

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

Complainant,

v.

NORM'S UTILITY CONTRACTORS, and its
successors,

Respondent.

OSHRC DOCKET NO. 98-0019

APPEARANCES:

For the Complainant:

Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Stanley D. Moore, Esq., Winston & Cashatt, Coeur D'Alene, Idaho

Before: Administrative Law Judge: Benjamin R. Loye

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, Norm's Utility Contractors, and its successors (Norm's), at all times relevant to this action maintained a place of business at County Road 4A, Naples, Idaho, where it was engaged in utility construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 21, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Norm's Naples, Idaho work site. As a result of that inspection, Norm's was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Norm's brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 16, 1998, a hearing was held in Coeur D'Alene, Idaho. The parties have submitted briefs on the issues and this matter is ready for disposition.

Because “repeat” citation 2 is at the basis of the above captioned matter, that alleged violation will be discussed first.

Alleged Violation of §1926.652(a)(1)

Repeat citation 2, item 1 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 29 CFR 1926.652(b) or (c):

(a) County Road 4A, Naples, ID: Employee was working in an approximately 10 foot deep trench from a 6 foot deep trench shield with approximately 4 vertical feet of wet sloughing soil exposed above the top of the trench shield. The design and use of sloping and the shield system did not meet the requirements of appendix B of this subpart in accordance with 29 CFR 1926.652(b)(2).

Facts

On November 21, 1997, OSHA Compliance Officers (CO) Van Howell and David Kearns arrived at Respondent’s Naples, Idaho work site (Tr. 21-23). At the site Howell and Kearns videotaped an approximately 37 foot east-west trench which ranged between nine and eleven feet wide (Tr. 32, 48). Two six foot trench boxes had been placed against the south wall of the trench, which was vertical and extended three and one half to four feet above the top of the trench box (Tr. 31-33, 39, 75). The slope of the north wall was nearly vertical, down to a bench created by fill dirt that Norm’s added between the box and trench wall to stabilize the box (Tr. 75, 127). The north wall showed a series of fissures and soil had begun to separate from the trench wall (Tr. 39, 43; Exh. C-5). The trench boxes contained approximately two feet of ground water, and the surface soil was also wet, from rain which had been falling on and off throughout the day (Tr. 41, 55). CO Howell testified that soil was sluffing into the trench from the south wall as he and Kearns watched (Tr. 52-53).

CO Howell testified that the foreman, Tyler Eberle, and an employee, Julio Gayton, both told him that they had been in and out of the trench throughout the day (Tr. 23-24, 69). Howell stated that Gayton told him he had been working in the east end of the trench standing on some angle iron approximately half way down the inside of the trench box, attempting to “adjust for the pumping of water,” and that he had just exited the trench (Tr. 24, 34, 37, 56-57, 91-92). Howell noted a shovel and a two by four on top of the trench box, which he believed Gayton had been using (Tr. 24, 35-36; Exh. C-3, C-5).

CO Kearns’ testimony was consistent with Howell’s testimony in all respects (Tr. 112-13).

Tyler Eberle testified that the trench box was originally placed at ground level, but that ground water from the adjacent creek washed the soil out from under the box, which began to sink (Tr. 118,

121-22). Eberle stated that his crew later used the excavator to tap the box down into the unstable soil in an attempt to seal out the water (Tr. 122, 128). Eberle testified Julio Gayton was in the trench box early in the day, to set a casing; Eberle stated that the top of the box was level with the ground at that time (Tr. 126, 136, 160). Eberle testified that later he and Julio took grade shots from the top of the box at the east end of the trench, below the north trench wall, but that no one actually entered the trench box after it sank below grade (Tr. 137, 167-69). Eberle did not remember Gayton telling Howell that he had just come out of the trench (Tr. 123). Eberle further stated that the shovel Howell saw had been used to level the gravel fill between the box and the north trench wall (Tr. 127). The 2 x 4 had been used to push a piece of plywood down between the first and second box (Tr. 127).

Julio Gayton testified that he might have told CO Howell he had just been in the trench, but that he was on top of, not in the trench box (Tr. 173-74). Gayton stated that he had been in the trench just before noon, setting some casing, but that the top of the box was level with the roadway at that time (Tr. 175-78). Gayton stated that everything was done from the top of the box from then on (Tr. 175). Gayton stated that there were approximately three and a half feet of soil above the top of the trench box, reaching to his hip level, as he stood on the lip of the trench box (Tr. 186).

In rebuttal, CO Howell testified that an employee on the top of the trench box was exposed to a hazard in that the sloughing soils from the trench walls above the top of the trench could knock an employee into the trench, where he could be buried or drown (Tr. 204).

Discussion

The citation. The citation in this matter alleges that Norm's employees worked from the bottom of the trench box. After hearing the testimony of Norm's employees, it became apparent to the Complainant that those employees worked mainly from the top of the trench box, rather than in the box. Complainant moved to amend the specifics of the citation to allege, in the alternative, that employees working on top of the trench box were exposed to a hazard from the wet sloughing soil above the top of the box (Tr. 214-17).

Pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, made applicable to Commission proceedings by 29 CFR §2200.2(b), post-trial amendment of the pleadings is proper "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties." *Peavey Co.*, 16 BNA OSHC 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). In this case the citation placed Norm's on notice of the matter at issue generally, *i.e.* the adequacy of its protective systems. Norm's itself raised the specific issue, *i.e.* the employees' position on, rather than in the trench box, and introduced all

the evidence pertaining to that issue. I find that Norm's is not prejudiced by the Complainant's requested amendment, having fully tried the issue.

Citation 2, item 1, instance (a) is hereby amended to conform to the evidence as set forth at trial.

The standard. The relevant portion of the cited standard provides:

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or © of this section except when:

* * *

(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.

Paragraph (b)(2)(ii) refers the reader to Appendix B, which sets forth the allowable configurations for excavations in unclassified soils¹.

All excavations 20 feet or less in depth which have vertically sided lower portions shall be shielded or supported to a height at least 18 inches above the top of the vertical side. The support or shield system must extend at least 18 inches above the top of the vertical side.

Norm's argues that the north wall of its trench was less than 5 feet in height as measured from the ledge at the top of the trench box, and so is exempt from the requirements of ¶(b) under subparagraph (a)(1)(ii), quoted above. This judge has previously rejected this method of measuring the depth of a trench. *See, Globe Contractors, Inc.*, 17 BNA OSHC 2165, 1996 CCH OSHD ¶31,172 (No. 95-0494, 1996), *aff'd.*, 132 F.3d 367 (7th Cir. 1997). In order to determine a trench's compliance with OSHA standards, it is measured from the toe of the trench to the surface, without regard to any benching, or the presence of a box in the trench. The record shows that the cited trench was between nine and one half and ten feet deep.

It is clear from the evidence in the record that the support system in the nine and one half to ten foot trench did not comply with ¶(b), Appendix B, which prohibits vertical, or benched walls above a trench box, and requires that sloping be cut at least 18 inches below the top of the box.

Though CO Howell had no direct evidence of employee exposure at the bottom of the trench, it is undisputed that both Gayton and Eberle worked on the ledge three and one half to four feet below the lip of the trench. In affirming *Globe Contractors, supra*, the Seventh Circuit found that the Secretary has previously interpreted §1926.652(a)(2) as applying to employees in the excavation, regardless of their position in the excavation, so long as the employees are exposed to a hazard. *Globe Contractors,*

¹ Norm's does not claim Eberle made any attempt to classify the soils at the site; unclassified soils are treated as Type C soils (Tr. 105).

Inc. V. Secretary of Labor, 132 F.3d 367 (7th Cir. 1997), citing, *Ford Dev. Corp.*, 15 BNA OSHC 2003 (No. 90-1505, 1992).

Howell stated that an employee in the trench could be struck by the saturated soil, be buried, or knocked into the water and drown (Tr. 40). CO Howell's testimony and the photographic evidence establish that there was a danger that the saturated soil could slough off, knocking an employee into the trench. Complainant has established employee exposure, and the violation will be affirmed.

Classification

The violation was cited as a repeat violation. A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (No. 16183, 1979). Norm's was cited for violation of the identical standard in April 1997; the citation was affirmed in a final order of the Commission dated October 31, 1997 (Tr. 78, 99; Exh. C-2).

Norm's maintains that the violation affirmed here is not substantially similar to the April 1997 violation, because in that case employees were working in the bottom of a trench without benefit of a trench box (Tr. 101). I find, however, that the April 1997 citation was substantially similar, in that it served to put Norm's on notice of the need to take steps to ensure its employees' use of sloping and shoring which complied with §1926.652 *et seq.*, See, *Caterpillar, Inc. v. Herman*, 154 F.3d 400 (7th Cir. 1998).

Penalty

A penalty of \$4,000.00 was assessed for this item, representing a gravity based penalty of \$2,000.00 and a multiplier of 2 for repeat violations. I find that the CO's overstated the gravity of the hazard, believing that Norm's employees had been working in the bottom of the trench, rather than on the ledge at the top of the trench box.

Taking into account the limited exposure of Norm's employees, and the low probability of an accident occurring, I find that a gravity based penalty of \$800.00 is appropriate. The repeat multiplier shall be applied, and a penalty of \$1,600.00 assessed.

Alleged Violation of §1926.651(c)(2)

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) County Road 4A, Naples, ID: Employee working at the east end of an approximately 10 foot deep trench gained access and egress via a wet and uneven slope at the opposite end of the approximately 37 foot long trench.

The cited standard provides:

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.

Facts

Howell testified that Gayton told him that he had climbed into the trench using the spreader bars where the two trench boxes came together (Tr. 62-63, 93). At the hearing Gayton testified that he climbed into the box using the holes in the box as steps (Tr. 177-78; Exh. C-4). Gayton testified that he might have used the angle iron to exit the box after he placed the casing (Tr. 183-85).

Eberle admitted that there was no ladder on the site, but stated that earlier in the day, there was a ramp down to the pump location which was used for access (Tr. 64, 160-164). The ramp was obliterated by the backhoe as it dug towards the east (Tr. 160-61). Gayton confirmed that there was a ramp before the second trench box was placed in the trench (Tr. 178).

Discussion

The evidence establishes that, although there was ramp access into the trench early in the day, the ramp was obliterated by the backhoe before the east trench box was placed in the trench. There was no safe means of access available to Julio Gayton when he climbed down the holes in the eastern trench box pictured in Complainant's exhibit C-4. The citation has been established.

Penalty

CO Howell testified, without contradiction, that an employee climbing the trench box could slip and fall, possibly hitting his head on the metal trench box (Tr. 66). At a height of six feet, Howell stated that such a fall could result in serious injury (Tr. 66).

This item was properly classified as "serious." A penalty of \$800.00 was proposed and is deemed appropriate.

Alleged Violation of §1926.651(k)(1)

Citation 1, item 2 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, indication of failure of protective systems, hazardous atmospheres, or other hazardous conditions:

(a) County Road 4A, Naples, ID: Foreman on site, responsible for conducting daily inspections failed to remove an employee from an approximately 10 foot deep trench which was not adequately protected from cave-ins from wet and sloughing soil.

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. . .

Facts

Howell testified that Eberle, who claimed to be the competent person on site, had not classified the soil in the trench and was unfamiliar with OSHA regulations requiring that trench walls above the top of a trench box be sloped to 18" below the top of the box (Tr. 69-70).

Eberle testified that he has taken safety courses in construction, excavation and environmental hazards (Tr. 142), that he is familiar with OSHA standards relating to trenching (Tr. 144), and that he understands OSHA's system of soil classifications, though he had not "been out to classify soils (Tr. 145-46)." Eberle stated that "[w]e respond to what we find (Tr. 145-46). Specifically, Eberle stated that the standards require a slope of 1-1/2 to 1 in type C soil, and that the slope must be cut 18" below the top of any trench box in use (Tr. 147-48).

Discussion

As a threshold matter I note that the citation specifically refers to Eberle's failure to remove an employee from a 10 foot trench which was not adequately protected from cave-ins, circumstances addressed by §1926.651(k)(2):

Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

The appropriate subsection, (k)(2), was not cited here, and Complainant makes no attempt to address the cited circumstances in her brief. Rather Complainant argues that Eberle was not a competent person, as required under the cited subsection (k)(1). As noted by the Complainant, "competent person" is defined at §1926.650 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.

The evidence shows that Eberle was trained in excavation safety, was familiar with the relevant OSHA standards and soils classifications. Complainant failed to show that Eberle was not a competent person, as contemplated by the cited standard².

Complainant failed to establish the cited violation; citation 1, item 2 is vacated.

ORDER

1. Citation 2, item 1, alleging violation of §1926.652(a)(1) is AFFIRMED as a repeated violation, and a penalty of \$1,600.00 is ASSESSED.
2. Citation 1, item 1, alleging violation of §1926.651(c)(2) is AFFIRMED as a “serious” violation, and a penalty of \$800.00 is ASSESSED.
3. Citation 1, item 2, alleging violation of §1926.651(k)(1) is VACATED.

Benjamin R. Loye
Judge, OSHRC

Dated:

² Complainant’s reliance on this judge’s decision in *Womack Brothers*, __ BNA OSHC __, 97 CCH OSHD ¶31,375 (No. 96-0640, 1997) is misplaced. The cited standard does not require employers to provide competent person training. In *Womack* the employer was cited under the training standard at §1926.21(b)(2).