

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

DAKOTA UNDERGROUND, INC.,

Respondent.

OSHRC DOCKET NO. 97-2079

APPEARANCES:

For the Complainant:

Rachel Parsons, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Richard Henderson, Esq., Nilles, Hansen & Davies, Ltd., Fargo, North Dakota

Before: Administrative Law Judge: James H. Barkley

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, Dakota Underground, Inc. (Dakota), at all times relevant to this action maintained a place of business at 17th Avenue North & Broadway, Fargo, North Dakota, where it was engaged in excavation. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 13, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Dakota's Fargo work site. As a result of that inspection, Dakota was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Dakota brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 26, 1998, a hearing was held in Fargo, North Dakota. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

Compliance Officer (CO) Earl Lagro testified that he was driving in the area of Broadway and 19th Street in Fargo when he saw a backhoe in operation (Tr. 67). Lagro stopped and walked over to the excavation site, which consisted of two trenches, the "east" trench running north-south on the east side of Broadway; with a shorter leg running approximately 30-40 feet east-west along 17th Avenue and joining the north-south leg at the intersection (Tr. 75-76; Exh. C-8; *See* illustration #1). Lagro testified that he measured the north-south leg at 4 feet 6 inches wide and 8 feet 4 inches deep, and that the depth of the east-west leg was consistent (Tr. 85, 100-01, 160; Exh. C-11). Neither leg was sloped or shored (Tr. 95). In addition, there was an excavation on the west side of Broadway to the north of 17th Avenue, referred to as the "west" trench (Tr. 86; Exh. C-8, C-16). The west trench was 6 feet wide, 10 feet deep and 16 feet long, and was neither sloped nor shored (Tr. 87, 96; Exh. C-12, C-16A, C-16B). The west trench undercut the curb and street by approximately 2 feet (Tr. 91, 97). It is stipulated that the soil in both trenches was Type B (Tr. 10).

Lagro testified that he saw a Dakota employee, Lawrence Moran, in the east trench walking towards the T where the trench joins the north-south leg (Tr. 73, 109). Moran admitted that he spent approximately 10 minutes hooking up a service, as he had been doing at the T (Tr. 118, 291; Exh. C-18, C-19). Lagro additionally stated that for several minutes, Moran was in the trench without any means of egress from the portion of the trench where he was working (Tr. 95). As Lagro videotaped Moran, another employee placed a ladder in the trench (Tr. 95, 111; Exh. C-14, C-19). Moran testified that a ladder had been in use throughout the day, and was being moved along with the trench box as work progressed (Tr. 289). Lagro testified that Gary Rolstad, the site superintendent, was operating a backhoe at the south end of the north-south trench and had a clear view of the entire trench, and had to have seen in the trench (Tr. 10, 74, 95, 112).

Lawrence Moran testified that he attended weekly safety meetings, during which his foremen instructed him to work from a trench box, with a ladder available for egress (Tr. 285-86). Moran stated that the trench box and ladder were moved as work progressed in the trench (Tr.

288-89). Nonetheless, Moran admitted that when hooking up services he sometimes steps out of the trench box; he estimated he worked outside the box for about 10 minutes during the OSHA inspection (Tr. 290-91). Moran testified that Rolstad could see him in the trench (Tr. 296; *See also*, testimony of Greg Rolstad, Exh R-1, p. 49).

Lagro further testified that he watched two other employees, Greg Villanueva and Jesse Reller, in the north-south leg of the east trench trying to push a copper pipe through an abandoned pipe underneath the street (Tr. 72-73, 107-08; Exh. C-17). Lagro stated that the employees were working outside a trench box located two or three feet north of them in the trench (Tr. 73). Lagro stated that, after two or three minutes, Villanueva and Reller came out of the trench; Villanueva crossed the road and went down a ladder into the west trench (Tr. 74, 109). Lagro observed Villanueva working in the undercut portion of the trench hooking a chain onto the bucket of a second backhoe (Tr. 77, 91). Lagro videotaped Villanueva in the trench standing in ankle high water (Tr. 77, 94; Exh. C-14). Lagro guessed Villanueva was in the trench for at least five minutes (Tr. 80). Lagro stated that he did not observe any water pumps in the area (Tr. 96, 133). Lagro further testified that Villanueva returned to the trench on the east side of Broadway after exiting the west trench (Tr. 106).

Jesse Reller testified that Rolstad did not give him any specific instructions as to how to perform his job; merely telling him to help Villanueva (Tr. 272-75). Reller stated that he entered the trench on the east side of Broadway, and went into the trench box (Tr. 273). Reller testified that there was no room for Villanueva in the trench box, he did not believe they could have pushed the copper pipe through the existing pipe from inside the trench box (Tr. 274, 280). Lowell Johnson, Dakota's president, admitted that sheeting and/or shoring could have been used in lieu of a trench box to perform the job (Tr. 341).

Reller knew Villanueva entered the west trench without using a trench box (Tr. 276). Reller testified that they were frustrated, and thought they could get in and out of the trench quickly (Tr. 277). Reller testified that Dakota did have a written safety program, which was updated in 1994 (Tr. 261-62; Exh. C-4, C-5). Reller stated that Dakota sponsors a safety training course, which is attended by all its employees; Reller attended the course in the spring of 1994 and again in the spring of 1998 (Tr. 263). In addition, Reller stated, Dakota's supervisory personnel hold weekly safety meetings at the job site (Tr. 264). Reller testified that violations of

Dakota's safety policies result in a verbal warning from a superintendent or foreman (Tr. 265). Reller stated that a third reprimand would result in dismissal (Tr. 266). Reller had seen employees reprimanded, but did not know of anyone who had been fired or suspended (Tr. 265-66, 281).

Reller did not know whether Rolstad held regular safety meetings at the North Broadway job, because he was not there in the mornings (Tr. 268). Reller stated that he knew he and Villanueva wouldn't be fired if they got caught working in the trench without a trench box, though Rolstad would be hard on them for the rest of the season (Tr. 277). Reller testified that he had never been reprimanded before this incident (Tr. 278). After the OSHA inspection Lowell Johnson told Reller he would be fired if such an incident ever happened again (Tr. 278). In May, 1998, Reller was promoted to superintendent (Tr. 279).

Lagro testified that he asked superintendent Rolstad why his men were working outside of the trench boxes on site. Rolstad told him that it was difficult to keep the trench box in position at all times (Tr. 113). Lagro admitted that he did not ask Rolstad, the "competent person" as defined by §1926.650(b) (Tr. 10), whether he had inspected the west trench (Tr. 166). Lagro did not know whether the water in the west trench was present when Rolstad first dug it out (Tr. 167).

Gary Rolstad, who was unable to attend the August 26 hearing for medical reasons, testified in an August 24, 1998 deposition (Exh. R-1). Rolstad testified that when a man was down in the trench, there was always a ladder within arms length of the box (Exh. R-1, p. 27). Rolstad stated that if they didn't move the ladder right away it was because no one was down in the hole (Exh. R-1, p. 25).

Rolstad testified that he was qualified as a competent person (Exh. R-1, p. 41). Rolstad stated that he dug the west trench, breaking the abandoned pipe and releasing the water in the pipe into the trench (Exh. R-1, p. 29-30). Rolstad stated that he inspected the trench and had pumps put into the hole to remove the water (Exh. R-1, p. 30).

Rolstad testified that he was responsible for the enforcement of Dakota's safety rules on the job site (Exh. R-1, p. 17). Employees violating the rules were "chewed out;" repeated violations would result in termination (Exh. R-1, p. 18). Rolstad testified that he had fired an employee for safety violations in 1994 (Exh. R-1, p. 18). Dakota keeps no records of its disciplinary actions; Rolstad did not state the reason for the termination (Tr. 325). Rolstad

generally worked with the same six man crew (Exh. R-1, p. 12, 53). Rolstad admitted that his men would occasionally “get a slack period;” he would catch them going out of the box and would have to yell at them to get them back in (Exh. R-1, p. 25-26). Rolstad testified that the employees would “chuckle and kind of hit their head, oh, yeah, I forgot about it” (Exh. R-1, p. 27).

Rolstad stated that he assumed Greg Villanueva would use the trench box to push the copper through the existing pipe because he was a “pretty smart person” and Rolstad had never seen him working outside the box before (Exh. R-1, p. 32-33). Rolstad testified that he spoke to Villanueva after the OSHA inspection, but didn’t reprimand him, merely reminding him about the safety rules (Exh. R-1, p.36).

Lagro testified that the violations were willful because they took place in full view of the superintendent on site, Gary Rolstad. Rolstad had been present during prior OSHA inspections which resulted in citations (Tr. 122). Lagro stated that he had personally discussed the sloping requirements with Rolstad at the time of the prior inspection (Tr. 124). The only discipline Rolstad received as a result of the OSHA inspection was a reduction in his Christmas bonus (Tr. 326).

Lagro stated that the cited violations were high gravity, in that the three cited employees were exposed to a cave-in hazard; which would, in all probability result in serious injury or death (Tr. 120-21). Lagro believed that the likelihood of a cave-in in the trenches was exacerbated by fissures in the trench (Tr. 99, 121-22). Lagro stated that the soil in the trench was previously disturbed, to lay the original, abandoned pipe, and so was more likely to cave in (Tr. 154). In the west trench, the presence of water and the undercutting of the curb and sidewalk increased the likelihood of an accident occurring (Tr. 99, 121-23).

Lagro testified that no adjustment was made in the proposed penalty for size, good faith, or history because Dakota had been cited several times previously for willful violations of the Act (Tr. 124-27). Bruce Beelman, the OSHA area director (Tr. 181) testified that in June 1996, Dakota was cited for violations of the OSHA trenching standards. The matter was settled; a final order was entered affirming two serious and one willful citations; total penalties of \$25,000.00 were assessed (Tr. 186; Exh. C-13, p.2). In August 1994, citations were issued against Dakota for two willful violations of the trenching standards. The citations were settled; the classification

was removed from the violations; a penalty of \$20,000.00 was assessed (Tr. 188; Exh. C-13, p.4). In the February 16, 1995 agreement settling the 1994 citation, Dakota agreed to immediately hire a safety consultant (Tr. 200-01; Exh. C-22a). Not until January 1998, did OSHA received confirmation of the required abatement; a safety consultant had been hired over two years later, in June, 1997 (Tr. 200; Exh. C-21c).

OSHA also took into account the citations of Dakota's predecessor, Johnson Construction, because both companies were owned by Lowell Johnson, who also served as president of each (Tr. 185). In January 1988, October 1987, Johnson was cited for willful violations of the trenching standards. The matters were settled and penalties of \$5,000.00, and \$4,200.00 were assessed (Tr. 193; Exh. C-13). In October 1985, Johnson was cited for a repeat violation of the trenching standards; the matter was settled and a \$960.00 penalty assessed (Tr. 194; Exh. C-13).

Beelman testified that Dakota's annual sales were \$15 million in 1997 (Tr. 184). Lowell Johnson testified that Beelman's information was incorrect; stating that Dakota's gross sales were less than \$10 million in 1997 (Tr. 314).

Alleged Violation of §1926.651(c)(2)

Willful citation 1, item 1 alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

(a) At the construction site at 17 Avenue North and Broadway Street, Fargo, North Dakota, a ladder was not provided for the employee in the trench.

The cited standard provides:

A stairway, ladder, ramp or other means of safe egress shall be located in trench excavations that are 4 feet or more in depth so as to require no more than 25 feet of lateral travel for employees.

Discussion

Rolstad's testimony, that a ladder was always placed within arm's reach of the trench box is clearly refuted by the testimony of the CO, who stated that there was no means of egress in the trench where Lawrence Moran was working, and by the videotape, which shows a ladder being placed in the area while the CO taped. The record establishes that although a ladder was present

on the site, at the time of the OSHA inspection it was not available for Moran's use. There were no safe means of egress provided. The violation was in plain sight of Gary Rolstad, Dakota's foreman. The citation has been established.

Classification

The violation was cited as "willful." A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a heightened awareness of the illegality of the conduct or conditions, and by the state of mind, *i.e.* conscious disregard or plain indifference.

During the August 13, 1997 inspection, in full view of their co-workers and supervisory personnel at least two employees in three different locations were observed working in conditions that exposed them to immediate burial from collapsing trench walls. Alternative means of protection in the form of trench boxes were provided, but due to the employer's lax enforcement of safety rules, discussed fully in item 2B below, employees routinely left the protection of the trench boxes.

Dakota's failure to enforce its safety rules, in such an inherently hazardous occupation, and in light of its history of prior OSHA citations, establishes its indifference to its employees' safety and its disregard for the requirements of the Act. I find that the cited violation was properly classified as willful.

Penalty

The Secretary proposes the statutory maximum penalty of \$70,000.00. The maximum penalty, however, must be reserved for the most egregious of circumstances. Here no employee was killed or injured as a result of the violation. Only one employee was exposed for a short period. The hazard associated with this violation is less grave than the hazard associated with the failure to slope or shore, with which Dakota was also cited. There the hazard is instantaneous burial, without warning. Here the ladder allows the employee to immediately exit the trench in the event of a partial collapse that does not engulf the employee.

I find that the Secretary overstated the gravity of the violation. An appropriate gravity based penalty is \$23,000.00.

Dakota is a small company, with approximately 25 employees (Tr. 115). Bruce Beelman,

an OSHA area director, testified that OSHA did not give Dakota the normal credit afforded to small companies because of its record of prior willful violations, and its failure to adhere to the terms of its settlement agreements with the Secretary (Tr. 225). Dakota was not given credit for good faith or for history for the same reason (Tr. 226).

Respondent's size, as measured by its annual sales of approximately 10 million dollars, establishes that no reduction for size is merited. No reduction for history or good faith is merited in this case given Respondent's history of prior citations. Moreover Dakota's failure to timely fulfill its obligations under prior settlement agreements demonstrates its unwillingness to accept the spirit of the Act. No credit for good faith is appropriate.

A penalty of \$23,000.00 will be assessed for this violation.

Alleged Violation of §1926.651(h)(1)

Willful citation 1, item 2A alleges:

29 CFR 1926.651(h)(1): Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation:

(a) At the construction site at 17th Avenue North and Broadway, Fargo, North Dakota, precautions were not taken to prevent cave-in hazards in a trench on the west side of Broadway where there was significant accumulations of water in the trench.

The cited standard provides:

Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation.

The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to prevent cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

Discussion

Dakota does not dispute the existence of the cited violation, but argues that the Secretary failed to prove that it could have reasonably anticipated that employees would enter the unguarded excavation, and that Villanueva's presence in the trench was the result of unpreventable employee misconduct.

Dakota was running copper lines from the east to the west side of Broadway, through the

existing piping. Rolstad would not have excavated the west side, had he not anticipated a need to access the area to complete the work Dakota was engaged in. Dakota cannot argue that the presence of its employees in the trench was unforeseeable.

In order to prove the affirmative defense of unpreventable employee misconduct Dakota must prove that it had a work rule in place which prohibited the violative conduct, and that it communicated and enforced the rule. *DCS Sanitation Management, Inc.*, 82 F.3d 812 (8th Cir., 1996).

Dakota maintains that it has adopted the OSHA standard in its entirety as part of its written safety program (Exh. C-4), and that it specifically prohibited employees working in unloped excavations unless they worked from inside a trench box (Tr. 285, 301). Nonetheless, there is substantial evidence that Dakota permitted employees to leave the trench box, and winked at the employees' occasional lapses from compliance with the rule. Both Moran and Villanueva were observed working in unprotected trenches on the same day (Villanueva at two separate locations), with the full knowledge of their co-workers, and in clear sight of their supervisor. Both Moran and Reller believed that it was necessary to leave the trench box to perform their jobs; Moran admitted that he did so regularly. Rolstad told the CO that it was difficult to keep the trench box in position, and admitted he would have to remind employees to get back in the boxes. Despite the fact that Rolstad generally worked with the same six man crew, however, none ever received any discipline other than a verbal warning. Reprimands were greeted with laughter. Reller testified that he and Villanueva knew they shouldn't be working in an unguarded trench, but did so because they didn't think they'd get caught. Reller knew they would not be fired if they were caught.

After the OSHA inspection Rolstad merely reminded Villanueva of the company policy; he was not fired, his pay was not docked (Exh. R-1, p. 56). Both men were merely reprimanded by Lowell Johnson. who testified that as far as he knew it was both men's first infraction (Tr. 333). Rather than being disciplined, Reller was promoted to superintendent in May, 1998.

The evidence establishes that Dakota's safety rules were not effectively enforced, and its affirmative defense is rejected.

Characterization

The violation was cited as "willful," and a combined penalty of \$70,000.00 was proposed

for this and the violation alleged at item 2B.

The Secretary argues that Dakota's lax enforcement of its own safety rules, discussed fully above, in light of its substantial history of past OSHA citations, demonstrates a disregard for the requirements of the Act, as well as plain indifference to employee safety. This judge agrees.

As noted above, two employees in three different locations were exposed to the danger of immediate burial from collapsing trench walls. Due to the employer's lax enforcement of safety rules, employees routinely left the protection of the trench boxes.

Dakota's failure to enforce its safety rules, in light of the high gravity of the violations, and its history of prior OSHA citations, establish its indifference to its employees' safety and its disregard for the requirements of the Act. The cited violation was properly classified as willful.

Penalty

The proposed penalty, however, is excessive. The proposed \$70,000.00 is the maximum allowable penalty for a willful violation. As noted above, the maximum penalty allowable under the statute must be reserved for the most egregious of circumstances.

Though no employees were injured, or killed as a result of this violation, the gravity of the proven violation is high. Dakota argues that the water in the trench was not groundwater, that there was "not really" a lot of vibration from surface activities, and that spoil materials had been placed back at least two feet from the edge (Exh. R-1, p. 24, Tr. 164, 295-95). Nonetheless the walls of the west excavation (stipulated as Type B) were either vertical or undercut. Gary Rolstad admitted that accumulations of water in a trench, which were clearly visible in the videotape of the cited trench, adversely affect an employee's footing, and can increase the chance of a cave-in (Exh. R-1, p. 43-44). Trench walls may collapse and bury an employee in the trench without warning. Given the 10 foot depth of this trench, it is likely that an exposed employee would have been completely engulfed by a collapsing wall. Villanueva was in the trench for approximately five minutes, during which time he was exposed to the cave-in hazard.

A gravity based penalty of \$40,000.00 is deemed appropriate for the cited violation and will be assessed. In accordance with the prior penalty discussion, no reduction of the gravity based penalty for size, history or good faith is appropriate.

Alleged Violation of §1926.651(k)(1)

Willful citation 1, item 2B alleges:

29 CFR 1926.651(k)(1): Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions:

(a) At the construction site at 17th Avenue North and Broadway, Fargo, North Dakota, the competent person on site did not make daily inspections of the trench on the west side of Broadway in which there was a significant accumulation of water.

The cited standard 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.

Discussion

Gary Rolstad testified that he inspected the west excavation after encountering water in the existing pipe. Neither the CO, nor Complainant's counsel questioned Rolstad about his methods, nor produced any evidence contradicting Rolstad's testimony. There is no evidence establishing that Rolstad's inspection was insufficient to identify the hazards posed by the water in the west excavation, or that his inspection failed to conform to the requirements of the standard.

Because the Secretary failed to establish this violation by a preponderance of the evidence, the citation will be vacated.

Alleged Violation of §1926.652(a)(1)

Willful citation 1, item 3 alleges:

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

(a) At the construction site at 17th Avenue North and Broadway, Fargo, North Dakota, for employees observed in several areas working outside of the trench box.

(b) At the construction site at 17th Avenue North and Broadway, Fargo, North Dakota, where a trench approximately 100 feet north of 17th Avenue North on the west side of Broadway was not properly sloped, shored, or otherwise protected, exposing employees to a potential cave-in hazard.

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 in depth and examination of the ground by a competent person provides no indication of potential cave-in.

Discussion

As in item 2A, Dakota admits that employees were working in unprotected trenches in the cited locations. Dakota relies solely on its stated affirmative defense of unpreventable employee misconduct. That defense has been thoroughly discussed above, and for the reasons there stated is rejected.

Classification

For the reasons discussed fully above, I find that the cited violation is properly classified as willful.

Penalty

These violations are the crux of the OSHA citation. The sudden collapse of the 8 to 10 foot trenches could bury an employee without warning; the probable outcome of a cave-in in a narrow, deep trench is death. The likelihood of an accident occurring was exacerbated by the presence of water in one of the trenches, undercutting, and the presence of previously disturbed soil from prior excavations. The Secretary chose to group the violations, assessing a single penalty for the three separate instances observed. In this instance, I find that the violations are egregious, and that the penalty proposed by the Secretary is appropriate because of the severity of the hazard, the multiple trenches involved and exposures observed, and because the record establishes that Dakota and its employees regularly ignored OSHA's prohibition against working in unguarded trenches.

A gravity based penalty of \$70,000.00 is deemed appropriate. No reduction for size, history, or good faith is merited.

ORDER

1. Willful citation 1, item 1, alleging violation of 29 CFR §1926.651(h)(1) is AFFIRMED, and a penalty of \$23,000.00 is ASSESSED.
2. Willful citation 1, item 2A, alleging violation of 29 CFR §1926.651(h)(1) is AFFIRMED, and a penalty of \$40,000.00 is ASSESSED.
3. Willful citation 1, item 2B, alleging violation of 29 CFR §1926.651(k)(1) is VACATED.
4. Willful citation 1, item 3, alleging violation of 29 CFR §1926.652 (a)(1) is AFFIRMED, and a penalty of \$70,000.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: