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Secretary of Labor,
Complainant,

v.

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Yates Grading & Heavy Equipment, Inc.,
Respondent.

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OSHRC Docket No. **97-0387**

Appearances:

Dorian West, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. David Yates
Yates Grading & Heavy Equipment
Locust Grove, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Yates Grading and Heavy Equipment, Inc. (Yates) contests the March 7, 1997, citation issued as a result of the Occupational Safety and Health Administration's (OSHA's) inspection of February 19, 1997. The citation alleges that Yates violated § 1926.20(b)(1) by failing to have an adequate safety program; § 1926.21(b)(2) by failing to properly instruct employees to recognize and avoid hazards associated with excavations; § 1926.652(a)(1) by failing to have a protective system in the excavation; and § 1926.651(j)(2) by failing to have the spoil pile properly pulled back from the edge of the excavation. Yates contends that its safety training and programs complied with the standards, that the trench was not sufficiently deep to require a protective system, and that it was still in the process of pulling back the spoil pile when OSHA came to its worksite. For the reasons stated, Yates's arguments are rejected.

Yates is a small family-operated piping and grading construction subcontractor operating in middle Georgia. Yates was represented by its president, Willie Yates. Its vice-president, David Yates, also testified at the hearing. Unless otherwise specified, reference to "Yates" in this decision refers to the company, not to either Willie or David Yates.

Facts

At the time of the inspection, Yates was in the process of installing sewer pipes for a subdivision in Fayetteville, Georgia. It had laid between 100 to 150 feet of pipe as it reached the Old North Road. With a house and fence on one side and woods on the other, Yates had a narrow area within which to dig the excavation and lay the pipe. Since the roadway was needed for access, Yates was digging the excavation and backfilling it as soon as the pipe could be laid (Tr. 122). As Yates's employees excavated across the road, one of the neighbors complained to OSHA that employees were working in a 9-foot trench with straight sidewalls. Some hours later, OSHA compliance officer Patricia Morris arrived at the worksite, and the neighbor met her saying that the trench he had complained about had already been backfilled (Tr. 64). Morris conducted the investigation which resulted in the citation.

Discussion

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 constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Items 1a and 1b: Alleged Serious Violations of §§ 1926.20(b)(1) and .21(b)(2)

The Secretary alleges that Yates did not have an adequate safety program which addressed anticipated hazards in violation of § 1926.20(b)(1). The standard provides:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

The Secretary also alleges that Yates did not adequately train employees to recognize and avoid hazards in violation of § 1926.21(b)(2). The standard requires:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Neither §§ 1926.20(b)(1) (safety program requirements) or .21(b)(2) (the safety training standard) specifies exactly what programs or instructions employees must receive. The

Commission and the courts have held that an employer must include in its programs and must train its employees to recognize and avoid the hazards of which a reasonably prudent employer would have been aware. Or, stated another way, it must instruct its employees in what they may reasonably be expected to encounter in their work. *E.g., R & R Builders, Inc.*, 14 BNA OSHC 1844 (No. 88-282, 1991); *Pressure Concrete Const. Co.*, 15 BNA OSHC 2011 (No. 90-2668, 1992).

As part of Yates's regular operations, its employees excavate and lay pipe. Long-term employee Curtis Brooks described his work as a "ditch man." He entered and walked along the newly-dug excavations to even out the gravel and make sure the pipe is laid on grade. He bent over to grease the bell of the pipe and later re-entered the excavation so that the next section of pipe could be laid into the bell (Tr. 50-56, 200). During these times, the "ditch man" was subjected to the possibility of cave-ins. This fact was not lost on Yates. Yates instructed the "bank man" (the employee remaining at ground level who overlooks the excavation from the bank) to assist the ditch man with gravel, pipe, or whatever was needed and "to help your ditch man watch his banks" and "look for cave ins." The bank man was to warn the ditch man to get out of the excavation or "tell the backhoe operator to pull that little section of dirt that looked like it was about to cave in" (Tr. 130, 134, 139, 150). Thus, Yates clearly recognized that its employees could encounter hazards as they performed their work. For the reasons explained below, Yates safety training and instructions were inadequate to address those hazards.

Employee witnesses demonstrated little knowledge of safety provisions relating to excavations. In large part, this must be attributed to Yates's decision that employees should heavily rely on the knowledge of the competent person. Employees did not need specific safety knowledge of their own (Tr. 126-27, 132, 149, 165-66). When asked whether he considered the trench to be safe, Curtis Brooks replied that (Tr. 197) :

Well, the only answer I can give you, I'm used to being in ditches like that. And it may have not been safe enough for OSHA, but, you know, I know how to just go in there and do it and come out. So that's the only way I can answer that.

Yates is correct that not all employees must be trained on proper excavation procedures to the extent that a "competent person" would. (For this reason, the Secretary's test-like questions to employee witnesses were not helpful on the issue.) However, employees must be given the

rudiments of sloping, shoring, storing of the spoil pile, and other safety requirements, regardless of whether a competent person is at the jobsite. Otherwise, employees do not have the safety information they need to protect themselves if the competent person is unavailable or if the competent person decides to ignore safety requirements.

Specifically, based upon this judge's evaluation of the witnesses, Yates's "safety meetings," allegedly conducted when a new job began and in the truck as employees traveled to the worksite each day, were job related discussions rather than safety instructions. The fact that some general safety advice, such as "be careful," "do not be in a hurry," or "[w]atch out for rocks, and cracks in ditches," was mentioned does not change the character of the discussions (Tr. 32, 60, 133-34, 152).

Nor would Yates's written "safety program" constitute compliance with either standard. Other than addressing the use of ladders in excavations, no other part of Yates's 14-point, one page "safety program" specifically related to trenching (Exh. C-1). David Yates's competent person training manual, kept from years earlier, was periodically loaned to certain employees (Exh. R-1). However, the manual was not given to most employees and was not provided at the beginning of the employees' employment (Tr. 126, 160-61). There is a significant difference between handing out a large booklet for employees to study at home, if they wished, and providing training on the contents of the manual.

Yates's safety program and employee training did not sufficiently instruct employees to recognize and avoid hazards they could anticipate while excavating. *See Gary Concrete*, 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991) (awareness of skill needed, but little specific training on methods). A violation of these standards is serious if the specific deficiency (*i.e.* trench cave-ins) is serious. In this case, the Secretary has established that death or serious bodily injury is the probable result of a cave-in. Violations of the safety program and the safety training standards (§§ 1926.20(b)(1) and 21(b)(2)) are affirmed as serious.

Item 2: Alleged Serious Violation of § 1926.652(a)(1)

The Secretary alleges that Yates violated § 1926.652(a)(1) by failing to slope the excavation. The standard 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.

The excavation was not sloped, shored, protected by a trench box, or protected by use of some other system as required for either Type B or Type C soil. The excavation was dug in Type B or Type C soil (Exh. C-13; Tr. 14, 73-75, 167, 184). As stated, “ditch man” Curtis Brooks was exposed to the hazard of cave-ins while he was working inside the excavation. The knowledge of David Yates, a supervisor who was on site directing the operation, is imputed to the company. *Hamilton Fixture*, 16 BNA OSHC 1073, 1086-87 (No. 88-1720, 1993). Thus, if the excavation was 5 feet or greater in depth, the Secretary has proven the violation.

Measurements of the Excavation

Morris measured and photographed the excavation. Yates disputes two of her measurements: the depth, and the bottom width of the excavation. To measure the depth of the excavation, Morris leaned her engineering rod against the side wall. The rod showed between 5½ to 6 feet. In an attempt to be conservative and to allow for the fact that the side walls leaned outward somewhat, she estimated the depth to be 5½ feet. Morris did not measure the bottom width of the excavation. She believed that a 48-inch bucket was used to dig the excavation, a fact that Yates disputes. In any event, Morris testified that the bottom width of the excavation appeared to be approximately 4 feet (Exh. C-6; Tr. 65, 72).

Yates contends that the backhoe bucket used to dig the excavation was 24 inches. It, thus, contends that the bottom width of the excavation was no greater than 24 inches. Using this dimension and the Secretary’s other measurements, Yates argues that an algebraic formula proves that the true depth of the excavation was not greater than 4 feet, 5 inches (Exh. R-2).

There are several flaws in Yates’s argument. It cannot be assumed that the bottom width is 24 inches simply because Yates refers to the bucket size as 24 inches.¹ Even backhoe operator David Yates was unsure of the actual bucket size, believing that the “24-inch” bucket may have

¹ The undersigned considered Yates’s estimate of the number of pipes arguably fitting within the excavation, as shown by photograph Exhibit C-13. The photograph does not appear to show the complete width of the excavation. In fact, photograph Exhibit C-7 shows a wider area than appears on Exhibit C-13. A comparison of the backhoe tractor tread and the bucket in photograph Exhibit C-3 would, likewise, tend to support a larger bucket size. In any event, these discrepancies illustrate a well-accepted fact that the angle from which photographs are taken can result in optical distortions. Photographs cannot be used to measure to scale.

been 28-inches wide (169). It must be assumed that several inches of soil would be disturbed on both sides as the bucket dug. Yates earlier responded to the Secretary's interrogatories that the bottom width measured 36 inches. This late change in the alleged dimensions is afforded less credibility. Further flaws exist in Yates's theory. The side walls of the excavation did not make an exact angle. The angle is unknown. Nor can Yates subtract the 8-inch pipe laying on the bottom of the excavation from the depth measurement. Brooks was exposed at an area below the pipe (and footprints) seen on the photographs (Exh. C-13; Tr. 47, 199). Finally, the Secretary's depth measurement is supported by the testimony of employee Brooks. Brooks, who is 5 ft 6 inches tall, recalled that at the point where he was working the bank was at or above his head. He estimated that the trench was approximately 6-feet deep (Tr. 198-199). Brooks was a credible witness.

Since the excavation was at least 5½ feet deep, Yates violated the standard. The violation of § 1926.652(a)(1) is affirmed as serious.

Item 3: Alleged Serious Violation of § 1926.651(j)(2)

The Secretary alleges that Yates's spoil pile was placed too close to the edge of the excavation in violation of § 1926.651(j)(2). The standard requires:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations . . . 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

The exhibits and testimony amply establish that a large spoil pile of unstable dirt was placed immediately on the edge of the excavation (Exh. C-9; Tr. 16). Yates argues that backhoe operator David Yates had not had an opportunity to pull the spoil pile further back. Since Curtis Brooks was sent into the excavation while the excavated material was stored at the edge, the argument has no significance. The spoil pile must be pulled away from the edge *before* employees enter the excavation. It is questionable whether Yates customarily complied with 2-foot requirement. Curtis Brooks estimated that the spoil pile may have been moved back as far as 1 foot during earlier periods of excavation at the worksite (Tr. 195). Yates violated the terms of the standard. As discussed, Yates had knowledge of these conditions. Employees may be exposed to broken bones from falling rocks or death from cave-ins made more likely because of

the extra weight the spoil pile places on the excavation walls. The violation of § 1926.651(j)(2) is affirmed as serious.

Penalty

The Commission must give “due consideration” to the size of the employer’s business, the gravity of the violation, the employer’s good faith, and history of past violations in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-691, 1992).

Gravity includes considerations of the severity of an accident and the probability that it might occur. The safety program, training, and spoil pile violations presented real, but less immediate, dangers than the failure to use a protective system for the excavation. Thus, the gravity of the latter violation is the highest of the four. One employee was exposed for relatively short periods of time to hazards of a potential cave-in or being hit by a falling spoil pile. All employees were affected by failure to have a safety program and safety training. Yates is a small company with less than 10 employees (Tr. 82-84, 101). Unlike for the Secretary’s recommended penalty, a “small size” credit will be allowed for each of the violations. Also, varying amounts of credit are permitted for good faith, depending upon the nature of the violation, *i.e.*, very little credit can be afforded for the safety program or training violations. For these reasons, penalties for grouped items 1a and 1b are assessed at \$500.00; for item 2, \$3,250.00; and for item 3, \$300.00.

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

1. Items 1a & 1b (§§ 1926.20(b)(1) and .21(b)(2)) are affirmed with a penalty in the amount of \$500.00 assessed;

2. Item 2 (§ 1926.652(a)(1)) is affirmed with a penalty in the amount of \$3,250.00 assessed; and
3. Item 3 (§ 1926.651(j)(2)) is affirmed with a penalty in the amount of \$300.00 assessed.

NANCY J. SPIES
Judge

Date: May 4, 1998