

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.

Flanagan Contracting, LLC,

Respondent.

OSHRC Docket No. **10-1329**

Appearances:

Schean G. Belton, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee
For Complainant

Hugh M. Flanagan, Esq., Long, Flanagan & McDonald, LLC, Guntersville, Alabama
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Flanagan Contracting, LLC (Flanagan) is a civil contracting company which performs site preparation work including sewer and water installations. Flanagan was engaged in this type of work at the Beaumont Subdivision in Birmingham, Alabama, when on April 28, 2010, Occupational Safety and Health Administration (OSHA) Compliance Officer Alpha Davis initiated an inspection of the construction site. As a result of Davis's inspection, on June 11, 2010, the Secretary issued a citation to Flanagan alleging one serious violation of the Occupational Safety and Health Act of 1970 (Act). Flanagan denies that it violated the cited standard and contested the citation and proposed penalty. Thereafter, this case was designated for the Commission's Simplified Proceedings.

For the reasons that follow, item 1 is affirmed as a serious violation with a \$2,000.00 penalty assessed.

Jurisdiction

A hearing was held on September 30, 2010, at which time the parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act. The parties also stipulated at the hearing that at all times relevant to

this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 11).

Background

Flanagan was one of several contractors on the Beaumont Subdivision multi-employer construction site in Birmingham, Alabama, controlled by Signature Homes. The site was a multi-home residential development (Tr. 20). Flanagan was responsible for sewer and water installation on the site (Tr. 105, 132-134). The inspection at the site was initiated on April 28, 2010, as a result of a fall hazard observed by Davis (Tr. 18, 132).¹ Once on the jobsite, Davis held an opening conference with general contractor Signature Homes and conducted a walk around inspection. During the walk around inspection Davis observed an excavation at Lot 31B, which to her appeared to be improperly sloped and had no shoring (Tr. 19). There were two other excavations on the site, but the one that was of most concern to Davis was at Lot 31B, because of its depth and appearance (Tr. 21, 110). There was no one in the excavation at Lot 31B at the time of the OSHA inspection; however, Davis noted that work had been done on the excavation (Tr. 19).

During the inspection, Davis learned that Flanagan was the contractor responsible for the excavation at Lot 31B. She then conducted an opening conference with Flanagan supervisor James Goodwin and conducted an inspection of Flanagan relating to the excavation. During her inspection, Davis interviewed employees, took photographs, obtained a soil sample and took measurements of the excavation. As a result, she determined that the excavation was 8 feet deep, was not sloped, and no shield had been used during entries into the excavation (Tr. 37). Further, Davis discovered that the excavation had been opened the day prior to the inspection, and during that time Goodwin had entered the excavation without a protective system in order to connect a sewer line (Tr. 23, 33, 111).

As a result of Davis's inspection, the Secretary issued the citation that gave rise to the instant case.

¹ The fall hazard observed by Davis was associated with another employer on the site and did not involve Flanagan.

The Citation

The Secretary alleges that Flanagan violated OSHA's excavation standard relating to protective systems. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 1: Alleged Serious Violations of § 1926.652(a)(1)_____

_____The Secretary cited Flanagan for a serious violation of § 1926.652(a)(1), alleging that it failed to provide an adequate protective system for employees working in an excavation.

Applicability of the Standard:

In proving whether there is a violation, first it must be determined whether the cited standard applies in this case. The Secretary cited Flanagan for a violation of § 1926.652(a)(1), a construction standard addressing the protection of employees working in excavations. The testimony establishes that Flanagan was engaged in construction activities on the jobsite (Tr. 38). Michael Flanagan, owner, testified that Flanagan dug the excavation at issue for the purpose of connecting a sewer line at Lot 31B (Tr. 134). Therefore, the excavation standard applies to the work performed by Flanagan at the jobsite.

Noncompliance with the Terms of the Standard:

_____The Secretary must prove there was noncompliance with the terms of cited standard, § 1926.652(a)(1) which 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The citation alleges that on or about April 27, 2010, at the Beaumont Subdivision - Lot 31B on Beaumont Avenue, Birmingham, Alabama, an employee worked in an excavation approximately

8 feet deep that was improperly sloped and had one vertical wall. Flanagan contends, however, there was no violation of the standard because the excavation was dug partially in stable rock and the walls of the excavation were sloped back 1 to 1 as required by the regulations.

Whether Flanagan violated the terms of § 1926.652(a)(1) depends on the type of soil into which the excavation was dug and on the depth and slope of the excavation. Soils are classified as Type A (generally the most stable types of clay), Type B (angular gravel, silt, silt or sandy or clay loam, some previously disturbed or fissured soils, or those subject to vibrations), or Type C (the least stable gravel, sand, loamy sand, water soaked soils, or some previously disturbed soils). The more unstable the soil, the further back the employer must slope the walls of the excavation. As to depth, other than when dug in solid rock, the standard requires excavations 5 feet and deeper to have cave-in protection. As set forth below, in this case the soil in the excavation was Type B soil and the excavation's depth was approximately 8 feet.

Soil Sample

Davis obtained a soil sample from the spoil pile of the excavation which she sent to OSHA's Laboratory in Salt Lake City for testing (Tr. 26). The laboratory test classified the soil as Type B soil (Tr. 26; Exhs. C-3 and C-4). In addition to having the soil tested by the Salt Lake City Laboratory, Compliance Officer Davis determined the excavation was made in previously disturbed soil as evidenced by the construction of homes at the site and the presence of a gas line and sewer connection in the excavation (Tr. 25-26, 88-89). Michael Flanagan confirms the soil was previously disturbed as a result of Respondent having installed a water main two years prior (Tr. 155-157). Previously disturbed soil at most is classified as Type B soil. Although Respondent does not dispute this result, it contends the excavation contained layers of soil reflecting Type A soil at the bottom 3 to 4 feet of the excavation and Type B soil at the upper portion of the excavation (Tr. 153, 214). Respondent did not introduce any evidence reflecting any soil testing supporting its contention. Goodwin testified that he did not obtain any soil samples himself (Tr. 213). Moreover, Goodwin appeared to speculate regarding the soil type in the excavation (Tr. 213-214). Accordingly, the credible evidence supports a finding that the soil in the excavation was Type B soil.

Measurements

During the inspection, Compliance Officer Davis with the assistance of Goodwin took measurements of the excavation. The width of the excavation was measured with a surveyor rod after Flanagan had begun back filling, and showed a measurement of approximately 14 feet (Tr. 25, 45-46; Exh. C-6). Davis testified, however, she determined the width to be approximately 2 feet less than what was shown on the trench rod (12 feet), stating the measurement with the surveyor rod went well beyond the walls and the actual opening of the excavation with the walls dropping to the inside of the excavation (Tr. 97-99, 100, 115-116). Both parties agree the width of the excavation was less than the 14 feet reflected on the surveyor rod. Although not at the site, owner Flanagan testified the width was 13.7 by his calculations (Tr.136-144). The length of the excavation was measured to be 40 feet (Tr. 116). Davis testified the depth of the excavation was “a little over 8 feet” and Goodwin testified the depth was “8 feet something” (Tr. 24, 207). Owner Michael Flanagan testified he determined the depth of the excavation to be between 6.23 and 6.29 feet (Tr. 177). However, owner Flangan was not at the site and his measurement of the depth was based on a combination of his review of the photographs and application of the Pythagorean Theorem (Tr. 146-150). The undersigned does not find owner Flanagan’s measurement to be persuasive as to the actual depth of the excavation since it was not based on an actual measurement of the excavation itself.

Protective System

Because the excavation was greater than 5 feet in depth, a protective system is required for employees working in the excavation, unless the entire excavation consisted of stable rock. Protective systems may consist of trench shields, sloping and benching.

Davis testified she initially was concerned about the excavation at Lot 31B because of its depth and appearance (Tr. 21). Upon further inspection, Davis determined that the left side of the excavation was sloped but the other three sides were improperly sloped, with one of the walls being vertical (Tr. 39, 41, 50, 58, 86; Exhs. C-1, C-2, C-5). Further, Davis determined the excavation was greater than 5 feet in depth, was not entirely in stable rock and had no protective system in place (Tr. 103). Respondent does not dispute that the excavation was over 5 feet deep and that no shoring system was used within the excavation (Respondent’s Brief, p. 1). Further, Respondent admits that one wall was not sloped, but contends the remaining walls were properly sloped (Tr. 216).

Respondent's argument is premised on its contention that the north, east and west walls of the excavation were stable rock up to a height of 3 feet from the bottom of the excavation (Tr. 181). Goodwin testified the excavation was partially in stable rock up to the bottom 3 feet and it was sloped back 1 to 1 (Tr. 203-204). The standard provides for an exception to the requirement of a protective system when excavations are made entirely in stable rock. § 1926.652(a)(1)(i). Goodwin's testimony confirms that the entire excavation was not in stable rock. Accordingly, the exception is not applicable here and a protective system was required, as the plain language of the standard is very clear, in order for the exception to apply, the excavation must be entirely in stable rock. Further, since the excavation was more than 5 feet deep, the exception in § 1926.652(a)(1)(ii) also is not applicable.

In determining whether the excavation was properly sloped considering stable rock on the bottom portion of the walls as contended by Respondent, it must first be determined whether there was stable rock in the bottom 3 feet of the excavation, and then whether the walls above that were properly sloped. Compliance Officer Davis testified she did not observe stable rock in the bottom of the excavation (Tr. 104). Further, the evidence shows the excavation was in previously disturbed soil and the soil tests show the soil was Type B (Tr. 26). Type B soil by definition is inconsistent with stable rock. This evidence leads the undersigned to conclude that the bottom walls of the excavation were not in stable rock as contended by Respondent. Accordingly, it is not necessary for the undersigned to determine whether the excavation was properly sloped from the point of 3 feet up.

Since the evidence does not support the presence of stable rock in the bottom portion of the walls of the excavation, the determination of the proper slope of the excavation must be based on the eight foot depth of the excavation. Davis did not measure the bottom width of the excavation; however, owner Flanagan estimated the bottom of the excavation measured approximately 4 feet (Tr. 136-144). There is no evidence to dispute this measurement. Although the top width of the excavation is somewhat unclear, the testimony shows that the width at the top measured between 12 and 14 feet (Tr. 97-99, 115, 136-144). Further, the credible evidence as to the soil type reveals that the soil was Type B soil. Appendix B to the standard requires for Type B soil, an excavation must be sloped at a ratio of 1 to 1 (or a slope of 45 degrees), *Pt. 1926, Supt. P, App. B*. This is 1

foot horizontal distance for each 1 foot of vertical distance. Therefore, for an excavation measuring 4 feet wide at the bottom, with walls measuring 8 feet deep, the top width of the excavation would need to be at least 20 feet in order for it to have the proper slope. Looking at the width measurement in the light most favorable to the Respondent, the top width of the excavation was 14 feet, which is 6 feet less than what is required for the excavation to have been sloped properly. Even if the bottom of the excavation measured less than 4 feet as estimated by owner Flanagan, the top width of the excavation would need to be at least 16 feet to be sloped properly. Accordingly, the undersigned finds that the excavation was not sloped sufficiently.

Further, Respondent admits there was no trench shield in use at the excavation. As the evidence reveals the excavation was not properly sloped and there was no trench shield in use, the undersigned finds the Secretary has established that Flanagan failed to provide an adequate protective system for employees working in an excavation as provided for by the standard.

Exposure or Access:

As an element of the Secretary's burden of proof, the record must show that employees were exposed or had access to the violative condition. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991). Here, Goodwin testified he was in the excavation for approximately thirty to forty minutes (Tr. 212). Goodwin admitted to Davis during the inspection he had worked in the excavation on the day before the inspection and he had not used a trench shield at the time he worked in the excavation (Tr. 23, 44, 111). Further, Davis's notes on the worksheet for the soil sample provide the "foreman states he entered the inadequately shored and sloped excavation." (Exh. C-3). This admission to Davis on the day she pointed out the conditions to Goodwin leads the undersigned to conclude the conditions Davis found on the day of her inspection were the conditions in existence at the time Goodwin entered the excavation. Accordingly, the Secretary has met her burden of establishing exposure or access to the violative condition.

Knowledge:

The Secretary must establish actual or constructive knowledge of the violative conditions by Flanagan. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). James Goodwin was

a supervisor for Flanagan and he admitted he entered the excavation to connect the sewer line (Tr. 23, 44, 111, 212). Since Goodwin was a supervisor, his knowledge is imputed to Flanagan. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994). “Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). See also *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer’s foreman can be imputed to the employer).

However, an employer may rebut the Secretary’s prima facie showing of knowledge with evidence that it took reasonable measures to prevent the occurrence of the violation. In particular, the employer must show that it had a work rule that satisfied the requirements of the standard, which it adequately communicated and enforced. *Aquatek Systems, Inc.*, 21 BNA OSHC 1400, 1401-1402 (No. 03-1351, Feb. 2, 2006). Moreover, “[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee.” *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991). Here, the only evidence arguably in support of reasonable diligence is the testimony of Goodwin that he had taken competent person training (Tr. 202). Flanagan did not put forth any evidence to show that it had a work rule which was adequately communicated and enforced. Accordingly, Flanagan has not made the requisite showing to rebut knowledge.

Respondent contends in its brief that the misconduct of its foreman was unforeseeable, arguing it had adequately trained Goodwin, citing *W. G. Yates & Sons Construction Company v. Occupational Safety and Health Review Commission*, 459 F.3d 604 (5th Cir. 2006) (Respondent’s Brief, p. 6). In *W.G. Yates & Sons Construction Company, Inc., id.*, if the supervisory employee is participating in misconduct, the Secretary needs to show his violation was foreseeable. The instant case is distinguishable. First, the Fifth Circuit case law is not controlling here, as this case arose in the Eleventh Circuit. Second, the Fifth Circuit found that a supervisor’s knowledge of his own

malfeasance “is not imputable to the employer where the employer’s safety policy, training and discipline are sufficient to make the supervisor’s conduct in violation of the policy unforeseeable.” *W.G. Yates & Sons Construction Company, Inc.*, supra. Here, although owner Flanagan testified that he sent Goodwin to competent person training, there is no evidence that Respondent had a safety policy. Nor did Flanagan put forth any evidence to show that it had a disciplinary policy thus making it foreseeable that supervisors would feel free to engage in misconduct. The evidence is insufficient to establish Goodwin’s conduct was unforeseeable. The undersigned finds that Complainant has established actual knowledge of the violation.

Complainant has met her burden of establishing a violation of the cited standard. Accordingly, the citation alleging a violation of § 1926.652(a)(1) is affirmed.

Classification

A violation is serious under § 17 of the Occupational Safety and Health 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). Compliance Officer Davis testified that the violation was serious because of the potential for death for the employee entering the unprotected excavation in the event of a cave-in of soil into the excavation (Tr. 39). Respondent does not dispute that the violation is serious as defined by the Act (Respondent’s Brief, p. 6). Here, because serious injury or death could have resulted from a cave-in, the undersigned finds that Flanagan committed a serious violation of § 1926.652(a)(1).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. 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)*. Gravity is the primary consideration

and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993).

In arriving at the proposed penalty, Davis determined that the violation was of high severity because of the potential for death due to a cave-in of soil into the excavation. She assessed the probability at greater because of the improper sloping and lack of other protective system and determined the gravity to be great (Tr. 41-42). Davis's testimony further reveals Respondent benefitted from a 40% penalty reduction for size since it was a small employer with approximately forty employees, three of whom worked at the cited jobsite (Tr. 46-47, 112). Respondent also benefitted from a 10% reduction for history because it had no recent history in the last two years (Tr. 46-47). Davis did not apply a reduction for good faith because in light of the gravity of the violation good faith was not allowed (Tr. 46-47).

The undersigned finds that a high gravity is appropriate here because Goodwin, a supervisor, worked for thirty to forty minutes in an excavation which was 8 feet deep without an adequate protective system, exposing himself to potential cave-in and serious injury or death. Flanagan, however, is a small employer and has had no history of prior violations. These factors weigh in favor of a small penalty. Further, there is no evidence that Flanagan failed to cooperate with the investigation and it corrected the conditions immediately. These good faith factors weigh against a large penalty. Considering these facts and the statutory elements, a proposed penalty of \$2,000.00 is appropriate.

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 1, item 1, alleging a violation of § 1926.652(a)(1) is affirmed, and a penalty of \$2,000.00 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: November 15, 2010
Atlanta, Georgia