



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

Digco Utility Construction,

Respondent,

OSHRC Docket No. **12-1527**

APPEARANCES:

Demian Camacho, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Complainant

Michael K. Swan, Esquire, Akin Gump Strauss Hauer & Feld, LLP, Houston, Texas
For the Respondent

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

DECISION AND ORDER

On June 11, 2012, Derek Rusin, a compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration (OSHA), drove past a worksite in Huntsville, Texas, where a crew from Digco Utility Construction (Digco) had dug an excavation. The CSHO saw a person in the excavation. He parked his vehicle and conducted an inspection of the worksite. As a result of the CSHO's inspection, the Secretary issued a two-item citation to Digco on June 28, 2012, alleging repeat violations of two standards of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of the Citation alleges a repeat violation of 29 C.F.R. § 1926.651(c)(2) for failing to provide a safe means of egress from an excavation that was 4 feet or more in depth. The Secretary proposed a penalty of \$5,940.00 for Item 1.

Item 2 of the Citation alleges a repeat violation of 29 C.F.R. § 1926.652(a)(1) for failing to provide cave-in protection for an employee working in an excavation 5 feet or more in depth. The Secretary proposed a penalty of \$13,860.00 for Item 2.

Digco timely contested the Citation. The court held a hearing in this matter on February 5, 2013, in Houston, Texas. Digco stipulates the Commission has jurisdiction over this proceeding under § 10(c) of the Act and that it is an employer covered under § 3(5) of the Act.

The parties have filed post-hearing briefs. Digco contends the Secretary failed to establish the company violated the cited standards. For the reasons discussed below, the court agrees with Digco and vacates Items 1 and 2 of the Citation.

Background

Digco is a utility construction contractor. Centerpoint Energy hired Digco to locate a gas line and tie in a new line to provide service for a restaurant next to Highway 190 in Huntsville, Texas. On June 11, 2012, Digco was working at 1523 Normal Park Drive in Huntsville, Texas, excavating to find the gas line. Digco foreman Manuel Navarro was supervising three crew members. Digco welder Gary Ward was also on site to tie into the line once Navarro's crew had uncovered it.

At approximately 11:30 a.m., CSHO Rusin was driving west on Highway 190. As he approached the intersection of Highway 190 and Normal Park Drive, he observed Digco's worksite next to the highway on the left. As he passed by, the CSHO "saw the top part of a hard hat in the excavation" (Tr. 17). The CSHO stopped at a red light at the intersection, then turned left on Normal Park Drive and then into a parking lot adjacent to the excavation. The CSHO parked his truck, exited it, and approached the worksite.

When the CSHO reached the worksite, no one was in the excavation. Foreman Navarro was in the process of digging in the excavation with a Komatsu excavator. The foreman saw the CSHO and stopped operating the excavator.

The CSHO held an opening conference with the foreman. The CSHO interviewed the foreman and the employee he had observed in the excavation. The CSHO took photographs of the site and measured the excavation. The excavation was 6 feet long and 4 feet wide. At the time of the inspection the depth of the excavation was 6½ feet deep with vertical walls. There was no cave-in protection in the excavation.

The Citation

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).

Applicability of the Cited Standards

The standards at 29 C.F.R. §§ 1926.651(c)(2) and 652(a)(1) appear in “Subpart P—Excavations” of OSHA’s Construction Standards. The standard at 29 C.F.R. § 19236.650(a) provides that Subpart P “applies to all open excavations made in the earth’s surface. Excavations are defined to include trenches.”

It is undisputed that Digco dug an excavation at 1523 Normal Park Drive in Huntsville, Texas, on June 11, 2012. The cited standards apply to the cited conditions.

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

Item 1 of the Citation alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62) of lateral travel for employees:

The employer does not provide a safe means of egress for employees working in excavations that are four feet or more in depth. This violation was observed on or about June 11, 2012, when an employee working in an excavation was exposed to fall hazards while climbing in and out of the excavation that did not have any form of safe egress.

Digco Utility Construction was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.651(c)(2), which was contained in OSHA inspection number 315910612, citation number 1 item number 1 and was affirmed as a final order on December 6, 2011, with respect to a workplace located at International Plaza Drive & Greens Road, Houston, TX.

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

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Compliance with the Terms of the Standard

It is the Secretary’s burden to establish that a safe means of egress was not located in in the excavation and that the excavation was 4 feet or more in depth when the employee was working in it. The Secretary asserts he has met this burden based on the CSHO’s testimony that he observed an employee in the excavation, he subsequently measured the excavation and found it to be 6½ feet

deep, and the employees he interviewed admitted there was no ladder or other safe means of egress from the excavation.

Digco concedes its employee was in the excavation but denies the excavation was as deep as 4 feet when he was in it. Digco contends that between the time the CSHO observed the excavation from the highway and the time he walked up to the excavation, the foreman had used the excavator to deepen the excavation.

Foreman Manuel Navarro stated he had worked for Digco for twelve years. He was the competent person on the site. On the morning of June 11, 2012, Navarro and his crew set out to uncover a gas line so that welder Gary Ward could tie into it. Navarro testified he first surveyed the site for safety hazards and set up orange cones around the site. He determined the soil, which was very soft and previously disturbed, was Type C. One of the crew members, the helper¹, used a shovel (referred to as a “sharpshooter”) and then a probe to make sure there were no waterlines or other utilities where Digco planned to dig. The sharpshooter is a shovel that is approximately 42 inches long. The probe is a 48-inch iron rod with a wooden handle. Navarro described the process for initially checking the soil with the sharpshooter and the probe: “Well, first we dig a small trench [with the sharpshooter] about 6 inches deep to make sure there are no lines close by. And if there are no lines close by, then we use the probe to go deeper” (Tr. 86).

After the helper determined there were no utilities under the immediate surface, Navarro used the excavator to remove the next 3 feet of dirt, creating a 3½ foot excavation. The helper reentered the excavation and used the probe again to check for utilities. He did not locate the gas line.²

Navarro decided to excavate deeper and use shoring to protect against a cave-in. The helper exited the 3½ -foot excavation and Navarro directed him to go get a ladder to provide egress from the deeper excavation. Navarro proceeded to excavate another 3 feet of dirt from the

1 There was some confusion at the hearing as to the actual name of the crew member the CSHO observed in the excavation. Foreman Navarro knew him by his first and last name, which is the name that appeared on Digco’s payroll. The CSHO attached a second surname to the name Digco had listed. Welder Gary Ward did not recognize either of these names but said he always referred to the crew member by nickname. The crew member did not appear at the hearing. Regardless, there is no dispute that all three names refer to the same crew member who was in the excavation the day of the inspection. The crew member is referred to as the “helper” in this decision.

2 Digco never did locate the gas line in the excavated area. The crew eventually excavated on the other side of a gully located nearby to find the line.

excavation. At this point, Navarro noticed the CSHO approaching him and he stopped operating the excavator. Navarro stated that the helper had not entered the excavation after exiting it when it was 3½ feet deep.

Welder Gary Ward corroborated Navarro's testimony. Ward sat and watched Digco's excavation process the morning of June 11, 2012. Ward testified he always watched Digco's crew excavate when he had to tie into a line because he could direct them on how best to uncover the line:

[W]hen I get ready to weld—see, when I make attachments, I'm right-handed and when they locate the gas line, I kind of tell them how to dig it, you know, on over to more one side. It depends on what attachments I'm doing to the main to make it easier for me to get in there. If it's easy for me, then I'm in there and I'm out.

(Tr. 128).

Ward testified he observed the helper working in the excavation for 15 to 20 minutes when it was between 3 feet and 3½ feet deep. Ward had provided a statement to Digco following the inspection in which he stated, "While watching the helper probe for a gas main, the helper was about 4 feet deep" (Tr. 163). When asked at the hearing whether his statement was accurate, Ward said, "Yeah. Could have been 3½ foot" (Tr. 164). After the helper failed to find the gas line with the probe, Ward saw him exit the excavation by stepping onto a pipe. The helper left to get a ladder and Navarro began to dig deeper in the excavation.

As Navarro was digging, Ward saw the CSHO drive up in his truck. Ward testified the CSHO did not get out immediately: "I thought it was somebody for the bank or something because he sat there a little bit before he got out. I don't know if he was on the phone or what. I didn't know who it was" (Tr. 131). Ward estimated the CSHO stayed in his truck for 3 or 4 minutes. The CSHO then approached the excavation wearing his OSHA hard hat and Ward "figured it was somebody to deal with us" (Tr. 132).

The Secretary takes issue with Digco's version of events the day of inspection, stating it "defies common sense and logic" and should be rejected. First, the Secretary contends, "there is no credible basis for Digco's assertion that the excavation was conveniently only 3.5 feet deep when [the helper] was seen inside of it" (Secretary's brief, p 11). The court disagrees with this assessment.

Both Navarro and Ward testified the excavation was approximately 3½ feet at its deepest when the helper was in it. Navarro actually dug out the excavation. He gauged the depth of the

excavation by comparing it to the sharpshooter the helper used: “We take the sharpshooter as a reference. . . . [W]e’ve taken measurements with the sharpshooter that are about 42 inches so we know that if it’s at about that level, it’s about 3½ feet deep. . . . We have measured it before to not get close to the trenches” (Tr. 112).

The demeanor of both Navarro and Ward during their testimony was steady and forthright. Their testimony was consistent. It is concluded their testimony is credible.

The Secretary also disputes Digco’s timeline:

Second, Navarro testified that Digco began digging the excavation at approximately 10:00 or 10:30 a.m. and dug continuously thereafter, only stopping to check for the gas line. [The CSHO] testified that he arrived at the worksite about 1 hour later at approximately 11:30 a.m. Thus, if what Digco asserts is true, it took Digco about 1 hour to dig the first 3.5 feet of the excavation, but only about 4 minutes to dig the additional 3 feet.

(Secretary’s brief, p. 11).

The Secretary glosses over several steps of the excavation process when he states the company “dug continuously.” The helper initially dug out the first 6 inches of the excavation by hand, using the sharpshooter. He then used the probe to a depth of approximately 3½ feet. In order to push the probe into the ground, the helper had to bend at his waist and put weight on it. The helper probed at several different points at this level attempting to locate the line. After determining the gas line was not at that level, Navarro proceeded to take off the next 3 feet of dirt, at which time the helper repeated the probing process. It does not defy common sense or logic to conclude that it might take a single employee one hour to perform the manual labor done by the helper the morning of the inspection.

When the helper once again could not locate the gas line, Navarro instructed him to get out and bring a ladder to the excavation, because Navarro was going to excavate deeper and install shoring (the two other crew members were to install the shoring).

The bucket of the excavator measured 20 inches by 16 inches, and was equipped with a bar across the teeth as a protective measure to reduce the danger of penetrating a buried line. Navarro estimated he was digging for 3 to 5 minutes between the time the helper exited the excavation and the time the CSHO showed up. He was able to excavate to the depth of 6½ feet in that time because the Type C soil was very soft. Because the helper had probed to a depth of 3½ feet without finding any lines, Navarro knew he could dig 3 feet deeper without damaging any existing utilities underground.

The CSHO's timeline does not vary widely from Navarro's. He testified that from the time he observed an employee in the excavation until the time he approached Navarro on the excavator, 2 to 4 minutes had elapsed. He stated he exited his truck immediately upon parking in the adjacent lot and that he did not stop to make a phone call.

The CSHO interviewed Navarro and the helper. Spanish is the first language of both employees. The CSHO interviewed both in English, without an interpreter. Navarro speaks some English (but had the assistance of an interpreter at the hearing). Navarro and Ward both testified the helper speaks no English. Navarro testified that the CSHO misunderstood him at the site, and that he thought the CSHO knew that the depth at which he measured the excavation was not its depth when the helper was working in it.

The CSHO testified he held an opening conference with Navarro and measured the excavation and found it to be 6½ feet deep. The CSHO testified he then told Navarro, “[Y]ou had a 6½ foot hole.’ And that’s when [Navarro] said, ‘Well, I didn’t realize how deep it was. That’s why I told him to go out and get a ladder’” (Tr. 69). At the time of the inspection, the CSHO did not realize Navarro had deepened the excavation after the CSHO had seen the helper’s hard hat as he passed by. The CSHO did not ask Navarro if the helper had been in the excavation at the 6½ foot depth. On cross examination, Mr. Rusin testified as follows:

Q. Did you ask them if they—how they used the probe?

CSHO Rusin: No, sir. Because this is the first time I heard that they—that the hole got deeper when I was driving up.

Q. I’m sorry?

CSHO Rusin: You’re asking me if he could have been bending over in a shallower hole? That never came up when I was doing the inspection. Mr. Navarro admitted that the hole was too deep while I was out there. So I didn’t really go that avenue trying to find out those types of questions. . .

(Tr. 67).

The CSHO conceded there were no tools or footprints in the excavation when he examined it.

The height of the helper was an issue at the hearing. The CSHO testified that when he first observed the helper in the excavation, he saw the top of the helper’s hat extending above the top of the excavation. He was adamant that the hard hat was above the surface level:

Judge Simko: Can you tell where that hard hat was in relation to the plane . . .of the grassy plane area?

CSHO Rusin: Yes, Your Honor. Say this is the plane, like flat. [Indicating]. . . . I seen like, the side top-profile of the employee's hard hat.

Judge Simko: How much of the hat did you see?

CSHO Rusin: Like a couple of inches.

Judge Simko: Above the plane?

CSHO Rusin: Above the plane, like that of the –from ground-level.

(Tr. 73).

The CSHO testified that when he interviewed the helper, the helper appeared to be “a little taller” than the CSHO’s own height of 5 feet, 9 inches (Tr. 19). Navarro and Ward each also gave their respective heights of the helper. Navarro estimated that the helper came up to his shoulder, while Ward, who characterized the helper as “a little skinny guy,” estimated him to be about 5 feet, 4 inches (Tr. 134). Navarro and Ward had worked with the helper for 5 years and 1 year respectively, and have a better sense of his actual height than does the CSHO, who interviewed him during a few minutes on one day. Nevertheless, for the purpose of this decision, the court will assume the helper was approximately 5 feet, 10 inches, tall.

The Secretary’s mathematical dilemma is that the CSHO testified he observed the hard hat of the 5 foot, 10 inch, helper extending approximately 2 inches above the top of 6 foot, 6 inch, deep excavation. The Secretary offers two theories to account for the 10 extra inches of excavation. First, the Secretary posits that the CSHO may have glimpsed the helper in the act of exiting the excavation as he stepped on a pipe to climb out. An examination of Exhibits C-2 through C-5, which are copies of photographs the CSHO took of the excavation, show there is no pipe at or near the 6½ foot level.

There is a white pipe visible at the 3½ foot level, but if the helper had been stepping up on that pipe, then the CSHO would have seen much more of the helper than the top 2 inches of his hard hat.

Second, the Secretary undermines the credibility of its own witness by suggesting the CSHO “mistakenly believed he saw the hard hat sticking out of the excavation given the fact that he was observing all of this from an elevated angle from inside his truck” (Secretary’s brief, p. 2, footnote 1). If the theory that the CSHO was mistaken in his observation is accepted, then the

Secretary is left with no probative evidence of the actual depth of the excavation at the time the helper was in it. The CSHO was, however, questioned closely regarding whether he saw the hard hat above or below the surface level of the excavation. He testified consistently and emphatically that the hard hat was visible above ground level, extending outside the excavation. Both of the theories the Secretary asserts to account for the discrepancy between the depth of the excavation in relation to the height of the helper are speculative and not supported by the record. They are rejected.

On the other hand, Digco's theory of the case is consistent and plausible. It is more likely that the CSHO saw the top 2 inches of the hard hat extending above the excavation because a 5 foot, 10 inch, man was bending over at the waist in a 3½ foot excavation than because a 5 foot, 10 inch, man was standing up straight in a 6½ foot excavation.

Based on the totality of the evidence, the court finds the Secretary failed to establish Digco failed to comply with the terms of the standard. The Secretary did not prove the excavation was 4 feet or more deep when the helper was working in it. Item 1 is vacated.

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

Item 2 of the Citation alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-in by an adequate protective system designed in accordance with 29 CFR 1926.652 paragraph (b) or (c):

The employer does not ensure that employees are protected from cave-ins while working in excavations. This violation was observed on or about June 11, 2012, when an employee was exposed to cave-in hazards while working in an excavation approximately 6½ feet deep that was not sloped, benched or shored.

Digco Utility Construction was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.652(a)(1), which was contained in OSHA inspection number 314426685, citation number 1 item number 3 and was affirmed as a final order on May 10, 2012, with respect to a workplace located at the corner of I-10 East and Thompson Rd., Baytown, TX 77521.

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 except when:

...

(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.

Compliance with the Terms of the Standard

It is undisputed that at the time of the CSHO's inspection, the excavation was 6½ feet deep with vertical walls. As such, some form of cave-in protection was required to protect employees working in the excavation. Navarro testified he was aware of this requirement and had sent two crew members to retrieve the shoring while he was deepening the excavation. He had also sent the helper to retrieve a ladder because he was aware a safe means of egress was required for the deeper excavation.

The Secretary has not established Digco failed to comply with the terms of the standard. The CSHO testified that Navarro was operating the excavator when he arrived at the site.

Digco was in the process of digging out the excavation when the CSHO arrived. The foreman had instructed his crew members to bring the shoring to the excavation for installation after he had completed digging. Digco was taking steps to comply with the terms of the standard as the CSHO arrived.

Employee Exposure

The record establishes that the helper entered the excavation at depths of 6 inches and of 3½ feet. Cave-in protection is not required at these depths, where, as here, the competent person examined the ground and found no indication of a potential cave-in. Furthermore, the employee was standing in the excavation and the foreman was watching this work. No employee entered the excavation after Navarro began digging to deepen it to 6½ feet. Therefore, no employee was exposed to a cave-in hazard.

Employer Knowledge

Foreman Navarro was the competent person on the site. He operated the excavator and instructed the helper as he watched him perform his work. Navarro had actual knowledge of all of the events that occurred at the worksite on June 11, 2012. There is no evidence a violative condition existed at the site that day. The Secretary has failed to demonstrate Digco was aware of a violation of 29 C.F.R. § 1926.652(a)(1).

Exception to 29 C.F.R. § 1926.652(a)(1)

The Secretary failed to establish Digco violated 29 C.F.R. § 1926.652(a)(1). Even if the Secretary had made a *prima facie* case that Digco violated the standard, Digco meets the requirements set out in exception (ii) to the cited standard.

The standard at 29 C.F.R. § 1926.652(a)(1)(ii) provides that the employer must provide cave-in protection in excavations except when “[e]xcavations 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.”

As the party seeking the benefit of an exception to a legal requirement, Digco has the burden of proof to show that it qualifies for the exception. *A.E.Y Enterprises*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006) (the Commission remanded the case to the ALJ, stating, “When determining whether AEY meets the exception to § 1926.652(a)(1), the judge shall place on AEY the burden of proving that (1) the excavation was less than 5 feet, and (2) an examination of the ground by a competent person provided no indication of a potential cave-in.”).

Digco has established the first element of the exception, that the excavation was less than 5 feet, for the reasons discussed in the previous section. The most credible evidence indicates the excavation was approximately 3½ feet deep when the helper was working in it.

Digco has also established the second element of the exception, that the competent person examined the ground and found no indication of a potential cave-in. Navarro was the competent person on the site. The CSHO did not ask him if he examined the ground for cave-in hazards. Navarro testified that he did so. Navarro determined the ground in that area was composed of Type C soil. When asked what he did to prepare the site, Navarro stated:

Well, most of all, as we do always when we go to a work site, we check the area where we’re going to work for utilities. And if there is something that we need to do to protect ourselves, we take action. We place cones or whatever we need to do to protect the work area.

(Tr. 85).

Because the excavation met the terms of exception (ii) to 29 C.F.R. § 1926.652(a)(1) at the time the helper was in it, the company was not required to provide cave-in protection. No violation is established. Item 2 is vacated.

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 on the foregoing decision, it is ORDERED that:

1. Item 1 of the Citation, alleging a repeat violation of 29 C.F.R. § 1926.651(c)(2), is vacated and no penalty is assessed; and
2. Item 2 of the Citation, alleging a repeat violation of 29 C.F.R. § 1926.652(a)(1), is vacated and no penalty is assessed.

/s/

Stephen J. Simko, Jr.
Judge

Date: April 22, 2013
Atlanta, Georgia