

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

Secretary of Labor,

Complainant

v.

Eutaw Construction Company, Inc.,

Respondent.

OSHRC Docket No. **10-2329**

Appearances:

Uche N. Egemonye, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

David C. Goff, Esquire, Deutsch, Kerrigan & Stiles, L.L.P., Gulfport, Mississippi
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Eutaw Construction Co., Inc. (Eutaw) is a heavy construction and underground utility contractor headquartered in Aberdeen, Mississippi. In December 2009, the City of Dothan, Alabama, contracted Eutaw to install a 48-inch underground sewer line between two treatment plants. To assist in laying the sewer line under a four lane highway, Eutaw subcontracted B & B Underground Contractors, Inc. (B & B) to perform three boring operations.

After conducting a planned inspection of the project on October 5, 2010, the Occupational Safety and Health Administration (OSHA) issued to Eutaw a serious citation on October 19, 2010. The citation alleges Eutaw violated 29 C.F.R. § 1926.652(a)(1) by failing to ensure that B & B provided adequate cave-in protection for employees working in an excavation, 14-feet in depth, used to perform the boring operation. The serious citation proposes a penalty of \$ 7,000.00. Eutaw timely contested the citation.

The case was heard in Dothan, Alabama, on July 7, 2011. The parties stipulated jurisdiction and coverage (Tr. 8). The parties filed post-hearing briefs.

Eutaw denies the violation and claims the standard was not violated because of a layer of rock below the less stable Type C soil. Eutaw also argues that under the multi-employer worksite doctrine, it was not responsible as a general contractor for the inadequate cave-in protective system utilized by B & B. Eutaw's employees were not working in the excavation. As affirmative defenses, Eutaw asserts unpreventable employee misconduct as to its project superintendent and infeasibility because of the layer of rock. (Tr. 12-13, 15).

For the reasons discussed, Eutaw's arguments are rejected, and the citation is affirmed and a penalty of \$ 2,500 is assessed.

Background

Eutaw's primary business involves heavy construction and the installation of underground utilities. Eutaw employs approximately 300 employees. Its main office is located in Aberdeen, Mississippi (Tr. 145).

In 2009, the City of Dothan, Alabama contracted Eutaw to install approximately 22,000 feet of 48-inch diameter sewer line from the Little Choctawhatchee Treatment Plant to the Beaver Creek Wastewater Treatment Plant. The project began in December 2009. In order to run the sewer line underneath Highway 84 (a four lane highway), Eutaw contracted B & B to perform the boring operation. The three borings by B & B were for a total of approximately 600 feet. Eutaw's project superintendent was James Allen (Tr. 114, 125-126, 148-149).

On October 5, 2010, OSHA Compliance Officer (CO) Dale Schneider initiated a planned inspection of the project. His inspection involved B&B's bore pit #3 which was on the south side of the westbound lane of Highway 84. B & B had been at this bore pit for approximately two months. At the time of the inspection, the bore pit was dug, the boring equipment was in the pit, and boring operations under the highway were proceeding. CO Schneider interviewed B&B's owner Oneal Bates and Eutaw's project superintendent Allen. Superintendent Allen acknowledged the excavation used as the bore pit was unsafe, but he did not believe that it was Eutaw's responsibility to correct the condition (Exh. C-2; Tr. 21, 36, 47, 66, 80, 82, 143).

The bore pit was approximately 18 feet wide, 45 feet long and 14 feet deep. Two trench boxes, set side by side, were in the excavation and steel sheeting placed behind them. The trench boxes were 8 feet tall. The boxes were placed approximately four feet off the bottom of the

excavation and a gap of several inches was between the two trench boxes. There were also gaps in many places between the boxes and the walls of the excavation. CO Schneider did not consider B & B's protective system adequate because the boxes were not within two feet of the bottom, one cross member was bent, and one box was not level (Exh. C-1A through 1K; Tr. 23).

CO Schneider observed that the east and west walls of the excavation contained fissures, erosion, and inadequate backfill behind the trench boxes. Also, water accumulations were seen in the bottom of the excavation despite a pump in the northeast corner. CO Schneider saw water seeping from the west wall in two locations which he testified could cause the wall to destabilize and collapse (Tr. 23, 31-32). He opined that it was a "very unstable excavation trench wall" which could "blowout at any time" (Tr. 59).

CO Schneider classified the soil in the excavation as Type C soil, based on his visual observation and a manual penetration test (Tr. 55-56). The two soil samples collected from the spoil pile and sent to OSHA's Salt Lake City Laboratory for analysis confirmed the Type C soil classification. The analysis described samples as greyish-brown granular sand, containing in excess of 89% sand and gravel (Exhs. C-4, C-5; Tr. 104).

When CO Schneider returned on October 6, 2010, Eutaw had shut down the work in the excavation. It had put caution tape around the bore pit. Eutaw began lowering the trench boxes to within two feet of the bottom of the excavation, backfilled behind the boxes, and sloped the excavation walls away from the top of the trench boxes (Tr. 60-61, 145).

As a result of CO Schneider's inspection and observations, Eutaw received a serious citation for violation of 29 C.F.R. § 1926.652(a)(1).¹

Discussion

The Secretary has the burden of proving a 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

¹ As a result of the same OSHA inspection, B & B received serious and other than serious citations on January 21, 2011, alleging, among other violations, a similar violation of §1926.652(a)(1). B & B contested the citations and the hearing was held May 10-11, 2011 in Abbeville, Alabama. Judge Calhoun's Decision and Order, entered on June 27, 2011 (Docket No. 11-0466), affirmed most of the violations against B & B, including the serious violation of §1926.651(a)(1). Judge Calhoun's Decision was not directed for review by the Commission and has become a final order.

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).

Eutaw stipulates, as the general contractor, that it was the controlling employer of the B & B excavation (Tr. 8). Eutaw does not dispute the condition of the protective system observed by CO Schneider.

Violation of § 1926.652(a)(1)

The citation, as amended by Order dated June 26, 2011, alleges that “On or about October 5, 2010 and times prior at Hwy 84W and Green Valley Rd, Dothan, Al: The employer exposed employees of B & B Underground Contracting, Inc. to cave-in hazards by not ensuring adequate cave-in protection was provided in an excavation approximately 14 feet deep, 18 feet wide, and 48 feet long in that items such as but not limited to one of the trench shield supports was bent/damaged and the trench boxes were not installed a maximum of 2 feet from the bottom of the trench.” Section 1926.652(a)(1) provides, in part:

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

Although Eutaw argues that the lower portion of the excavation was rock, the exceptions involving an excavation dug entirely in stable rock or less than 5 feet in depth do not apply in this case.

1. Application of 29 C.F.R. § 1926.652(a)(1)

The requirements of § 1926.652(a)(1) are not in dispute. CO Schneider observed a number of conditions that he considered unsafe with B & B's protective system including a bent brace, trench boxes not installed within two feet of the bottom of the excavation, and the gaps between the excavation walls and boxes (Exh. C-1). He also observed seeping water, standing water, “severe” erosion, and fissures (Tr. 32, 37, 86). He opined that it was a “very unstable excavation wall” (Tr. 59).

Although other standards may be applicable to the conditions alleged in the citation, the general requirements of § 1926.652(a)(1) are appropriate to the B & B excavation. The hazard addressed by the citation is the inadequacy of the overall protective system in providing cave-in protection for B & B's employees.

2. B & B's Protective System Failed To Comply With § 1926.652(a)(1)

There is no dispute the excavation was approximately 14 feet deep, 45 feet long, and 18 feet wide. The Geotechnical Report, which was performed by the City of Dothan, showed a "silty" sand type material with rock at the 23 foot depth (Exh. R-7; Tr. 159, 198). At bore pit #3 in issue, B & B received a change order because of rock at the 8-foot depth which made the boring operation under the highway more costly. Instead of pushing the casing under the highway by hydraulic jacks, B&B had to switch to actual hand excavation with jackhammers and shovels (Exh. R-8; Tr. 160-162, 206).

To perform the boring operation under the highway, B & B dug the 14-foot deep excavation and installed two 8 x 24-foot trench boxes with steel shields behind the boxes. The trench boxes were placed 4 to 6 feet from the bottom of the excavation. A 6-foot spreader bar on one trench box was damaged. There were gaps between the two trench boxes and between the boxes and the shields allowing erosion to fall inside the boxes (Exhs. C-1C, C-1K). CO Schneider observed "severe" erosion and fissures in the excavation's walls. There was also seeping water accumulating in the bottom of the excavation. CO Schneider opined that the water accumulation could weaken the walls and cause a cave-in (Tr. Tr. 31, 37).

The excavation was dug in Type C soil, the least stable soil. Significant erosion was present underneath and behind the trench boxes and metal shields. In some areas, the trench box appeared unsupported from the bottom. Erosion or soil migration was exacerbated by water seeping in and accumulating in the excavation. The excavation, according to CO Schneider, was very unstable which had started to cave-in and could have blown out at any time (Tr. 59).

Eutaw argues that although classified as Type C soil, the excavation consisted of a layer of rock in the bottom eight feet. Eutaw asserts that as a layered excavation with more stable rock below the Type C soil, the layers should be classified separately (Exh. R-1; Tr. 77). Eutaw cites 29 C.F.R. Subpart P, Appendix A, section (c)(4) and OSHA Technical Manual, Section V, Chapter 2 (Exhs. R-1, R-2).

The two soil samples taken from the spoil pile show Type C soil were consistent with the City of Dothan's Geotechnical Report. As explained by CO Schneider, the samples were taken near the top of the spoil pile and thus an inference could be drawn that the samples represent the soil near the bottom of the excavation (Tr. 68-69). CO Schneider's visual observations of the soil erosion, fissures, and seeping water at the excavation site show the lack of solid rock below the 8-foot level. Eutaw performed no independent soil analysis of the excavation site.

Eutaw's argument that the change order obtained by B & B establishes the presence of rock is misplaced. The change order was due to the rock under Highway 84 which prevented B & B from using the hydraulic jacks to force the core. The change order does not show that the excavation dug to perform the boring operation also had rock at the 8-foot level.

The same layered contention was raised by B & B in its hearing before Judge Calhoun (No. 11-0466, June 27, 2011). According to her decision, the rock layers were sporadic or patchy, "there was a 3 ft. patch here, a 2 ft. patch there, it was not consistent." Judge Calhoun concluded that the layered system must be classified in accordance with the weakest layer, in this case Type C, as required by Appendix A of subpart P of Part 1926. This court agrees with Judge Calhoun.

Also, B & B's protective system at issue was abated by Eutaw by lowering the trench boxes, filling in the gaps, and slopping the top of the excavation wall away from the trench boxes (Tr. 60-61). Eutaw made no showing that such abatement was prevented by rock.

Eutaw's project superintendent Allen agreed the protective system was inadequate. Mr. Allen testified that "I would have felt it was unsafe, and I needed to protect my employees" (Tr. 143). If it was Eutaw's excavation, he testified that he would have stopped the work and immediately corrected the conditions (Tr. 142). In his interview statement, Mr. Allen acknowledged that he had 18 years of trenching experience; was the competent trenching person on site; and knew the location of a trench box more than two feet above the bottom of the excavation violated an OSHA standard (Exh. C-2).

The inadequacy of the protective system and the concerns regarding instability of the soil conditions exposed B & B employees working in the excavation to possible cave-in. The excavation had been open for approximately two months and approximately four B & B employees had worded

in the excavation. On the day of OSHA's inspection, two B & B employees were in the excavation performing the boring operation (Tr. 36, 80).

The record establishes noncompliance with § 1926.652(a)(1), employees' exposure to the conditions, and Superintendent Allen's knowledge of the unsafe conditions. The excavation was in plain view. Mr. Allen admitted that he inspected B & B's work two to three times a week for approximately 30 minutes each inspection (Tr. 127). If Eutaw is found to have sufficient authority and control to prevent or abate the unsafe conditions under the multi-employer work site doctrine, Eutaw's violation of § 1926.652(a)(1) is established.

3. Multi-Employer Worksite Doctrine

Eutaw stipulates that it was the controlling employer of the worksite (Tr. 8). Its subcontract agreement required B & B to follow all of Eutaw's rules, policies, procedures and practices pertaining to safety and health in the workplace "to the extent not inconsistent with and/or to the extent more comprehensive or stringent than required by applicable law" (Exh. R-6, ¶ 14). Although Eutaw generally subcontracts boring operations, it has significant excavation experience and knowledge of OSHA's excavation requirements. Underground utility work is its primary business (Tr. 137, 146).

Under the multi-employer worksite doctrine, an employer including a general contractor who controls or creates a worksite safety hazard may be liable for violations of the Occupational Safety and Health Act (Act) even if the employees exposed to the hazard are solely employees of another employer. A general contractor may be held responsible on a construction site to ensure a subcontractor's compliance with safety standards such as cave-in protection requirements if it is shown that the general contractor could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2129-2130 (No. 92-0851, 1994). Also, see OSHA's Directive CPL 2-0.124 (Multi-Employer Citation Policy) issued December 10, 1999. (Exh. R-2).²

² The Commission is not bound by OSHA's directives. OSHA's internal documents and interpretations do not have the force and effect of law, and do not confer procedural or substantive rights or duties on individuals. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 (No. 87-0922, 1993).

As controlling employer, Eutaw had the authority to ensure its subcontractor dug a safe excavation. Its subcontract agreement required B & B to comply with OSHA requirements. Eutaw exercised control over the work site and B & B employees. Eutaw's project superintendent Allen testified that he "had the authority to stop B & B's employees if they committed an unsafe act." He also had the authority to correct any hazards (Tr. 137-138). He acknowledged that he knew B & B's protective system was inadequate (Tr. 143). Although he took no steps to correct the conditions or even bring the problems to B & B's attention, Mr. Allen "shut down the work site," roped off the excavation, and repositioned the trench boxes after the OSHA inspection (Tr. 60, 145).

Eutaw's violation of § 1926.652(a)(1) is established as the controlling employer.

Unpreventable Employee Misconduct

Eutaw claims that if a violation is found, the violation was the result of unpreventable employee misconduct by its project superintendent Allen. Eutaw claims that its supervisors such as Mr. Allen were trained on the multi-employer policy and that employees were disciplined for not complying with the company rules.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

"When 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). The defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317 (No. 86-351, 1991).

Project superintendent Allen acknowledges B & B's protective system was inadequate and he took no steps to correct it (Tr. 137-138). He testified that he was unaware of the company's multi-employer policy at the time of the OSHA inspection. Since the inspection, he now recalls training on

the multi-employer policy in the OSHA 30- and 10-hour courses (Exhs. R-12, R-13; Tr. 124, 138). Such training was provided to Eutaw's supervisors by a safety consultant hired by Eutaw (Exh. R-15).

Eutaw's employee misconduct defense is rejected. The record fails to show that Eutaw has a specific rule concerning the superintendent's responsibilities as a controlling employer for the safety of employees under his authority. There is no multi-employer policy as part of Eutaw's written safety program or its accident prevention program (Exhs. R-9, R-10). The fact the multi-employer policy was taught to supervisors during the OSHA 30-hour course or 10-hour course does not mean Eutaw adopted the policy as part of its safety program and provided superintendents with guidance on implementing the policy (Exhs. R-12, R-13). Mr. Allen acknowledged that he gained his knowledge of the multi-employer doctrine "since the inspection at this particular site" (Tr. 140).

Also, there is no showing that Eutaw monitored for compliance or disciplined for noncompliance. Eutaw safety audits of worksites were not shown to include monitoring for subcontractor's safety compliance except for an audit after the OSHA inspection (Exh. R-11). Mr. Allen received no discipline (verbal admonishment, written reprimand, demotion, or loss of pay) for failing to comply with Eutaw's alleged policy (Tr. 141, 190). There is no evidence of any supervisors receiving discipline for not complying with the multi-employer policy.

Infeasibility Defense

Although Eutaw asserted an infeasibility defense at the hearing, it did not argue the defense in its brief.³ Nevertheless, the record fails to support an infeasibility defense. To establish the affirmative defense, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

³ Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

Eutaw's defense is based on B & B's claim of rock at the 8-foot depth which allegedly prevented the trench boxes from being installed within two feet of the bottom. However, Eutaw presented no evidence that either it or B & B considered alternate methods for providing cave-in protection. Adequate protective systems recognized by § 1926.652 include sloping, benching, support systems, shield systems, and other protective systems. After the OSHA inspection, Eutaw lowered the trench boxes (Tr. 60-61).

Serious Classification

Eutaw's violation of § 1926.652(a)(1) was properly classified as serious. In order to establish that a violation is serious under § 17(k) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known of the violation. The likelihood of an accident is not required. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Project superintendent Allen knew B & B's protective system was inadequate based on the positioning of the trench boxes more than two feet above the bottom of the excavation, the gaps between the boxes and between the boxes and the excavation walls, and a bent cross bar. The instability of the Type C soil was aggravated by the seeping water, standing water, and severe erosion and fissures. B & B employees were exposed to a cave-in hazard as a result of the inadequate protective system which could have resulted in death or serious injury.

Penalty Consideration

In determining an appropriate penalty, the Act requires consideration of the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor.

Eutaw has approximately 300 employees and is not entitled to credit for size (Tr. 145). Twelve Eutaw employees worked on the sewer line project but none of them were exposed to the inadequate protective system. Eutaw has a history of past serious citations within five years (Tr. 61). Eutaw is entitled to credit for good faith based on its safety programs which consist of written rules, training, and safety audits of projects (Exhs. R-9, R-10, R-11). Eutaw also has a progressive disciplinary program (Exh. R-14).

A penalty of \$ 2,500 is reasonable for Eutaw's violation of § 1926.652(a)(1). B & B had been working at the bore site for two months. There were approximately five B & B employees exposed. Project Superintendent Allen was aware of the unsafe condition of the protective system but failed to take any steps to correct the condition or even bring it to B&B's attention.

**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:

1. Serious violation of § 1926.652(a)(1) is affirmed and penalty of \$ 2,500 is assessed.

/s/ Ken S. Welsch

KEN S. WELSCH
Administrative Law Judge

Date: September 27, 2011