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Secretary of Labor,
Complainant,

v.

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Geo. Gradel Company,
Respondent.

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OSHRC Docket No. **96-1424**

Appearances:

Kenneth Walton, Esquire
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Frank A. Justen, Esquire
Sylvania, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Geo. Gradel Company (Gradel) is an excavation contractor whose office is located in Toledo, Ohio. On August 27, 1996, a backhoe operator working for Gradel punctured a gas utility line while removing a sewer line in Perrysburg, Ohio. Occupational Safety and Health Administration (OSHA) compliance officer Robert Koedam investigated the incident. As a result of Koedam's investigation, the Secretary issued two citations to Gradel on September 17, 1996.

Citation No. 1 alleges a serious violation of § 1926.21(b)(2) for failure to instruct each employee in the recognition and avoidance of unsafe conditions. Item 2 of the citation, alleging a serious violation of § 1926.651(k)(1), was withdrawn by the Secretary at the hearing (Tr. 6).

Citation No. 2 contains one item that alleges a willful violation of § 1926.651(b)(3) for failure to determine the exact location of underground installations by safe and acceptable means when approaching the estimated location.

Gradel contests the two remaining alleged violations, their classifications, and proposed penalties, and asserts the affirmative defense of unpreventable employee misconduct with regard to the willful allegation.

Background

Gradel began work in May 1996 on a project to widen South Boundry, a two-lane road in Perrysburg, Ohio. Gradel's responsibilities on the project included installing a new main sewer

line; widening the road by 8 to 10 feet on each side; installing new curbs, gutters, drainage, and crossovers; and re-stoning and blacktopping the widened areas (Tr. 139-140).

In order to install the new sewer line, Gradel had to remove an existing line. On the morning of August 27, 1996, one of Gradel's crews met with Gradel foreman James Zibbel. The crew consisted of an operating engineer, Ronald Amos, and two laborers, Gerald Whalen and Jami Aravantis (Tr. 16-17, 162-163). Zibbel told Amos and the others "to get the flow line of the ditch started, expose the gas main and dig down to the flow line of the catch basin" (Tr. 27). This involved removing the existing sewer pipe where it crossed an 8-inch gas main. Zibbel planned to expose the gas main by hand and then to remove the existing sewer pipe (Tr. 26-27).

Zibbel told Amos that he would be using the backhoe Amos designated as "the 566." Amos objected that the 566 "was entirely the wrong machine to put in that position for that job . . . It's too big" (Tr. 20). Zibbel told Amos that the 566 backhoe was the only machine available and that he would have to use it (Tr. 29, 180-181).

Part of the sewer line that was to be replaced crossed over the gas line. As the gas line approached the sewer line, it dipped at a 45° angle. On August 27, Gradel had uncovered only one side of the gas line at the 45° angle. The exposed portion consisted of 2 feet of the straight gas line and another 2 feet of the angled line. No one from Gradel knew exactly how or where the gas line was configured underneath the sewer line (Exhs. C-1, C-3, R-2; Tr. 20, 24, 89, 148, 168).

At approximately 8:30 on the morning of August 27, Amos was operating the 566 backhoe to remove the old sewer pipe. The teeth of the backhoe's bucket punctured the gas line (Tr. 52). Gradel alerted the fire department and the gas company, and blocked off the road. A high school located 300 to 400 yards west of the gas line rupture was evacuated (Tr. 29). Gradel fired Amos the next day as a result of the incident (Tr. 19).

Discussion

The Secretary has the burden of proving the 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 standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or

Whalen: I do what the boss tells me. I mean, we get new people on the job, and a lot of times they -- you can't put five new people there. And you put a couple of new ones with me to help them out and stuff like that.

Q.: You provide some training for these newer people?

Whalen: Oh, I try to help them out.

When asked how many times he and his crew had been told about the danger of working near the gas line, Whalen responded, "Quite a bit. We knew it was there . . . [W]e always remembered the gas line next to us" (Tr. 195).

Zibbel, the foreman in charge of the crew, gave similar vague testimony regarding safety training (Tr. 156):

From the day we started on that main line sewer, which was our first project and especially encountering [a gas line] that wasn't marked, they were all told to be careful.

And at that point there was one crew working and I was working along with them on a daily basis. Any time I would see the side of that became exposed in any way, shape or form, I would tell them, you know, "Move things over a little. Let's be careful and watch what we're doing."

And, I think it was pretty much on a daily basis that a lot of these -- the guys that worked around it were made aware of it.

When Zibbel was asked if he ever gave the crew any safety training other than telling them to be careful, he replied, "No" (Tr. 157-158).

No one who testified for Gradel mentioned holding weekly safety meetings. Gradel contends both in its brief and its reply brief that Gradel held weekly safety meetings that Amos attended and signed attendance sheets showing his presence. This assertion is curious both because Gradel adduced no such evidence, and because the only evidence relating to safety meetings is detrimental to Gradel's case.

Amos testified that, after he punctured the gas line on August 27, he and the crew gathered in a nearby parking lot and ate while the various emergency vehicles arrived at the site. Amos stated that Zibbel "showed up with a bunch of safety sheets and said we had to sign them that day" (Tr. 30). Amos testified that he and his crew "were given several of them there at noon, and we were told to read and sign them. So we read them and signed them that day" (Tr. 31).

Amos identified Exh. C-2 as a safety sheet he signed on August 27 (the only safety sheet introduced and admitted into evidence) (Exh. C-1; Tr. 31). Amos noted that the safety sheet, which he signed on August 27, was not dated at that time. The date "7-8-96" appeared on Exh. C-2 after Amos and the crew signed it (Tr. 32). Compliance officer Koedam testified that he warned Gradel not to provide him with false information (Tr. 91). When he asked if Gradel had any training documentation, Gradel did not provide any (Tr. 103).

Amos's testimony is uncontradicted. Neither Zibbel, Whalen, nor Daniel Murry, Gradel's project manager, disputed Amos's assertion that he and the crew were directed to sign several safety sheets on August 27, which were then back-dated. Neither Zibbel, Whalen, or Murry asserted that Gradel held the weekly safety meetings claimed by Gradel in its post-hearing briefs. Amos's testimony regarding Gradel's lack of safety training and its attempted *post hoc* creation of a fraudulent record of safety meetings is accepted as unrefuted.

Instruction in the recognition and avoidance of unsafe conditions requires more than weak admonitions to "be careful" and reminders that a potential hazard is nearby. *See Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997). Gradel failed to provide its employees with safety training related specifically to its work in proximity to the gas line. Reminders to "be careful" are inadequate to meet the requirements of § 1926.21(b)(2). The Secretary has established a violation of § 1926.21(b)(2).

The hazard created by Gradel's violation of § 1926.21(b)(2) was that of a gas explosion. Such an explosion could result in death or serious injury. The violation is serious.

Citation No. 2

Item 1: Alleged Willful Violation of § 1926.651(b)(3)

The Secretary alleges that Gradel committed a willful violation of § 1926.651(b)(3), which provides:

When excavation operations approach the estimated location of underground installations, the exact location of the installations shall be determined by safe and acceptable means.

On the morning of August 27, 1996, Zibbel met with a crew consisting of Amos, Whalen, and Aravantis. Zibbel told the crew their assignment that day was to remove the old sewer line and install a new one at a location where the sewer line crossed over the gas line (Tr. 19). Previously, Zibbel had contacted the Underground Protective Service (UPS) of Ohio, which

notified the utilities in the area that excavation work was going to be done. Each utility sent out a crew to mark where the various utility lines were located. Most of the utilities spray paint the location of the utility line, Zibbel testified, “or if the gas company is concerned, run flags along it and tell you where it’s at” (Tr. 145). In the area where Gradel’s crew was working on August 27, the gas company had marked the 8-inch high-pressure gas line with flags for a distance of about 1,500 feet (Tr. 146).

The gas company had previously exposed part of the gas line at that area to show where the gas line stopped (Tr. 146). Gradel’s crew spent approximately an hour and a half exposing the top 45° bend of the gas line by hand (Tr. 163-165). After exposing the east side of the bend in the gas line, Zibbel realized that he needed to order more sewer pipe (Tr. 147). Zibbel halted the work and either Whalen or Aravantis stuck a shovel in the ground next to the gas line (Tr. 40, 149). Zibbel explained that, “It’s normal practice that once you located a utility, you put a shovel in next to it if any additional work is going to take place any time during that day” (Tr. 148).

Zibbel sent Whalen to pick up the additional sewer pipe. According to Zibbel and Whalen, Zibbel told the crew to “just hold tight” until Whalen got back (Tr. 151, 164, 166, 174, 197-198). Both Zibbel and Whalen recalled specifically that Zibbel used the expression “hold tight.” Zibbel testified that he intended “hold tight” to mean that no more work was to be done around the gas line until Whalen returned (Tr. 151-152). Whalen testified that he understood “hold tight” to mean the crew was to do no more digging “[u]ntil I got back or Jim got back, and especially no digging around the gas line” (Tr. 194).

Amos did not say whether Zibbel told the crew to “hold tight,” but he was adamant that Zibbel did not tell him to wait for Whalen’s return (Tr. 40, 43). Zibbel conceded that he did not specifically order Amos not to dig, but he assumed Amos would know that Zibbel wanted him to wait (Tr. 167):

I really can’t say that he violated any instructions, but I didn’t specifically say, “Do not touch those controls until I get back.”
But, I don’t believe I’ve ever worked around any other operators that would have taken it on themselves to work that close to a high-pressure gas line without a qualified person there to work with them.

Zibbel testified that he planned to do some more hand digging around the gas line when Whalen got back (Tr. 152). After Whalen’s return, Zibbel intended to expose more of the line

(Tr. 163):

[W]hen Jerry got back, we would have exposed the west side the same way as we did the east, and we would have removed the old sewer and put the new sewer in place of that, set a manhole, and then we had two or three other pipe to run out and dump it into the creek.

The Secretary has failed to establish that Gradel committed a violation of § 1926.651(b)(3). The standard requires the employer to determine the exact location of the installations when excavation operations approach their estimated locations. Gradel took the following steps to determine the exact location of the gas line: (1) Gradel called UPS, which notified the gas company, which came out and placed flags along the site of the gas line; (2) Gradel's crew uncovered by hand a 4-foot section of the gas line where it dipped in order to determine its configuration in relation to the sewer line; and (3) a member of Gradel's crew stuck a shovel in the ground next to the gas line when Gradel temporarily stopped working in that area.

Gradel was still in the process of determining the exact location of the gas line when Amos punctured the line. Zibbel testified that he intended to do more hand-digging and expose the west side of the line after Whalen returned. Amos's action in digging with the backhoe was done in Zibbel's absence and without his knowledge. Both Zibbel and Whalen thought that no digging with the backhoe was to be done until Whalen's return. Zibbel reasonably assumed that his instruction to "hold tight" would be understood and followed by the crew. Neither Zibbel nor any other supervisory person at Gradel knew or, with the exercise of reasonable diligence, could have known, that Amos would either not understand or choose to ignore Zibbel's instruction. This item is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Gradel employed approximately 100 workers at the time of the inspection (Tr. 101). No evidence relating to good faith was adduced. Gradel has a history of prior violations (Tr. 97).

The gravity of Gradel's violation of § 1926.21(b)(2) is high. Failure to instruct employees in the recognition and avoidance of hazards associated with underground installations of gas line could result in an explosion. A penalty of \$3,000.00 is assessed.

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 upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of Citation No. 1, § 1926.21(b)(2), is AFFIRMED and a penalty of \$3,000.00 is assessed;
2. Item 2 of Citation No. 1, § 1926.651(k)(1), is withdrawn by the Secretary and no penalty is assessed; and
3. Item 1 of Citation No. 2, § 1926.651(b)(3), is VACATED.

Date:

KEN S. WELSCH
Judge