



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,

v.

HEMPHILL CONSTRUCTION COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 95-1482

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 5, 1996. The decision of the Judge will become a final order of the Commission on October 7, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before September 25, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

A handwritten signature in cursive script that reads "Ray H. Darling, Jr." followed by a flourish.

Ray H. Darling, Jr.
Executive Secretary

Date: September 5, 1996

DOCKET NO. 95-1482

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

HEMPHILL CONSTRUCTION CO., INC.,
Respondent.

OSHRC Docket No. 95-1482

APPEARANCES

Carla J. Gunnin, Esq.
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U. S. Department of Labor
Birmingham, Alabama
For Complainant

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Jackson, Mississippi
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest a citation and proposed penalty issued by the Secretary of Labor (Secretary) pursuant to Section 9(a) of the Act. The citation alleges a repeat violation of an excavation standard that occurred off Highway 80 in Brandon, Mississippi.

The facts are not in dispute that on August 1, 1995, Hemphill Construction Co., Inc., (Hemphill) was engaged in laying a ten-inch water line parallel to the highway. Johnny McDowell, Regional Investigator for the Occupational Safety and Health Administration (OSHA), observed the operation, which involved approximately six employees, a backhoe and a bulldozer.

The standard at 1926.651(J)(2) pertains to protection of employees from loose rock or soil:

(2) 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 or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The citation alleges as follows:

Employees working in and around trench located along Highway 80 near Brandon MS were exposed to injury from falling or rolling spoil that was not properly stored at least 2 feet away from the edge of the trench on the Terripen Skin Creek Sewer and Water project.

McDowell testified and he noted the ongoing process of opening and closing the trench while traveling on Highway 80 to his office. He observed two men exit a trench where a bulldozer and backhoe were being operated. He "became very concerned" when the men re-entered the trench. There was a large spoil pile on the side. By cellular telephone he notified the OSHA area office, since he is not authorized to issue citations (Tr. 6-7, 11).

Before leaving the area, McDowell approached the trench and took some photographs. He testified that the spoil pile depicted in Exhibit C-1 was to the edge of the trench, which was averaged six to eight feet deep (Tr. 9-11). McDowell saw the backhoe operator excavate the trench and place the dirt on the side (Tr. 19).

Compliance Officer James Pinnix received the referral from McDowell and went to the worksite. The trench had been covered, but after conferring with McDowell and viewing his photographs, Pinnix decided Hemphill had violated the standard. The citation was then issued.

Hemphill offered no evidence to directly refute McDowell's testimony that employees worked in the trench while spoil was piled to its edge. Charles Hubbard, a pipe layer at the site, testified that he believed the spoil was required to be two feet from the side of the trench and did not recall any time it was closer than two feet (Tr. 111-113). In addition, the foreman, L. C. Reynolds, testified a safety meeting was held that same day when placement of spoil piles was discussed (Tr. 98). Reynolds was not present when McDowell visited the site.

Hemphill's main contention is that the Secretary failed to prove the violation based upon McDowell's testimony. It is argued that since he is not a compliance officer and not trained in

trenching regulations, his report of the alleged violation lacks credibility. In support of this argument, Hemphill refers to McDowell's testimony at Page 21 of the transcript:

. . . [L]et's just assume the spoil pile is more than two feet from the edge of the trench, is it your position that if there is any loose dirt between the spoil pile and the side of the trench, that the OSHA regs pertaining to spoil pile placement has been violated?

A. I don't think that I can answer that. I don't think I'm qualified to answer that.

In addition Hemphill points out that McDowell did not know how wide the trench was at the bottom or top and its slope (Tr. 16-17). Both Hubbard and Reynolds testified that the trench was about six to ten feet wide at the top and 28 inches at the bottom contrary to McDowell's testimony. They believed it averaged about four and one-half feet deep (Tr. 94-95, 107).

Hemphill maintains that the spoil pile as seen in Exhibit No. 1 is actually back from the edge of the trench, but admits there was "loose dirt" near the edge that fell from the bucket (Tr. 112, 116). To help make a distinction between the loose dirt and a spoil pile, Hemphill refers to Pinnix's testimony. In his opinion, it was a question of whether there was a ". . . large enough piece of soil . . . that could fall off in that trench and injure an employee . . ." Pinnix did not actually know if a hazardous condition existed when McDowell was present and acknowledged McDowell's lack of training in the area (Tr. 50-51). Since the compliance officer authorized issuance of the citation solely on the basis of McDowell's opinions and photographs, Hemphill argues the Secretary failed to prove the violation.

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have know of it with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). There is no question the trenching standard applied to the project. The essence of the standard in question is to provide protection to employees from the hazard of material or equipment falling into excavations. There is no dispute that there was dirt or a spoil pile within two feet of the edge of the trench. The issue presented is whether the material posed a hazard to employees.

The Secretary's evidence shows that McDowell, within three feet of the trench, observed a large pile of excavated dirt on the opposite side. He saw the backhoe place the dirt to the edge of the trench, and he saw employees enter it (Tr. 7, 9, 15, 1, Exh. C-1). Although McDowell is not a trained compliance officer, he was familiar with the standard and its requirements (Tr. 29). His testimony is deemed credible for determining whether the terms of the standard were not met. Although there were questions about the location of employees as viewed in some photographs, McDowell's testimony clearly established employees were in the trench and exposed to the hazard of falling material.

The violation having been established, it must now be determined if it is of a repeat nature as alleged. A violation is a repeated violation under Section 17(a) of the Act, 29 U.S.C. § 666(a), if, when it is committed, there was a Commission final order against the employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary's evidence shows a citation was issued to Hemphill on April 6, 1994, alleging a serious violation of 29 C.F.R. § 1926.651(J)(2) (Exh. C-4). The citation was not contested and under Commission precedent, the uncontested citation became a final order. *See All Phase Elect. & Maint., Inc.*, 15 BNA OSHC 1301, 1303, 1991-93 CCH OSHD ¶ 29,482, p. 39,781 (No. 90-505, 1991).

Although Hemphill does not deny the citation was issued or became a final order, it denies a substantial similarity of conditions. Hemphill argues that the two work sites were 150 to 200 miles apart, and that different types of trenches and different employees were involved (Tr. 45-46, 69-70). The Commission has held that the Secretary may establish a prima facie case of substantial similarity by showing that the final order alleged a failure to comply with the same standard. The burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994). Under *Potlatch, supra*, the conditions set forth by Hemphill bear on the size of the penalty and not on the "repeated" character of the violations. Evidence of similar hazards is most relevant to determining substantial similarity and if a violation is repeated. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). The violations found to exist in this case are not only substantially similar, but are almost identical. In both instances, protection was not provided

employees by placing excavated material at least two feet from the edge of a trench. The violations were substantially similar and, therefore, the present violation is repeated.

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. Hemphill has approximately 90 employees and its history includes the April, 1994, violation of the identical standard involved in this case. Several witnesses testified regarding Hemphill's good faith efforts and its safety training program.

The Commission considers the gravity of the violation the principal factor. *See Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, pp. 20,043-4 (No. 4, 1972). Although the inspecting officer believed the depth of the trench to be seven to eight feet, two witnesses working in and around the trench testified it was about four feet. The evidence shows that the trench varied in depth at different points; and, considering that it was continuously opened and closed, the gravity is deemed moderate. Upon consideration of all the factors, the proposed penalty in the amount of \$4,500 is deemed appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

The citation is affirmed and a penalty in the amount of \$4,500 is hereby assessed.

/S/ PAUL L. BRADY

PAUL L. BRADY
Judge

Date: August 26, 1996