

SECRETARY OF LABOR,

Complainant,

v.

A & K CONSTRUCTION CO., INC.,

Respondent.

OSHRC DOCKET NO. 97-1091

APPEARANCES:

For the Complainant:

Ruben R. Chapa, Esq., U.S. Department of Labor, Office of the Solicitor

For the Respondent:

Syed Ayaz Ali, A&K Construction Co., Inc., Chicago, Illinois

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, A & K Construction Co., Inc., (A & K), at all times relevant to this action maintained a place of business at Hyacinth and Richard Court, Island Lake, Illinois, where it was engaged in water system construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 27, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of A & K's Island Lake work site. As a result of that inspection, A & K was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest A & K brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 15, 1997, a hearing was held in Chicago, Illinois. The parties made their closing arguments on the record, and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1, as amended, alleges:

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

At the jobsite at Hyacinth and Richard Court, Island Lake, IL, employees working in a trench approximately 40 feet long, 7-1/2 feet deep, and 4 feet wide were not provided protection from cave-ins in the form of sloping, shoring or a trench box.

The cited 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:

- (i) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Facts

David Morgan, the OSHA Compliance Officer (CO) conducting the May 27, 1997 inspection, observed an A & K employee, Arturo Cobarrubis, working in an open trench (Tr. 27-28, 82; Exh. C-2, C-3, C-4). The trench was approximately 40 feet long, including a partially backfilled section (Tr. 21, 115). The CO measured the trench near the backfill, and found that it was approximately 7 ½' deep and 48 inches wide at that location (Tr. 21, 87-88; Exh. C-2). The trench was just over the width of the 33" bucket (approximately 3 feet wide) at the bottom, and 5 ½' wide at the top at the spot where Cobarrubis was working (Tr. 76, 165; Exh. C-1 through C-4). Morgan testified at the hearing that the soil in the trench was Type C, a previously disturbed, sandy gravel (Tr. 23-24)¹. Morgan stated that some sloughing of soil into the trench was observable at the time of the inspection (Tr. 24). The trench was not shored, and no protective systems were on site (Tr. 26).

A & K disputes Morgan's testimony. Gulzar Singh testified that, in general, A & K's trenches are measured three feet on either side of the centerline, *i.e.*, where the water line is to be located (Tr. 98). All A & K's trenches are at least six feet wide (Tr. 98-99). Singh stated that the asphalt restoration in the area where the OSHA inspection took place was approximately 8 feet wide, with an additional 2 to 4 feet of

¹ Singh testified that he was told by his foreman that the soil at the Island Lake site fell between Type B and Type C, but did not know what that determination was based on; he did not take the penetrometer readings at that site, and did not know what penetrometer readings his foreman had obtained (Tr. 100, 105). The regulations do not provide for intermediate classification of soils. Where readings do not indicate an unconfined compressive strength sufficient to meet the requirements for a Type B soil, the soil must be classified as Type C.

lawn restoration, indicating that the trench in that spot was approximately 10 to 12 feet wide (Tr. 99). Syed Ayaz Ali testified that A & K's trenches were all over 6 feet wide (Tr. 132).

Singh admitted that he did not take any measurements of the cited trench (Tr. 105, 121). Ali was not at the work site on the day of the OSHA inspection, and based his testimony solely on his interpretation of the CO's photographs (Tr. 163-65). Morgan agreed that the trench was measured out at 6 feet, from saw cut to saw cut, but pointed out that between 6" and 1' of soil remained between the saw cut and trench wall (Tr. 71, 76-77; Exh. C-1 through C-4).

Morgan's measurements were supported by the project specifications, which call for a minimum of six feet of cover over the water system improvements.² The water pipe itself is eight inches in diameter, and approximately three additional inches of fill were placed under the pipe. (Tr. 39-41; Exh. C-5).

Mr. Cobarrubis was observed in the trench for approximately five minutes; during which time he was exposed to a potential cave-in hazard (Tr. 37). A & K's operation, as described by Mr. Singh, required Cobarrubis, as the bottom man, to repeatedly enter the trench to line up each section of pipe as the water line was installed the length of the project (Tr. 110-11).

Morgan testified that in the event of a cave-in, Cobarrubis could have sustained multiple fractures, aphasia or death (Tr. 46; Exh. C-6).

Discussion

Appendix A of the cited standard requires that Type C soil be shored or sloped to a ratio of 1 ½ to 1 (34°). Table B-1.3 illustrates the required cut-back. A six foot deep excavation measuring three feet at the bottom, cut in Type C soil, would have to measure 21' across the top to comply with the cited regulation.

The CO's estimation of the trench measurement at the spot where A & K's employee was exposed is supported by the photographic evidence and by the project specifications. It is uncontroverted by the testimony by A & K's witnesses, none of whom had actual knowledge of the trench dimensions.

The cited trench failed to comply with the sloping requirements of Appendix A, no shoring was provided. The Secretary has established the violation.

The violation is properly characterized as serious, as an accident could result in serious injury or death. However, A & K is a small employer with only two to five employees (Tr. 166). Mr. Ali testified

² A & K suggested that it could request a variance from the project specifications, but was unable to introduce any evidence that it had actually done so (Tr. 107, 136-63).

that in its 20 years of operation, A & K has never had an accident (Tr. 133). A & K immediately abated the hazard by bringing a trench box on site (Tr. 100). I find that a penalty of \$1,500.00 is appropriate.

ORDER

1. Citation 1, item 1, alleging violation of §1926.652(a)(1) is AFFIRMED, and a penalty of \$1,500.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: