Type B (Tr. 119).

GCI is entitled to partial credit for size with approximately 70 employees (Tr. 58). Three employees including the foreman were involved in tie-in work at the junction box (Tr. 64). GCI is entitled to credit for history because it has not received a serious citation within three years (Tr. 56). Because it sloped the north wall before Freeman left the excavation, good faith credit is also warranted (Exh. C-4; Tr. 32).

Having considered these factors, a penalty of \$2,000.00 is reasonable for violation of § 1926.652(a)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This 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 on the foregoing decision, it is ORDERED that:

A serious violation of 29 C. F. R. § 1926.652(a)(1) is affirmed and a penalty of \$2,000.00 is assessed.

/s/
Ken S. Welsch
Judge

Date: September 17, 2007