

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

Secretary of Labor,

Complainant,

v.

A.H. Beck Foundation Co., Inc.,

Respondent.

OSHRC DOCKET NO. 08-0626

Appearances:

Josh Bernstein, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

William W. Sommers, Esq., Brian R. Pietruszewski, Esq., The Gardner Law Firm, San Antonio, Texas
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of an A.H. Beck Foundation Co., Inc. (“Respondent”) worksite in Grand Prairie, Texas on February 28, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two violations of the Act. Citation 1 Item 1 alleged a serious violation of Section 5(a)(1), commonly referred to as the General Duty Clause, with a proposed penalty of \$3,500. Citation 1 Item 2 alleged a serious violation of 29 C.F.R. §1926.501(b)(7)(ii) with a proposed penalty of \$3,500. Respondent timely contested the citation and a trial was conducted April 28-29, 2009 in San Antonio, Texas.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The parties also agree that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Complaint and Answer).

Factual Findings

Respondent is engaged in the business of foundation drilling. At this particular jobsite, Respondent was in the process of drilling 55-foot deep foundation pier holes in preparation for the installation of a bridge. (Ex. R-27). On February 29, 2008, Compliance Safety and Health Officer (“CSHO”) Jack Rector was driving by Respondent’s worksite when he observed what he believed to be fall protection violations. (Tr. 229). He photographed employees from a nearby drug store parking lot for 30 minutes before entering the site and initiating an inspection. (Tr. 230). The on-site portion of CSHO Rector’s inspection lasted approximately 20 minutes. (Tr. 278).

The diameter of the particular hole being drilled at the time of the inspection was 9 feet for the first 5 vertical feet below the ground, and then narrowed to 7 feet for the remaining depth. (Tr. 78-79, 201). Respondent was using a track-mounted, custom-designed drilling rig which extracted about one foot of soil with each dig. (Tr. 129; Ex. C-18V). It required 60 digs to reach the desired hole depth of 55 feet. (Tr. 78, 129). After each dig, the operator would swing the bucket on the end of the drilling rig arm 90 degrees to one side to dump soil into a designated area. (Tr. 137). The excavation of the 55-foot hole began the day before the inspection and was nearly completed by the time the CSHO arrived the next morning around 8:00 a.m. (Tr. Vol. II, 78). Respondent’s drilling rig was mobile and moved from one drilling location to another as needed. (Tr. 134, 138).

The two citation items at issue reflect OSHA's determination that Respondent failed to protect employees from swing radius hazards posed by the rotating parts of the drilling rig and fall protection hazards around the edge of the excavated hole.

Alleged Swing Radius Hazard

OSHA issued the swing radius violation under Section 5(a)(1) of the Act because there is no specific standard addressing this issue. (Tr. 252). It is undisputed that the hazard of being struck by rotating/swinging parts of the drilling rig was specifically recognized by Respondent and its industry at the time of the inspection. (Tr. 31, 34). The International Association of Drilling Shaft Contractors ("ADSC"), an organization focusing on Respondent's industry, issues operational and safety guidelines which recognize and address swing radius hazards. (Tr. 27-28; Ex. C-12). Respondent acknowledged using some of ADSC's written procedures and video training materials with its employees. (Tr. 28). It is also undisputed that if the rotating parts of this drilling rig struck an employee, it could result in a serious and/or fatal injury. (Tr. 55, 179).

One ADSC training video used by Respondent, depicted employees standing inside cones demarcating a swing radius hazard zone when they are contacted by a watchman and instructed to remove themselves from the area. (Tr. 108-110; Ex. R-26). The Secretary asserts that this training video demonstrates Respondent's awareness that physical barriers, like red plastic tape, are required to protect employees from swing radius hazards. (Tr. 108-110). Respondent asserts that this same portion of video demonstrates the need for, and effectiveness of, a designated watchman to monitor the swing radius area and ensure employees remain clear of danger. (Tr. 108-110).

Although Respondent's written procedures identified red tape barricades as one method of guarding against swing radius hazards, there was no such physical barrier in place at this site on the side or rear of the drilling rig. (Tr. 35-36, 61; Ex. C-11). Instead, Respondent used a watchman, which it called a "stim" man, to constantly monitor the drilling rig to ensure that

employees were not standing in swing radius areas when the rig needed to rotate. (Tr. 35). Ray Stroup, Respondent's superintendent and most senior on-site supervisor, testified that his normal practice was to use "stim" men instead of red plastic tape. (Tr. 62). Superintendent Stroup acknowledged that he has used red tape to identify swing radius areas in the past, but only on jobs in which there was too much activity or too many pieces of equipment for a "stim" man to safely monitor. (Tr. 173-174). Rene Benitez, the "stim" man on this site, was responsible for ensuring that the rig did not rotate unless and until he and the rig operator confirmed, through the use of hand signals, that the swing radius was clear. (Tr. 42-43, 133).

In addition to monitoring by the "stim" man and rig operator, Superintendent Stroup trained everyone on his crew to make sure they were clear of the rig before each rotation. (Tr. 180). It is important to note that the drilling rig used on this site rotated slowly (3 r.p.m. at maximum speed) and had multiple, large warning signs on the side and back of the rig which stated "Danger. Keep out of turning area." (Tr. 132, 140, 155, 276; Ex. R-19).

Superintendent Stroup conceded that employees constantly moved in and out of the swing radius of the drilling rig during normal operations. (Tr. 156). However, every time the drilling rig completed a dig and was about to rotate to dump extracted soil, all employees were required to position themselves outside of the rig's swing radius. (Tr. 37).

OSHA's Form 1B for this alleged violation was prepared by CSHO Rector and states:

Among other feasible and acceptable means of abatement to correct this hazard is: (a) Barricading the accessible area(s) of the swing radius of the rear of the rotating structure of the drilling rig, or (b) During operations that require the equipment to be constantly moving, the employer can take any available alternative precautions to include:

- *Point out the swing radius danger by posting signs;*

- *Instructing employees in the danger of swinging counterweights;*
- *Instructing employees in the danger of rig pinch points;*
- *Instructing the operators to swing only on signals from the foreman or the designated signal man; and*
- *Requiring employees not to move a rig until they know the area is clear.” (Tr. 264-265; Ex. R-27).*

CSHO Rector acknowledged that, at the time of the inspection, Respondent had implemented all five of the alternative precautions listed in subsection (b) (“Abatement Method B”) above. (Tr. 266-267, 287-288). However, the Secretary argues that Abatement Method B was not available to Respondent because this drilling rig was not constantly moving. (Tr. 282-283). The method of abatement in subsection (a) above is essentially ADSC’s standard for barricading the swing radius of the drilling rig. (Tr. 61; Ex. C-13).

Alleged Fall Protection Hazard

It is undisputed that: (i) the hazard of falling into an excavated hole, such as the one being drilled during this inspection, was specifically recognized by Respondent and the ADSC (Tr. 32, Ex. C-13); (ii) Respondent’s employees worked within 4 or 5 feet of the excavated hole at various times (Tr. 32, 117); and (iii) a fall of more than 6 feet into the hole could result in a serious injury. (Tr. Vol. II, 25). The primary issue in dispute is whether the surface level of liquid mud inside the hole was more than 6 feet below the ground surface *while* the employees were working within 4 or 5 feet of the hole’s edge.

Throughout the excavation of this hole, Respondent pumped liquid mud into the hole using a hose connected to a semi-truck frac-tank equipped with a diesel pump. (Tr. 85). Respondent established that it had a non-safety-related reason to keep the surface of the liquid mud level inside the hole within 4-5 feet of the ground surface. (Tr. 122). The lateral pressure of the liquid mud against the vertical walls of the hole prevented soil from sloughing off and falling

back into the dig. (Tr. 127). After every dig, since equipment and soil were being removed, the mud level dropped from 4-5 feet below the surface to approximately 8-10 feet below the surface. (Tr. 122). Therefore, as soon as the bucket was removed and the mud level dropped, employees turned on a valve which increased the mud level back to within 4-5 feet of the surface. (Tr. 80, 128, 314). Respondent could not backfill the mud level all the way to ground level because mud would be pushed out over the edges every time the bucket re-entered the hole. (Tr. 122).

In addition to re-establishing the mud level within a few feet of the ground surface after each dig, Respondent placed sections of circular, metal, hay-bale rings around half of the hole perimeter to function as guardrails. (Ex. C-18A through I). The other half of the hole perimeter was un-barricaded so that the drilling rig bucket could swing in and out of the area without striking the guardrail. (Tr. 58).

Superintendent Stroup and Respondent's Vice President, Stephen Anderson, testified that if employees needed to work near the edge of the hole during the brief periods in which the mud level dropped to more than 6 feet below the ground surface, they were required to tie-off with a harness and lanyard. (Tr. 87-88, 310). Their testimony on this issue is corroborated by one of the photographs taken by CSHO Rector from the drug store parking lot. It depicts one of Respondent's employees working inside the partial guardrail, using his harness and lanyard, before the CSHO entered the worksite. (Ex. C-18-E).

Neither Respondent nor the CSHO took any measurements of the actual distance between the top of the mud level and the ground surface during the inspection when the equipment was in the hole or when the equipment was removed from the hole. (Tr. 221, 244, 248-249). Witnesses speculated and disagreed about the actual distances. Therefore, there was no reliable evidence introduced which established the true distance from the surface of the mud to the ground surface at any point in time.

Furthermore, the level of mud in the hole during the on-site portion of OSHA's inspection was not typical of normal working conditions. (Tr. 123-124). The general contractor representative ordered Respondent to stop all activity, remove the equipment from the hole, and pull the drilling rig away from the hole when the CSHO arrived at the site. (Tr. 123, 207). At that time, Respondent had just completed a dig and was about to open the valve to backfill the mud level in the hole. (Tr. 207-208). However, due to the order for all work to stop, the mud level remained at an un-measured low point for the duration of the inspection. (Tr. 207-208). That is the period of time during which CSHO Rector photographed the upper interior of the hole. (Ex. C-18L, M, N, O, R, S).

Finally, I note that Respondent's supervisory witnesses testified that employees were not violating any work rules with regard to either of these two citation items. (Tr. 160, 193). Respondent also acknowledged that the use of red tap barricades for swing radius hazards, as well as harnesses and lanyards for fall protection hazards, were feasible on this jobsite. (Tr. 194, 215, Vol. II, 22).

Discussion and Analysis

Citation 1 Item 1

Section 5(a)(1) of the Act states that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 *U.S.C.* §654(a)(1). To establish a violation of Section 5(a)(1), the Secretary must demonstrate that: (1) a condition or activity in the workplace presented a hazard to employees, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872, 1995-96 CCH OSHD ¶31,207 (No. 92-2596, 1996). In addition, the evidence must show that the employer knew or with the exercise of

reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204, 2007 CCH OSHD ¶32,920 (No. 03-1344, 2007).

The Secretary alleges in Citation 1 Item 1 that:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that on or about February 29, 2008, and at times prior thereto at a workplace located at 203 S.E. 9th Street, Grand Prairie, Texas; employees were exposed to the hazards of being struck-by and caught-between the rotating superstructure of a track-mounted drill rig: Among other methods, one feasible and acceptable means of abatement includes but is not limited to barricading the accessible area(s) within the swing radius of the rotating superstructure of the drilling rig.

The record clearly establishes that Respondent, and its industry, recognized the hazards associated with the swing radius of rotating drilling equipment. *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 1995-97 CCH OSHD ¶31,301 (No. 89-265, 1997). The parties agree that being struck by such equipment could result in a serious injury or death, and that feasible means of abating the swing radius hazard existed. The immediate presence of Superintendent Stroup establishes knowledge of the condition which is imputed to Respondent. (Tr. 63, 75). *Contour Erection & Siding Systems, Inc.*, 22 BNA OSHC 1072 (No. 06-0792, 2007).

The primary issue is whether or not Respondent's use of a "stim" man to watch and signal the rig operator, swing radius warning signs, and employee training, were sufficient to protect Respondent's employees from the swing radius hazard. The investigating CSHO, investigation file documents, and the citation itself all recognized that there is more than one way

of effectively protecting employees from swing radius hazards posed by heavy equipment. The CSHO conceded that Respondent was using one of the abatement methods *recognized by OSHA* (*i.e. Abatement Method B*) but maintained that Respondent was prohibited from using Abatement Method B because the drilling rig was not constantly moving.

I disagree with OSHA's position on this issue for two reasons. First, I find that Respondent's drilling rig was mobile. It is difficult to imagine heavy equipment that can perform its primary function without stopping for short periods to perform another activity closely associated with the functioning of the equipment. A forklift needs to stop moving for some specified amount of time to pick up and/or set down its load. A backhoe needs to stop moving for some specified amount of time to scoop up and/or dump out a load of dirt. Similarly, a track-mounted drilling rig must stop moving for some period of time to drill its intended holes. Even when this rig was stationary, it was "constantly moving" both vertically and horizontally as part of the digging and excavation process. The CSHO acknowledged that he would consider a drilling rig to be "constantly moving," and thus eligible for Abatement Method B, if the rig was stopping repeatedly to drill a series of 6-foot holes because the rig would not be "continuously in one place for a long period of time." (Tr. 283). In this case, Respondent's drilling rig moved to the location of the subject hole the day before the inspection, had nearly completed the entire 55-foot dig when the CSHO arrived at 8:00 a.m. the following morning, and was moved away from the hole during the OSHA inspection. OSHA's position that "constantly moving" encompasses numerous stops to drill several 6-foot holes, yet does not encompass a single stop to drill a 55-foot hole, appears arbitrary.

Second, it is unreasonable to conclude that the method of protection used by Respondent was effective only when the rig was mobile, yet not effective when the rig was stationary. It seems to me that a *mobile* drilling rig is more dangerous in that it presents *two* swing radius hazard possibilities: (1) employees could inadvertently walk into the swing radius of a drilling

rig's rotating parts, *or* (2) the drilling rig itself could inadvertently maneuver into an area that brings the swing radius hazard to stationary employees. A completely *stationary* rig creates the possibility of only *one* swing radius hazard: employees inadvertently walking within range of the equipment's rotating parts. If, as the CSHO testified, the use of signs, training, and a signaling watchman are effective abatement for a mobile rig, I find that those methods would also be effective abatement for a stationary rig. Section 5(a)(1) requires an employer to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." The statute does not specify any precise measures an employer is required to take for compliance. Therefore, an employer is free to choose from any and all available and effective methods of employee protection. *Pepperidge Farm, Inc. supra*.

Since it is undisputed that Respondent implemented all of OSHA's requirements for protecting against swing radius hazards on "constantly moving" equipment, i.e. Abatement Method B, there can be no violation. Therefore, I find that Respondent's employees were not exposed to recognized hazards that were causing, or likely to cause, death or serious physical harm. The Secretary failed to establish a violation of the General Duty Clause in this instance.

Citation 1 Item 2

The Secretary alleges:

29 C.F.R. 1926.501(b)(7)(ii): Each employee at the edge of a well, pit, shaft, or similar excavation 6 feet (1.8 m) or more in depth was not protected from falling by guardrail systems, fences, barricades, or covers: On or about February 29, 2008 and times prior thereto, at a work site located at 203 S.E. 9th Street, Grand Prairie, Texas; employees involved in the drilling operation of pier shafts, were exposed to the hazard of falling to the lower level while working directly near or next to the unguarded shaft.

The cited standard requires that:

(ii) Each employee at the edge of a well, pit, shaft, and similar excavation 6 feet (1.8 m) or more in depth shall be protected from falling by guardrail systems, fences, barricades, or covers.

To establish a *prima facie* violation of a specific regulation promulgated under the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

I find that the standard applies to the excavation of pier holes, that Respondent's employees were exposed to the cited condition by working near the hole's edge, and that knowledge of the cited condition on the part of Superintendent Stroup is imputed to Respondent. *Countour Erection supra*.

However, the Secretary failed to present sufficient evidence to establish that the terms of the cited standard were violated. The Secretary argues that the depth of the hole, for the purposes of analyzing this alleged fall protection violation, was 55 feet. I disagree. "OSHA has consistently held that Subpart M addresses the hazards of falling from a walking/working surface to any kind of lower level (e.g., solid, liquid, or colloid)." *59 F.R. 40,681*. The Secretary's own promulgation language concerning §1926.501(b) anticipates fall hazards *to* a liquid surface, not *through* a liquid surface. Therefore, the relevant distance for this alleged violation is measured from the top edge of the hole to the surface of the mud level in the hole.

I further find that there is insufficient evidence to conclude that Respondent's employees were working near the edge of the hole *while* the mud level was more than 6 feet below the

surface. The CSHO did not know, even at trial, what the mud level in the hole was when he photographed employees working near the edge from a nearby parking lot. (Tr. 231). He also did not know, at the time of the inspection, that Respondent pumped mud into the hole after each dig to bring the mud level back up to within a few feet of the surface. (Tr. 274-275). Nor was he aware that when he came on site, Respondent had just completed a dig and was about to open the valve to add mud to the hole when employees were ordered to stop working. (Tr. 278). CSHO Rector combined his pre-entry observations of the site, during which employees were standing near the hole, with his on-site observations of low mud levels after drilling activities were ordered to cease. These two observations, made at different times, led him to the conclusion that employees were working near the hole's edge, without fall protection, when the mud level was more than 6 feet below the surface.

There are two timeframes covered by the pictures taken by, and the observations of, the CSHO. The first period involves the CSHO's observation from the parking lot across the street from the work site. As previously noted, none of the pictures taken provide a clear indication as to the depth of the hole as they are "horizontal" pictures of the worksite. It is also noted that in many of the pictures taken from this location, the drilling equipment was in the hole. Testimony indicated that when the equipment was in the hole, there would be no instances where the mud level was more than 6 feet below the surface since the equipment in the hole would cause the mud level to rise.

The second location from which pictures were taken was at the work site itself. These pictures were taken after operation of the drilling rig was stopped, equipment was removed from the hole, and the rig was backed away. As previously noted, when the equipment was pulled from the hole, the mud level did recede to more than 6 feet below the surface but there was no evidence that any employee at that time was exposed to a fall hazard since the area had been cleared and work stopped.

