

Secretary of Labor,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 97-1299
Malouf Construction Corporation,	:	(EZ)
Respondent.	:	

Appearances:

Kathleen G. Henderson, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Mr. George Malouf
Malouf Construction Corporation
Madison, Mississippi
For Respondent *Pro Se*

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Malouf Construction Corporation (MCC) is constructing new offices for Worldcom in Clinton, Mississippi. MCC is the general contractor, and the project is scheduled for completion in 1999. As a result of a general scheduled inspection on July 8, 1997, by the Occupational Safety and Health Administration (OSHA), MCC received a serious citation. The citation alleges that prior to the start of work, and as needed throughout the shift, a competent person did not inspect an excavation for underground plumbing work as required by §1926.651(k)(1). The excavation was dug by the plumbing contractor, and only its employees were working inside the excavation. OSHA proposes a penalty of \$1,125. MCC timely contested the citation.

The case is designated E-Z trial proceedings under Review Commission Rules 200-211, 29 C.F.R. § 2200.200-211. MCC is represented by its owner *pro se*. MCC admits that it is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act (Act). The hearing was held in Jackson, Mississippi, on October 30, 1997 (Tr. 4, 11).

MCC argues the multi-employer worksite defense and asserts that it was unreasonable to expect MCC to prevent or detect the lack of inspection by a competent person. The court agrees and vacates the alleged violation.

The Inspection

In October 1996, MCC, as general contractor, began construction of a new office complex for Worldcom headquarters in Clinton, Mississippi. The complex covers 86 acres and will include four separate office buildings (Tr. 66, 204, 211). MCC has approximately forty-six employees on-site including a project manager, project superintendent, and a full-time safety officer (Tr. 128, 130-131, 210). In addition to overseeing the work of contractors, MCC is responsible for some concrete work.

Forty-four contractors work on the project, including J. L. Roberts Plumbing and Heating (Roberts Plumbing), the plumbing contractor (Tr. 25, 127). In business since 1951, Roberts Plumbing has annual revenues of \$10 million and is an experienced plumbing contractor with approximately one hundred plumbing jobs at any one time including many underground jobs (Tr. 190-192).

Initially at Worldcom, Roberts Plumbing was responsible for installing all plumbing, heating, and air-conditioning piping and equipment above the ground (Exh. R-8). Another plumbing contractor, Jesco, was responsible for all underground plumbing work. Sometime prior to July 8, 1997 (the date of OSHA's inspection), Roberts Plumbing was also awarded the underground plumbing work (Tr. 26-28).

On July 8, 1997, at approximately 8 a.m., Worldcom's architect and engineer issued a change order with drawings to replace and add new underground storm sewer lines for building #3. MCC and Roberts Plumbing were expecting the change order. However, the changes involved more pipe than Roberts Plumbing expected. The change order was to correct an error and required intersecting an existing underground 12-inch pipe installed by Jesco with an additional 10-inch pipe extending 35 feet. The ground had already been graded and was ready for pouring the concrete floor (Exhs. C-1, R-1; Tr. 30-32, 36-37, 45, 51, 60, 62). Based on elevation plans, Roberts Plumbing anticipated that

the 12-inch pipe was buried less than 5 feet (Tr. 35-36, 38, 67). Robert Lyle, job superintendent for Roberts Plumbing, assigned the excavation work to Charles Young, backhoe operator, and the plumbing work to Larry Howard and Mike Martin, plumbers, and Chris Gibson, helper (Tr. 34, 40, 105). This was Roberts Plumbing first underground work at Worldcom (Tr. 27). In order to cut through 12-inch pipe and other plumbing work, Lyle knew employees would enter the excavation (Tr. 32, 35).

At approximately 9 a.m., the backhoe began digging for the 12-inch pipe (Tr. 34). The backhoe operator removed the dirt from around the pipe and approximately 5-inches below the pipe. The excavation was approximately 10 feet long and 6 feet wide (Tr. 87, 89). While the backhoe operator began digging the intersecting 35-foot excavation, the plumbers entered the 10-foot excavation and cut through the existing 12-inch cast-iron pipe with a power saw (Tr. 48, 87). When the pipe was cut, water from the pipe emptied into the excavation approximately ankle deep. The backhoe was used to dip out the water and remove the piece of pipe (Tr. 89, 113). The two plumbers were in the trench for less than 45 minutes cutting the pipe (Tr. 110-111). MCC's employees were working at the adjacent building laying a concrete beam approximately 70 feet from the excavation (Tr. 53-54, 114).

While the excavation was being dug at approximately 9:15 a.m., Compliance Safety Specialist Vivian Stevens initiated a planned programmed inspection of the Worldcom construction complex. Her opening conference was with MCC's project superintendent and corporate safety officer; MCC's full-time project safety officer had quit the previous day (Tr. 126, 130-131). The OSHA inspection started in building #2, which already had most of its floors. It was adjacent to building site #3 where Roberts Plumbing was digging the excavation (Tr. 28, 127). While inspecting the building, from the third floor Stevens observed the open excavation. Upon inquiry, she was informed that the excavation was to remove pipe at a depth of 5 feet (Tr. 132, 136).

After completing her inspection of the building, Stevens proceeded to the excavation site. It was approximately noon. No employees were working in the excavation, but one employee was seen entering the excavation to retrieve a saw (Exh. C-1; Tr. 144). The excavation measured 6 feet deep where the plumbers cut the pipe (Tr. 154). Stevens noted the excavation was not sloped or shored; there was no means of egress; and the spoil pile was along one side within 2 feet (Tr. 57, 146,

152). She described the soil as previously disturbed dry, loose, sandy clay with plasticity and compaction (Tr. 93, 101, 171). Stevens concluded there had been no inspection of the excavation by a competent person (Tr. 78, 99, 147).

As a result of the inspection, a citation was issued to Roberts Plumbing for failing to shore or slope the excavation, for not maintaining the spoil pile more than two feet of the edge, for not having a means of egress, and for failing to have the excavation inspected by a competent person. Roberts Plumbing abated the condition of excavation and did not contest the citation (Tr. 18, 57-58, 154, 159, 184). Because the excavation was not inspected by a competent person, MCC, as general contractor, received the citation at issue in this proceeding.

Discussion

To prove a violation of a safety standard, the Secretary of Labor must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with the terms of the standard, (3) there was employee exposure or access to the hazard created by the noncompliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993). The Secretary has the burden of proof.

MCC does not dispute, and the record establishes, that the trench dug by Roberts Plumbing did not comply with the sloping, egress, and spoil pile requirements of the OSHA standards and that employees of Roberts Plumbing were exposed to the condition of the excavation (Tr. 14-15, 184). The Secretary agrees that the employees were in the excavation for less than forty-five minutes at the time of OSHA's inspection (Tr. 236).

Failing to Inspect by a Competent Person

The citation alleges "employees were working in a trench excavation that had not been inspected by a competent person prior to the start of work and throughout the shift to evaluate the protective measures necessary to protect employees." Section 1926.651(k)(1) requires:

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 also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

A competent person is defined at § 1926.650(b) as:

. . . one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

MCC does not dispute that the excavation, prior to the start of work, was not inspected by a competent person from MCC. Also, there is no showing that Roberts Plumbing inspected the excavation (Tr. 78, 99, 147). Although experienced, the backhoe operator and plumbers were not shown to be competent persons within the meaning of the standard. They were not designated as competent persons by Roberts Plumbing and were not able to identify the potential hazards or unsafe conditions posed by the excavation (Tr. 95, 100). The lack of shoring or sloping and the failure to maintain the spoil pile away from the edge of the excavation are elementary requirements for a safe excavation. Although compacted soil, the 12-inch pipe was located in previously disturbed soil consisting of clay and sand. Also, once the pipe was cut, several inches of water were released into the excavation.

The requirement of § 1926.651(k)(1) for an inspection by a competent person was violated. In defense, MCC asserts the multi-employer worksite defense.

General Contractor Responsibility

The issue remaining is whether MCC, as general contractor, who did not create or control the excavation work, was responsible for ensuring the excavation was inspected by a competent person prior to the start of work. A general contractor who, as in this case, did not have employees

exposed¹ and did not create the violative condition is responsible nevertheless 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). Therefore, it is reasonable to expect the general contractor to ensure a subcontractor's compliance with safety standards if the general contractor could reasonably be expected to prevent or detect and abate the unsafe condition by reason of its supervisory capacity. The duty imposed on a general contractor is reasonable. *Knutson Construction Co.*, 4 BNA OSHC 1759, 1761 (No. 765, 1976), *aff'd*, 566 F.2d 596 (8th Cir. 1977).

In *Knutson*, the Review Commission relieved a general contractor of liability for failing to detect a one-inch crack on the underside of a scaffolding platform before it collapsed. It was concluded that it was unreasonable to expect a general contractor to detect such a crack. However, in *Blount International Ltd.*, 15 BNA OSHC 1897, 1899 (No. 89-1394, 1992), the Review Commission found it reasonable to expect a general contractor to detect a GFCI problem even though the condition was by nature latent and hidden from view. 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).

In this case, the record shows MCC contracted with Roberts Plumbing to install plumbing lines and equipment at Worldcom. This later included the underground plumbing work. Roberts Plumbing is an experienced plumbing contractor. It has been in business more than thirty years and has been involved in many underground projects. Roberts Plumbing owns two backhoes, other earthmoving equipment, trench boxes, and shoring equipment (Tr. 190-192). Although Roberts Plumbing received an OSHA citation as a result of this inspection, there is no showing of a history of safety violations. Therefore, based on its experience in underground plumbing work and no

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Although the Secretary maintains that MCC employees were present at times near the excavation, no employees were in the excavation or shown exposed to the condition of the excavation.

previous history of operating unsafely, MCC could reasonably expect Roberts Plumbing to perform safely at Worldcom.

Upon contracting with Roberts Plumbing, MCC required a copy of its safety guide. Roberts Plumbing's safety guide states that excavations are shored and spoil piles are maintained at least 2 feet from the edge of the excavation. Also, the safety guide provides that "daily inspections of excavations shall be made by a competent person" (Exh. R-5; Tr. 73, 75, 177). MCC's program for subcontractors at Worldcom requires subcontractors such as Roberts Plumbing to submit a copy of its safety program. It further requires contractor compliance with the excavation safety standards including "daily inspections of excavations and trenches" to insure stability (Exh. R-5). Therefore, when MCC instructed Roberts Plumbing to replace the underground pipe, MCC could reasonably expect Roberts Plumbing to comply with its safety guide and the excavation requirements, including an inspection by a competent person. MCC's alleged previous warning of the backhoe operator for failing to maintain the spoil pile more than 2 feet from the edge is not given weight and is not shown as an indication of continued potential unsafe activity (Tr. 155, 186). The project safety officer who issued the warning had quit the day prior to OSHA's inspection and did not testify.

Although a general contractor may reasonably rely on the expertise of a contractor with no evidence of previous unsafe activity, the general contractor is still not relieved of its responsibility to assure safe working conditions by the contractor if it could reasonably detect an unsafe condition. The general contractor has a duty to regularly inspect the worksite to assure compliance and is charged with constructive knowledge of conditions that could be detected through an inspection of the worksite. An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980); *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221 (No. 86-758, 1991).

In this case, it was not shown MCC could have reasonably detected that the excavation was not inspected by a competent person. Roberts Plumbing was assigned the underground work on the morning of OSHA's inspection. This was Roberts Plumbing's first underground project. It anticipated the excavation to be less than 5 feet deep. Also, while Roberts Plumbing was involved

with the excavation, MCC's project superintendent and corporate safety officer were involved in the OSHA inspection. MCC's full-time project safety officer had quit the previous day.

The Secretary argues the condition of the excavation, including the lack of sloping and the placement of the spoil pile, were in plain view and detectable. However, during the period the excavation was open, employees were in the excavation less than forty-five minutes and supervisory employees of MCC were participating in OSHA's inspection. Other MCC employees were working more than 50 feet from the excavation. Also, it is unclear that the condition of the excavation was so visibly unsafe that the lack of inspection by a competent person was evident. The backhoe operator testified that he cut back one side of the excavation, and most of the spoil pile was more than 2 feet from the side of the excavation (Tr. 86). Therefore, based on the duration of employees' exposure, the short time involved in digging the excavation, and MCC simultaneous involvement in the OSHA inspection and its own concrete work, it is unreasonable to expect MCC to detect the failure by Roberts Plumbing to inspect the excavation by a competent person.

MCC's responsibility for violation of §1926.651(k)(1) is not established.

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) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that serious Citation:

Item 1, in violation of § 1926.651(k)(1), is vacated.

KEN S. WELCH
Judge

Date: December 8, 1997