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. ComTran Group, Inc., Respondent.	OSHRC Docket No. **11-0646**

Appearances:

Tremelle L. Howard-Fishburne, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Andrew N. Gross, General Counsel, HB Training & Consulting, Lawrenceville, Georgia
For Respondent;

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

DECISION AND ORDER

The ComTran Group, Inc., is a communications utility contractor located in Buford, Georgia. ComTran contests a Citation issued to it by the Secretary on February 15, 2011. The Secretary issued the Citation following an inspection by a compliance officer for the Occupational Safety and Health Administration (OSHA) on December 2, 2010, at a worksite in Lawrenceville, Georgia.

Item 1 of the Citation alleges a serious violation of 29 C. F. R. § 1926.651(j)(2), for failing to protect an employee working in an excavation from soil falling or rolling into the excavation. Item 2 of the Citation alleges a serious violation of 29 C. F. R. § 1926.652(a)(1), for failing to provide an adequate protective system for an employee working in an excavation that was 6 feet deep. The Secretary proposed a penalty of $ 4,900.00 for each of the cited items, for a total proposed penalty of $ 9,800.00.

ComTran timely contested the Citation. This case was originally designated for Simplified Proceedings under Commission Rule 203(a). The court held a hearing in this matter on July 18, 2011, in Decatur, Georgia. At the hearing, ComTran conceded its project manager on the site violated the cited standards. ComTran asserted the affirmative defense of unpreventable employee misconduct on the part of its project manager. At the close of the hearing, the court removed this case from Simplified Proceedings (under Commission Rule 204(a)), over the objection of the Secretary. The court told the parties that converting the case to conventional proceedings "gives both sides a chance to file briefs with the benefit of a transcript. There are issues which are more complex relating to the unpreventable employee misconduct that need to be addressed and fleshed out" (Tr. 193).

The parties have filed post-hearing briefs. For the reasons discussed below, the court rejects ComTran's employee misconduct defense, and affirms Items 1 and 2 of the Citation. The court assesses a penalty of $ 2,500.00 for each Item, for a total penalty of $ 5,000.00.

Background

Most of the pertinent facts of this case are not in dispute. ComTran's office is located in Buford, Georgia. The company is a communications utility contractor. ComTran performs indoor wiring as well as outdoor utility work.

Gwinnett County hired ComTran in late 2011 to perform a small project in Lawrenceville, Georgia, next to Sugarloaf Parkway. ComTran's job was to relocate existing Department of Transportation utilities that ran parallel to Sugarloaf Parkway. Communication utilities are buried at a relatively shallow depth compared to water and sewer lines; they are generally not buried deeper than 4 feet under the surface.

ComTran assigned a two-man crew to perform the project, which was anticipated to be completed in two days. Walter Cobb was the project manager on the site. He was accompanied by Chris Jernigan, who "was a fairly new man" with ComTran (Tr. 58). ComTran's plan was for

Cobb and Jernigan to work at both ends of a utility line to tie in a duct. Their task was to locate and identify an existing duct bank, and then find the same duct approximately 600 feet further south. The employees would dig in two areas. Cobb planned to complete the south end in less than a day because it was a simple tie-in, where existing duct is coupled to a new duct. At the north end, the employees had to set a new junction box.

ComTran broke ground on the project on December 1, 2010. Cobb used an excavator to dig an excavation parallel to the Sugarloaf Parkway. Cobb placed the spoil pile for the excavation at least 2 feet away from the edge of the excavation, and erected a silt fence between the spoil pile and the excavation. Exhibit R-1 is a copy of a photograph taken at the site on December 2, 2010. On December 1, 2010, the excavation in the area marked "A" was the only area of the site in which Cobb had dug.

On December 2, 2010, Cobb and Jernigan arrived at the site at approximately 7:00 a.m. Sam Arno is a project manager for ComTran. The Lawrenceville worksite was one of three Arno was overseeing for ComTran the day of the inspection. Arno arrived at the Lawrenceville site at approximately 7:30, and discussed the day's planned work with Cobb. At that time there were no problems on the site. Arno left the site around 8:00 a.m.

After Arno left, Cobb began digging to locate the utilities, but could not find them. Cobb excavated between the areas marked "B" and "C" on Exhibit R-1. Eventually he took down the silt fence because, Cobb stated, "I had to dig back to try to find the existing conduit that I had been looking for and had problems finding it. . . .[There was] no way of locating it. You just have to dig to find it" (Tr. 135).

Cobb continued to dig, deepening the excavation and placing the spoil pile at its immediate edge. Cobb did not measure the excavation. He admitted at the hearing that he lost track of the depth of the excavation and the location of the spoil pile: "I just kept digging. I had problems and was trying to get out of there, and really I didn't pay no attention to it until OSHA come up and started asking me questions how deep the hole is and about my spoil pile" (Tr. 135). Eventually Cobb located the elusive conduit. He entered the excavation and began connecting the two ends

of the conduit.

At some point after Cobb entered the excavation, an OSHA compliance officer drove past it on Sugarloaf Parkway. The compliance officer saw only the top of Cobb's head as he went past, indicating to him that the excavation was deeper than 5 feet. The compliance officer called in to OSHA's East Atlanta Area Office and notified his supervisor of the potential violation. Compliance officer Caliestro Spencer was assigned to inspect the worksite. Spencer drove to the site accompanied by OSHA trainee Hilary Whitehall. They arrived at the site at approximately 1:00.

When Spencer arrived, Cobb was still working in the excavation. Spencer took several photographs of Cobb in the excavation (Exhs. C-1, C-2, and C-3), and then instructed him to exit it. Cobb called Arno, who arrived a short time later. Spencer held an opening conference with Arno. He took statements from Arno and Cobb. Spencer took several more photographs, and used a trench rod to measure the excavation. Spencer also took soil samples from the spoil pile.

Spencer determined the excavation was 40 feet long and 15 feet wide. The area where Cobb was working was 6 feet deep. The spoil pile, which was 5 feet high, was at the immediate edge of the excavation, creating an 11-foot high wall next to Cobb. The excavation walls were not sloped or benched, and there was no trench box in the excavation or available on the site. Spencer established that both Arno and Cobb were competent persons. When Spencer asked Cobb how he classified the soil he was digging in, Cobb responded "it was C because all around Georgia most of the time you're working in class C conditions" (Tr. 19). Spencer sent the soil samples to OSHA's laboratory at the Salt Lake City Technical Center for testing. The lab classified the samples as Type B (the presence of the pre-existing conduit in the excavation establishes the excavation was dug in previously disturbed soil, which is also classified as Type B) (Exh. C-11).

As a result of Spencer's inspection, the Secretary issued the instant Citation.

The Citation

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.651(j)(2)

The Citation alleges:

29 CFR 1926.651(j): Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 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 or about 12/02/2010 at the intersection of Scenic Highway and Sugarloaf Parkway, Lawrenceville, GA: An employee was exposed to a cave-in hazard when the spoil pile was placed on the edge of a trench approximately 6 feet in depth.

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

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 (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials and equipment from falling or rolling into excavations, or by a combination of both if necessary.

Item 2: Alleged Serious Violation of 29 C. F. R. § 1926.652(a)(1)

The Citation alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one half horizontal to one vertical (34 degrees measured from the horizontal):

On or about 12/02/2010, at the intersection of Scenic Highway and Sugarloaf Parkway, Lawrenceville, GA: An employee working in a trench approximately 6 feet deep was exposed to a cave-in hazard.

The standard at 29 C. F. R. § 1926.652(a)(1) provides:

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[.]

Analysis

The Secretary has the burden of establishing the employer violated the cited standard.

> 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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

With the exception of the element of knowledge, ComTran concedes the Secretary has established a *prima facie* case for Items 1 and 2. In its post-hearing brief, ComTran states:

> Employer ComTran acknowledges that it is engaged in utility line construction, and that the cited construction standards apply to the work performed at this worksite. ComTran also acknowledges that the cited standards were violated to the extent that ComTran Foreman Walter Cobb had placed himself in an excavation deeper than five feet, with a spoil pile closer than two feet from the edge of the excavation. Mr. Cobb was the only exposed employee.

(ComTran's Brief, p. 8).

Applicability

The court agrees the Secretary has established the cited standards apply to the cited conditions. The standards at 29 C. F. R. §§ 1926.651(j)(2) and 652(a)(1) are found in Subpart P of the construction standards. Subpart P addresses excavations. The standards apply to the excavation in which Cobb was working at the Lawrenceville site.

Employee Access

The Secretary also established Cobb had access to the violative conditions. Exhibits C-1, C-2, and C-3 are photographs showing Cobb working in the excavation with the combined 11-foot height of the excavation wall and spoil pile looming over him. Cobb was exposed to the hazards created by the violative conditions.

Compliance with the Terms of the Standard for Item 1

With respect to Item 1, ComTran concedes the spoil pile was closer than 2 feet from the edge of the excavation. At the hearing, both parties treated this fact as *prima facie* proof that

ComTran had violated 29 C. F. R. § 1926.651(j)(2). Spencer testified that the location of the spoil pile at the immediate edge of the excavation "creates a superimposed load on the trench, like a big guy standing on your shoulders. You can take the pressure for so long and sooner or later something can happen and it buckles and you have a catastrophic failure of the trench" (Tr. 33).

A hazard is not presumed when the standard incorporates the hazard as a violative element. *Bunge Corp. v. Secretary of Labor,* 638 F. 2d 831 (5th Cir. 1951). The standard at 29 C. F. R. § 1926.651(j)(2) unambiguously states that employees "shall be protected from excavated or other materials or equipment that could pose a hazard *by falling or rolling into excavations."* The standard does not mention a cave-in hazard created by a superimposed load. As the Secretary correctly notes in her brief:

> [S]ome Administrative Law Judges have held the Secretary has not met her burden unless she has proven that the spoil pile could pose a hazard by rolling or falling into the excavation. See *Schaer [Development of Central Florida,* OSHC Docket No. 11-0371, June 2, 2011]; *Honey Creek Contracting, Inc.,* 18 BNA OSHC 1652 (No. 97-0353, 1998); *Columbia Gas of Ohio,* 17 BNA OSHC 1510 (No. 93-3232, 1995); *Performance Site Management,* 21 BNA OSHC 2115, 2117 (No. 06-1457; 2007) (Judge Welsch held that § 1926.651(j)(2) requires that the Secretary must prove the materials or excavated materials "could pose a hazard by falling into rolling into the excavation").

(Secretary's Brief, p. 13).

In *Schaer,* several witnesses testified affirmatively that they saw no evidence of material rolling or sliding into the excavation. Judge Calhoun stated she had "reviewed the photographic exhibits showing the spoil piles and track hoe. The photographs alone do not conclusively demonstrate a hazard exists" (*Id.* at 7). In the instant case, I have before me eleven photographs (Exhs. C-1 through C-10, and R-1) from which I can conclude a hazard does exist. The photographs show an almost vertical 5 foot high spoil pile at the immediate edge of the excavation. The soil is visibly loose with various tools, boards, and other materials strewn about it (Exhs. C-1, C-2, C-3, C-6, C-9, C-10). The excavation is immediately adjacent to a highly trafficked road, and subject to the vibrations created by the passing vehicles, as well as the two excavators visible in Exhibit R-1. The soil is classified as Type B, both in its natural composition and by its having been previously disturbed. The Secretary has established the excavated soil could pose a hazard

by falling or rolling into the excavation, where Cobb was working immediately below the spoil pile. ComTran failed to comply with the terms of 29 C. F. R. § 1926.651(j)(2).

Compliance with the Terms of the Standard for Item 2

With respect to Item 2, the photographs and the testimony of Spencer and of Cobb himself establish that ComTran violated the terms of 29 C. F. R. § 1926.652(a)(1). The excavation was 6 feet deep and dug in Type B soil. The walls of the excavation were not sloped or benched, and no other protective system was provided. The Secretary has established ComTran failed to comply with the terms of the cited standard.

Knowledge

Cobb had actual knowledge that the excavation and spoil pile were not in compliance with the terms of the cited standards—he himself had dug the excavation and placed the spoil pile at its edge. At the time of the inspection, Cobb was a project manager for ComTran, a supervisory employee. As such, his knowledge is imputed to ComTran. *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.")

ComTran argues the Secretary must also establish that Cobb's actions were foreseeable by the company, citing *W. G. Yates & Sons Construction Co., Inc., Hwy. Div. v. OSHRC,* 459 F. 3d 604 (5th Cir. 2006). In *Yates,* the court concludes:

> [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.

Id. at 608-609.

ComTran's argument is rejected. The Court of Appeals for the Fifth Circuit issued the decision in *Yates,* and it is binding precedent in that Circuit. The instant case arises in the Eleventh Circuit, which has not adopted the foreseeability analysis as an aspect of the knowledge

element relating to knowledge as applied by the Fifth Circuit. Yates is, however, at variance with other circuits that have addressed the issue. See *Danis-Shook Joint Venture XXV*, 319 F3d 805 (6th Cir. 2003). The Court of Appeals for the Eleventh Circuit has not directly addressed this issue. Therefore, Commission precedent applies. Under Commission precedent, a supervisory employee's actual or constructive knowledge is imputed to the employer. It is undisputed project manager Cobb both created and was aware of the violative conditions.

The Secretary has established ComTran violated the cited standards. The Secretary classified these items as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. Cobb was exposed to the hazard of soil from a 5 foot high spoil pile falling on him as he worked in the excavation, as well as to the hazard of a cave-in in the unprotected excavation. Both violative conditions created a substantial probability of death or broken bones. Items 1 and 2 are properly classified as serious.

Employee Misconduct Defense

ComTran's primary defense is that Cobb engaged in unpreventable employee misconduct, for which the company cannot be held liable.

> To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule.

Schuler-Haas Electric Corp., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006).

In addition, the employer has the burden of showing "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L. E. Myers Co.*, 16 BNA OSHC 1037, 1040 (No. 90-945, 1993). Where, as here, the purported employee misconduct includes the actions of a supervisory employee, the employer faces a higher standard of proof. "[W]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's 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." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Established Work Rule

The employer must show it has a specific work rule designed to prevent the violative conduct. ComTran argues that it has a specific work rule, but no such rule appears in its Safety Manual (Exh. R-4). Page 30 of the Safety Manual addresses "Excavations," but the only rules it provides are ones designed to avoid damaging underground utilities. The only OSHA standard mentioned in the Safety Manual is 29 C. F. R. § 1926.956, which addresses underground lines. None of the rules in ComTran's Safety Manual addresses the hazards of spoil pile material falling into the excavation and cave-ins. When asked which specific work rules Cobb violated, ComTran's president, Greg Bostwick, responded, "He violated the OSHA regulations, which are part of our work rules" (Tr. 169). ComTran adduced training records for Arno and Cobb (Exhs. R-2 and R-3), suggesting that these meet the requirement for having an established work rule.

ComTran has failed to establish it had specific work rules addressing the proper location for a spoil pile and adequate protective systems for excavations.

Adequate Communication

Because ComTran failed to prove it had established work rules designed to avoid violations of the cited standards, it must necessarily fail to prove it adequately communicated the required rules.

Reasonable Steps to Discover Violations

It is ComTran's burden to establish it took reasonable steps to discover violations of its work rules. ComTran produced no evidence of daily logs or documents showing it took such steps. ComTran produced some lists of verbal warnings for minor safety infractions given to employees in 2010 (Exhs. R-6, R-7, and R-8). These lists were created from memory in 2011 during litigation of the instant case. They are accorded no weight.

ComTran has failed to establish it took reasonable steps to discover violations.

Effective Enforcement of the Rule

ComTran acknowledges Cobb violated the cited OSHA standards. Yet, at the time of the hearing, ComTran has failed to discipline Cobb. When asked why, Arno stated, "We were waiting for the outcome of this hearing. . . I went to Mr. Bostwick, the owner of the company, and we discussed it, and we made the decision to wait and see what kind of punishment ComTran was going to be given" (Tr. 94-95). Bostwick corroborated Arno's testimony, stating Cobb "offered to resign the next morning when he came in. I told him I didn't want to go that route right now, that I wanted more information. I thought there was more to it and I found out it appears there isn't. I don't know what I'm going to do" (Tr. 165).

ComTran's failure to discipline Cobb, despite acknowledging Cobb's violation of the cited standards, indicates the company takes a lax approach to safety. ComTran employs 48 workers. By waiting for the outcome of this hearing to determing what, if any, discipline Cobb would receive, ComTran is signaling its employees that it does not take safety rules seriously. This approach emboldens other employees to disregard their safety training.

ComTran has failed to establish any of the elements of the unpreventable employee defense. Items 1 and 2 are affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

At the time of the inspection, ComTran employed 48 employees. The company had no

history of previous violations. ComTran demonstrated good faith in its implementation of a safety training program. Bostwick, the president of ComTran, testified that the company took decisive steps to reinforce its safety program:

> Within two weeks [of the inspection] we had an outside consultant come in and give a four-hour class on trench safety to every single person. We shut down for a Friday afternoon and did it. . . . Our safety program, we've had 1400 days with no time lost to injury at all, and it's a result of our safety program.

(Tr. 162-163).

The gravity of each of the violations is high. Excavation cave-ins are a common occurrence in Georgia. In this case, Cobb was working directly below the spoil pile. He was already in an unprotected excavation that was 6 feet deep in Type B soil. The excavation was next to a busy road, and the employees had used excavators on the site.

The court credits ComTran for demonstrating good faith following the inspection, and accordingly reduces the penalties proposed by the Secretary. The court assesses a penalty of $ 2,500.00 each for Item 1 and Item 2.

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:

1. Item 1 of the Citation, alleging a serious violation of § 1926.651(j)(2), is affirmed, and a penalty of $ 2,500.00 is assessed; and

2. Item 2 of the Citation, alleging a serious violation of § 1926.652(a)(1), is affirmed, and a penalty of $ 2,500.00 is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: October 17, 2011
Atlanta, Georgia