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Secretary of Labor,
Complainant,

v.

Wye Electric, Inc.,
Respondent.

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OSHRC Docket No. **97-1642 (E-Z)**

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Appearances:

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

James Cox, Vice President
Wye Electric, Inc.
West Monroe, Louisiana
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Wye Electric, Inc. (Wye) contests the Occupational Safety & Health Administration (OSHA) citation issued to it on September 29, 1997. The citation resulted from the inspection conducted by OSHA compliance officer William Chandler on August 26, 1997. The citation alleges that Wye violated: § 1926.501(b)(7)(ii) (item 1) by failing to utilize appropriate barriers to protect employees from falling into an excavation pit; § 1926.651(c)(2) (item 2) by failing to utilize a ladder or other safe means as egress from an excavation; § 1926.651(j)(2) (item 3) by failing to keep excavated materials or equipment at least 2 feet from the edge of excavations; and § 1926.652(a)(1) (item 4) by failing to slope, shore or otherwise protect employees in an excavation from cave-ins. Wye accepts that the conditions violated the cited standards. It contends, however, that violations occurred only because of the misconduct of its foreman.

Wye is an electrical construction company specializing in the installation of underground power and communication systems. At the time of the inspection, Wye was working on the St. Dominic construction project in Jackson, Mississippi. This case proceeded under the E-Z trial procedures of §§ 2200.201-212. Jurisdiction and coverage are admitted (Pre-Hearing Order).

For the reasons stated below the alleged violations are affirmed.

Facts

Exceptionally unstable soil

The parties agree that the soil in which Wye's employees worked was unstable. The site had previously held a gasoline filling station with "old fuel tanks and pollution" (Tr. 102). Wye's president Robert Young did not like to dig on the site. As Young explained (Tr. 107):

I had seen the site when they excavated it out I didn't like the site or the way it was backfilled or the things that had gone on whenever they moved the old service station they dug it out and then they dumped some -- a bunch of old trucks of different kinds of material in there -- and ran over it with a bulldozer and went off and left it.

The soil was composed primarily of sand and clay fill and was properly classified as Type C soil (Exh. C-19; Tr. 19).

The Excavation

As Wye uses the term, "trenches" are shallow ditches into which the electrical cable is laid (Tr. 114). "Trenches" are usually no more than 4 feet deep. Employees rarely enter "trenches," which constitute most of Wye's excavations. "Holes," on the other hand, may be classified as pits which are dug more deeply to accommodate precast manholes (Tr. 114, 118). Precast manholes measured 4 feet by 4 feet by 6 feet. At the site, Chandler measured the depth of the of the "hole" and found that it ranged from 6 ½ to 7.2 feet. As stipulated from the citation:

Employees [were] working near a 7 foot deep by 10.5 to 13 foot wide by 26.5 foot long excavation, with side slopes ranging from 53 to 84 degrees.

The excavation had been opened 3 days prior to the inspection. Water was standing at the base of the "hole" (Exh. C-19; Tr. 14, 63). Employees entered the "holes" to spread and level the gravel prior to placing the manhole, removing the lowering chain, and connecting the conduit (Tr. 77, 89).

Citation 1

Item 1: § 1926.501(b)(7)(ii)

The parties stipulate that there were no guardrails or other protections to prevent employees from falling into the pit dug to accommodate the manhole. The standard requires:

Each employee at the edge of a well, pit, shaft, and similar excavation 6 feet (1.8 m) or more in depth shall be protected from falling by guardrail systems, fences, barricades, or covers.

Employee Mike Jacobs was leaning with his shovel at the edge of the 7-foot deep excavation pit (Exh. C-8; Tr. 67). Employees had also worked around the area before beginning to place the manhole. Wye's foreman, Tommy Cobb, had placed warning tape around the area on an earlier day. He considered this to be an appropriate barricade. Cobb removed the tape the morning of the inspection. Cobb had not placed the type of barricades or covers required by the standard to prevent falls into the excavation pit. The terms of the standard were violated.

Item 2: § 1926.651(c)(2)

The parties stipulate that there was no ladder, ramp or other safe means of egress from the excavation at the 7-foot level. The standard requires:

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.

To exit, an employee would have to "bend over and touch the ground and pull himself out" of the excavation (Tr. 30). The terms of the standard were violated.

Item 3: § 1926.651(j)(2)

The parties stipulate that the spoil pile of excavated materials or equipment was at the edge of the excavation. The standard provides that:

Employees shall be protected from excavated or other materials or equipment . . . 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 excavated soil was placed at the very edge of the excavation and was piled up in large clumps of soil which overhung it. The soil had begun drying out (Tr. 14). The videotape shows portions of the spoil pile rolling back into the excavation (Exh C-19; Tr. 19, 31). The conditions violated the terms of the standard.

Item 4: § 1926.652(a)(1)

The parties agree that there was no protective system for the excavation, which under § 1926.652(a), would require sloping or shoring. The standard provides:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system

The conditions of the excavation justify the assessment of Wye's president that he "was

especially concerned about cave-ins” at the site (Exh. C-19; Tr. 103). The conditions violated the standard.

The four standards apply to the cited conditions. Exposure is admitted. The knowledge of foreman Tommy Cobb, a supervisor with safety responsibility for his crew, is properly imputed to Wye (Tr. 94, 118). *See Pride Oil Well*, 15 BNA 1809, 1814 (No. 87-692, 1992). The Secretary has established the asserted violations. The probable result of an accident was serious bodily harm or death. The violations are serious.

Employee Misconduct Defense

Once the Secretary proves the violation, unless the employer establishes a defense, the violation will be affirmed. Here, the crux of Wye’s employee misconduct argument is that its foreman ignored its instructions on how to perform the work safely.

Some weeks before the inspection, a section of earth fell into Cobb’s excavation at the St. Dominic worksite. In an unusual step for them, Wye’s president Robert Young and vice-president James Cox made a special trip to Jackson to visit the site. There, they met with foreman Cobb to advise him how to work at this “bad site” (Tr. 103).

Young instructed Cobb on the slope to use for the excavation and on where to place the spoil pile. Young approved of Cobb’s suggestion to rent a trackhoe to have a greater flexibility for excavating and for storing the spoil pile. Cobb testified that he followed Young’s instructions until the Saturday before OSHA’s inspection. At that time, he was “in a hurry to get home.” He made a conscious decision to do the work a faster way, ignoring Young’s instructions (Tr. 60-62). Wye claims that it meets the employee misconduct defense.

In order to establish an employee misconduct defense, an employer must prove that:

- (1) it had work rules designed to prevent the violation;
- (2) the work rules were adequately communicated to its employees;
- (3) it took steps to discover violations of those rules, and
- (4) it had effectively enforced the rules when violations were discovered. *E.g., Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (No. 89-3444, 1993).

Work Rule -- Oral Instructions to its Foreman

Wye had no written work rules aimed at the cited hazards (Exh. R-1). A work rule need not be in writing to meet the defense. Like a written rule, however, a verbal rule must be clear and must protect against the specific hazard addressed by the standard. *Gary Concrete*, 15 BNA

OSHC 1051,1056 (No. 86-1087, 1991) (failure to establish work rules designed to prevent the violation defeats defense); *Beta Constr.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993).

(Item 1, barricades): At the worksite meeting, Young instructed Cobb that he should try to backfill the excavation each day. If he could not, Cobb needed to have it “barricaded off because there was a lot of traffic in that area and a lot of pedestrian traffic going on around” (Tr. 104). Cobb interpreted this to mean that when he left the excavation open, as he did here for 3 days, he should place red warning tape around the open area (Tr. 66).

Actual barricades or covers, not warning tape, are required to prevent employees from physically falling into the “hole.” Either Cobb misinterpreted Young’s vague instruction and put up tape, or he properly interpreted what Young had in mind. In either event, Young’s oral instruction does not meet the first requirement of the defense, *i.e.*, specificity in a work rule designed to prevent the hazard. Item 1, § 1926. 501(b)(7)(ii), is affirmed.

(Item 2, ladder): Wye claims that if Cobb properly sloped the excavation, as Young instructed, employees would not need a ladder for access into and out of the excavation. This argument misses the point. Wye lacked a specific work rule relating to use of ladders in excavations. Wye’s employee misconduct defense for item 2 fails to meet the defense’s first element. Item 2, § 1926. 651(c)(2), is affirmed.

(Item 3, spoil pile): Cobb testified that at the jobsite meeting Young instructed him regarding placement of the spoil pile (Tr. 60-61):

[T]o keep it back far away from the ditch as possible, which would utilize the reach of the trackhoe. . . . probably in an excess of 10 to 15 feet from the hole with the trackhoe.

Cobb claims that he followed this instruction, except for the excavation which OSHA inspected (Tr. 61). Here, Wye’s work rule was specific and would have eliminated the hazard to which the standard is directed. Since the first element of the defense is met, the second element will be examined for item 3.

(Item 4, sloping): Young advised Cobb that the excavation should be dug out to a 2 to 1 slope. He may also have told him that it was permissible to bench the wall at 4 feet, and then slope at a 2 to 1 angle. Either instruction complies with the standard and meets the first element of the employee misconduct defense (Tr. 41-42).

Initially in analyzing this element of the defense, it is significant that Wye's supervisor engaged in the misconduct. A supervisor's misconduct is "strong evidence that the employer's safety program was lax." *Baytown*, 15 BNA OSHC 1705, 1710 (No 88-2912, 1992). To prevail, Wye must overcome this "strong evidence." In Wye's discussion regarding the spoil pile and proper sloping of the excavation, Wye communicated the work rules only to the supervisor. Other potentially exposed employees were not included in the meeting nor did they share in the communication (Tr. 60, 92). A supervisor's behavior may limit the effectiveness of the work rule, especially of an oral workrule. *See Pressure Concrete*, 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992) (a supervisor's instruction to evacuate would be undercut by his failure to do so). Wye's foreman felt free to violate Wye's work rules. In fact, even at the time of the hearing Cobb considered that the "hole" was safe for him and his crew to enter.

By limiting dissemination of the work rule to the foreman, Wye failed to communicate to individuals who, while exposed to the hazards, lacked information intended for their protection. Neither work rule was sufficiently communicated to the appropriate employees. Thus, the employee misconduct defense fails. Items 3 and 4 (§§ 1926.651(j)(2) and .652(a)(1)) are affirmed.

Steps to Uncover and Discipline Violations of the Work Rule

Since Wye failed to meet the second element of the defense, nothing need be said regarding the defense's last two elements. It is noted, however, that as of the date of the hearing Cobb had not been disciplined for disobedience of the workrule. Cobb believed that he had not and would not be disciplined because, regardless of any OSHA citation, Wye understood that the excavation was actually safe (Tr. 63). Wye may intend to terminate Cobb for the safety infraction after "this [OSHA] matter was resolved" (Tr. 106). Delaying discipline could affect other employees who became aware of the company's inaction in the face of the violation of its work rule. It is questionable whether the last element of the defense could be met.

Penalty

The gravity of the violations was high as demonstrated by the instability of the excavation and the nature of the violations. Three employees were exposed to the conditions at the bottom of the excavations for times varying from 10 to 20 minutes (Tr. 15, 77, 89). The Secretary properly credited Wye with a 25 percent reduction for good faith because of Wye's written safety

program. Wye is a small company with 75 employees. It was allowed a 40 percent credit for size. Because it did not have a history of serious violations within the past 3 years, Wye was credited with an additional 10 percent for history (Tr. 34-35). The evidence demonstrates that some further reduction in the penalty is appropriate. Wye invested time and effort in its safety program and in having employees attend its own and the general contractor's safety meetings. However, the program lacked specificity and uniform communication in areas where its employees encounter predictable and grave safety hazards. The penalties set out below are assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The forgoing 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. Item 1 (§ 1926.501(b)(7)(ii)) is affirmed with a penalty of \$500.00 assessed.
2. Item 2 (§ 1926.651(c)(2)) is affirmed with a penalty of \$750.00 assessed.
3. Item 3 (§ 1926.651(j)(2)) is affirmed with a penalty of \$1,550.00 assessed.
4. Item 4 (§ 1926.652(a)(1)) is affirmed with a penalty of \$1,550.00 assessed.

Date: April 3, 1998

Nancy J. Spies
Judge