

)
Secretary of Labor,
Complainant,

v.

Anderson Columbia Co., Inc.,
Respondent.

*
*
*
*
*
*
*

OSHRC Docket No. 96-1477

)

Appearances:

Carla J. Gunnin, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Edward H. Trent, Esquire
Coffman, Coleman, Andrews & Grogan
Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Anderson Columbia Co., Inc. (Anderson), contests two citations issued to it by the Secretary on September 19, 1996. The citations resulted from a complaint inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Patrick Adams on April 11, 1996.

Citation No. 1 alleges serious violations of § 1926.651(j)(2) for failure to maintain a spoil pile 2 feet or more from the edge of an excavation (item 1); § 1926.651(k)(1) for failure to have a competent person make daily inspections of an excavation, adjacent areas, and protective systems (item 2); and § 1926.652(a)(1) for failure to use a protective system in an excavation to prevent a cave-in (item 3). Citation No. 2 contains one item alleging an "other" violation of § 1926.651(c)(2) for failure to provide a safe means of egress from an excavation.

Anderson was the general contractor on the site. The actual excavation work was being performed by a subcontractor, Phoenix Construction Services (Phoenix). Anderson's defense is that Phoenix, and not Anderson, was responsible for any safety violations that occurred. Anderson stipulated at the hearing that the conditions cited by the Secretary existed (except for the competent person charge), and that if violations were found, the Secretary's proposed penalties were appropriate (Tr. 4-5). Anderson disputes only that it had the requisite knowledge

of the alleged violative conditions.

Background

Anderson was the general contractor on a project to install a large concrete storm drainage pipe along Highway 29 in Pensacola, Florida (Tr. 72). Anderson contracted with Phoenix in August 1995 to install the pipe for a distance of approximately one-and-a-half miles (Tr. 84). Phoenix began work on the project in early 1996 (Tr. 85).

In April 1996, Sidney May, safety director for the Northwest Chapter of Associated General Contractors of America, drove past Phoenix's worksite along Highway 29 several times over the course of 3 or 4 days. He observed what he believed to be violations of OSHA safety standards. On April 8, 1996, May notified OSHA of his observations (Tr. 9-11).

OSHA compliance officer Adams investigated May's complaint on April 11. At that time, the excavation was located alongside Highway 29, directly in front of a car dealership (Tr. 18, 21). The trench was 25 to 30 feet to the west of Highway 29 (Tr. 14, 77). Two trailers, one belonging to Anderson and one belonging to Phoenix, were located side by side, 150 to 200 yards west of the excavation, behind the car dealership (Exh. J-1; Tr. 23). The excavation was not visible from the trailers (Tr. 73, 91).

Adams held opening conferences with Anderson and Phoenix, and inspected the site. The Secretary subsequently issued the citations which are the subject of this proceeding.

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.651(j)(2)

The Secretary alleges that Anderson committed a serious violation of § 1926.651(j)(2), which 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 or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Anderson stipulated that the cited standard applies to the conditions at the worksite, that the conditions existed as alleged in the citation, and that employees had access to the cited conditions (Tr. 4).

Item 1 of the citation, to which Anderson stipulates, provides:

At the Highway 29 at Marcus Point job site, the employer had not kept the spoil bank back at least two feet from the excavation edge, and had stored two sections of concrete storm drain pipe which had a total weight of approximately 12 tons, less than 6 feet from the excavation edge. The diameter of the pipe was 78 inches. There was also a compressor that was approximately eight inches from the edge of the excavation. The protection should have been to keep the spoil bank back at least two feet and not store the concrete pipe sections or equipment close to the excavation edge.

Anderson's stipulation establishes that the condition of the excavation violated the terms of § 1926.651(j)(2). The Secretary also introduced photographs taken by Adams that corroborated the details relating to the spoil pile set out in the citation (Exh. C-5).

Anderson contends that the violation is the responsibility of Phoenix, who performed the actual work on the excavation. Anderson contends that it did not know that Phoenix was violating the excavation standards while installing the drainage pipe. It argues that it did not have actual or constructive knowledge of the alleged violations. *See Atlantic Battery*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

As noted, the excavation was not visible from Anderson's trailer at the site. The nearest Anderson worksite was a half mile away and not visible from the excavation. Anderson employees did not generally travel along the excavation site due to traffic congestion (Tr. 79). Melvin Boutwell, construction superintendent and competent person for Anderson, testified that he inspected Phoenix's excavation once or twice a day, and never noted any safety violations (Tr. 91-92). Boutwell became ill with pneumonia on Friday, April 5. He did not report to work the following week (when the complaint and OSHA inspection were made), and returned to work for half a day on Tuesday, April 16 (Tr. 94).

Kenneth Pitts, a construction manager for Anderson, visited Phoenix's excavation site at least twice during the week of the OSHA inspection, on Monday and Tuesday, and did not notice any safety violations. Pitts specifically noted that the spoil pile was in the proper location (Tr. 75-76, 86). Pitts had not been at the site the day of Adams's inspection.

When compliance officer Adams arrived at the excavation site, only Phoenix employees were present. Adams met with Matt Marshall, Phoenix's superintendent. After speaking with Marshall, Adams determined that neither he nor any other Phoenix employee was a competent

person (Tr. 22, 29-30).

Anderson asserts that the facts establish that it could not have known that on April 11, the spoil pile for Phoenix's excavation would be too close to the edge of the excavation, in violation of § 1926.651(j)(2). Anderson asserts a multi-employer worksite defense. A general contractor such as Anderson, who did not have employees exposed and did not create the violative condition, is responsible for violations of other employers where the general contractor could reasonably be expected to prevent or detect and abate the violation. There is a presumption that the general contractor has sufficient control over its subcontractors to require them to comply with the safety standards and to abate violations. *Gil Haugan d/b/a Haugan Construction Company*, 7 BNA OSHC 2004, 2006, (Nos. 76-1512 & 76-1513, 1979). This presumption is borne out in the present case. When Pitts learned from compliance officer Adams that safety violations were found, Pitts had the violations corrected immediately. Pitts testified regarding his control over Phoenix (Tr. 79):

I had an immediate conversation with [Phoenix superintendent] Mr. Marshall. I told him that they had to operate in strict compliance with OSHA regulations, and that whatever Mr. Adams requested them to do, that if they needed -- if they wanted to keep working, they needed to do it. And we made arrangements to have one of our competent persons attend their site while they were working.

Anderson argues that, because Boutwell had inspected Phoenix's site every day prior to his illness and had never seen any safety violations, and because Pitts had inspected the site the Monday and Tuesday before the OSHA inspection and not seen any problems, Anderson had used all reasonable means to detect and abate the violations. This argument ignores the testimony of Sidney May, a disinterested third party, who stated that he noted that the trench was unsafe for 3 or 4 days in a row the week of April 8. May stated, "The trench had the spoil pile almost immediately on the edge, for one thing" (Tr. 10). Anderson would have the court believe that the day that compliance officer Adams arrived to inspect the excavation was the one day that the excavation was not in full compliance with OSHA standards and was the one day that Phoenix decided to ignore so many excavation safety requirements. Given May's testimony, such belief would be ill-founded.

Anderson had a duty, in its supervisory capacity, to reasonably detect and prevent safety violations. Since it is found that the spoil pile was too close to the edge on more than the one

occasion observed by OSHA, the adequacy of Anderson's alleged attempts to discover safety violations on its worksite is undermined. With the exercise of reasonable diligence, Anderson could have detected the spoil pile at the edge of the excavation. The general contractor is responsible for violations it would reasonably have been expected to prevent or abate by reason of its supervisory capacity. *See IBP, Inc.*, 17 BNA OSHC 2073 (No. 93-3059, 1997). The Secretary has established that Anderson was responsible for a serious violation of § 1926.651(j)(2).

Item 2: Alleged Serious Violation of § 1926.651(k)(1)

The Secretary alleges a serious violation of § 1926.651(k)(1), which provides:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The citation alleges:

At the Highway 29 at Marcus Point excavation job site; the employer had not provided a trained and knowledgeable competent person to inspect the excavation and protective system for evidence of possible protective system failure or trench wall collapse every morning before employees were exposed to trench wall collapse or system failure because there had been no daily inspections.

Although Anderson did not stipulate to the accuracy of this allegation, Adams's testimony is unrefuted that Phoenix had no competent person on the excavation site (Tr. 29-31, 45). Phoenix provided competent person training for 3 of its employees after Adams began his inspection. In the interim, Anderson transferred one of its employees, a Mr. Gilmore, to act as the competent person on site for Phoenix. Adams stated that he had full confidence in Gilmore's abilities as a competent person (Tr. 30-31, 52-53, 58-60).

Boutwell and Pitts both testified that they asked Phoenix management if Phoenix had competent persons available to monitor Phoenix's work, before Phoenix began the project. Phoenix assured them that it did (Tr. 70, 85, 90, 93). Anderson offered to provide competent

person training to Phoenix employees when it offered the training to its own employees in October or November 1995, which Phoenix declined (Tr. 70). Phoenix assured Anderson that it had its own competent persons (Tr. 77).

Although Anderson did not seek to verify that Phoenix did, in fact, have competent persons on site (Tr. 96), Anderson was entitled to rely upon Phoenix's word. In fact, since Anderson offered to provide the training, in Anderson's mind, Phoenix could have been a lesser motive to misrepresent the truth. In exercising reasonable diligence, a general contractor may rely in part upon the assurances of subcontractors so long as it has no reason to believe that the work is being performed unsafely. *See Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133 (No. 82-178, 1994).

Anderson reasonably relied upon Phoenix's assurances that it had qualified competent persons on the site. Item 2 is vacated.

Item 3: Alleged Serious Violation of § 1926.652(a)(1)

The Secretary alleges that Anderson committed a serious violation of § 1926.652(a)(1), which 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:

- (i) Excavations are made entirely in stable rock; or
- (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.

Anderson stipulates to the accuracy of the citation, which states:

At the highway 29 at Marcus Point job site, the employer had not used a protective system. The excavation had been sloped to approximately eighty degrees from the horizontal, was eighteen feet deep, twenty-two feet wide at the bottom, and was approximately forty yards long. The soil classification was class "C." The two tamper operators and the two pipe layers were exposed to the hazard of excavation wall collapse.

Boutwell and Pitts both testified that they had previously observed Phoenix using a trench box in the excavation (Tr. 76, 96). Neither could offer explanations as to why Phoenix decided not to use a trench box on the day of Adams's inspection (Tr. 86, 97). May testified that he saw no trench box in use on the days he drove by the excavation (Tr. 10). While he concedes that he

could not see the bottom of the trench, May noted that he could see only the top of any employee's hard hat from the highway, indicating that there was no protective system in place (Tr. 12). It is undisputed that Phoenix was not using a trench box on the day of Adams's inspection (Exh. C-5; Tr. 21).

Constructive knowledge of the violation is imputed to Anderson for the same reasons articulated in the discussion of item 1. It is not accepted that Phoenix complied with OSHA's safety standards for excavations until the very day of an OSHA inspection. Furthermore, May provided convincing testimony that the violations were ongoing and visible from the highway. Anderson was in serious violation of § 1926.652(a)(1).

Citation No. 2

Item 1: Alleged "Other" Violation of § 1926.651(c)(2)

The Secretary alleges an "other" violation of § 1926.651(c)(2), which provides:

Means of egress from trench excavations. 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.

Anderson stipulated to the accuracy of the citation:

At the Highway 29 at Marcus Point job site, in the trench that was more than four feet deep, the employer had not provided ladders or other safe means for employees to exit the trench that was approximately 120 feet long without having to travel laterally more than 25 feet.

For the reasons given in the discussions of items 1 and 3 of Citation No. 1, Anderson is found responsible for this violation. With the exercise of reasonable diligence, Anderson could have known of Phoenix's failure to provide its employees with a safe means of egress. Item 1 is affirmed.

Penalties

Anderson stipulated that the penalties proposed by the Secretary were appropriate, should violations be found. Accordingly, the Secretary's proposed penalties will be assessed, as set out in the order.

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:

1. Item 1 of Citation No. 1 (§1926.651(j)(2)) is affirmed and a penalty of \$4,500.00 is assessed;
2. Item 2 of Citation No. 1 (§ 1926.651(k)(1)) is vacated and no penalty is assessed;
3. Item 3 of Citation No. 1 (§ 1926.652(a)(1)) is affirmed and a penalty of \$4,500.00 is assessed; and
4. Item 1 of Citation No. 2 (§ 1926.651(c)(2)) is affirmed and no penalty is assessed.

Date: March 27, 1998

NANCY J. SPIES
Judge