

Secretary of Labor,
Complainant,

v.

Black Construction Corporation,
Respondent.

OSHRC Docket No. **98-0975**

Appearances:

Alan Raznick, Esquire
Cheryl L. Adams, Esquire
U. S. Department of Labor
Office of the Solicitor
San Francisco, California
For Complainant

Thomas C. Moody, Esquire
Klemm, Blair, Sterling & Johnson
Agaña, Guam
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Black Construction Corp. (BCC) contests a citation issued to it by the Secretary on April 29, 1998. Item 1 of the citation alleges a serious violation of §1926.652(a)(1) for failure to provide an adequate protective system in an excavation. Item 2 alleged a serious violation of § 1926.651(k)(1) or, in the alternative, of § 1926.651(k)2). The Secretary withdrew item 2 and the alternative allegation in her post-hearing brief (Brief, pp. 2-3). Accordingly, item 2 and its alternative are vacated.

The hearing was held on March 15, 1999. BCC stipulated to jurisdiction and coverage (Tr. 5-6). BBC argues that the Secretary's evidence fails to establish that BCC was in noncompliance with § 1926.652(a)(1). For the reasons set out, item 1 of the citation is affirmed.

Background

On November 6, 1997, Anthony Santos conducted an inspection on behalf of the Occupational Safety and Health Administration (OSHA) of a BCC worksite located near the

Guam International Airport (Tr. 8).¹ Santos arrived at BCC's worksite, where a crew was engaged in replacing a manhole and changing the direction of a sewage pipe (Tr. 18).

BCC had excavated a trench that morning (Tr. 37). The trench was located parallel to a public roadway, approximately 8 feet away. As Santos drove up, he saw the hard hat on an employee working in the trench. By the time Santos had parked and walked up to the trench, no one was in the trench (Tr. 10-11).

No protective system to prevent a cave-in was in use (Tr. 27). Santos spoke with the BCC's foreman and its project engineer. He asked why no protective system was being used in the trench. The foreman and the project engineer told him that the company had taken soil samples prior to excavating the trench and had determined that a protective system was not required (Tr. 14, 22-23).

Santos used a fiberglass measuring rod to measure the depth and width of the trench. He measured the depth as being 6½ feet and the width as 4 feet, 2 inches. He did not measure the length of the trench but estimated at the hearing that it was approximately 10 feet long (Tr.15).

Item 1: Alleged Serious Violation of §1926.652(a)(1)

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious

¹ Santos works for the government of Guam. He is permitted to make inspections on behalf of OSHA as part of joint enforcement program with the U.S. Department of Labor (Tr. 6).

physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

The Secretary alleges that BCC committed a serious violation of §1926.652(a)(1), which 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 this ground by a competent person provides no indication of a potential cave-in.

Section 1926.652(a)(1) applies to BCC's construction site. At least one employee was in the trench, and BCC knew that the employee was in the trench. The only element in dispute is the employer's noncompliance with the standard.

BCC argues that the Secretary failed to prove that the trench was greater than 5 feet in depth. This argument is without merit. Santos used a measuring rod to take the dimensions of the trench. BCC offered no evidence of any other measurements made of the trench. The company contends that Santos's testimony regarding the measurements is contradictory in relation to the photographs that he made of the trench (Exhs. C-1 through C-5; Tr. 17, 34). The undersigned does not find it so. Santos was clear that the areas of the trench shown in Exhibits C-2 and C-3 measured 6 feet, 6 inches deep, and the areas shown in Exhibits C-4 and C-5 were less than 5 feet deep. Santos's measurements are accepted as accurate. Santos saw the employee at the Exhibit C-2 area of the trench (Tr. 39).

BCC argues that the Secretary failed to establish that the excavation was not made entirely in stable rock, in which case no protective system would be necessary. BCC contends that the testimony of the Secretary's expert witness, Dr. Alan Peck, is speculative and not supported by reasonable scientific certainty. While the undersigned agrees that Dr. Peck's testimony deserves no consideration in the determination of this issue, she is compelled to conclude that the trench was not excavated in stable rock.

BCC stipulated to Dr. Peck's credentials and qualifications as an expert in soil analysis, as established in the hearing held immediately prior to the one in the present case, *Black Micro*

Corp., (No. 97-1413) (Tr. 41). Dr. Peck's credentials were set out in the decision issued in that case as follows (*Black Micro Corp.*, No. 97-1413, p.4 (citations to the transcript omitted)):

Dr. Peck is a soil specialist and chemist who has worked for the U.S. Department of Labor at its laboratory in Salt Lake City, Utah, for the past 24 years. Dr. Peck received a Bachelor's Degree in chemistry from Brigham Young University in 1953. He received a Master's Degree in 1955 and a Ph.D. in 1962, both from the University of Utah, in metallurgical engineering. Dr. Peck was accepted at the hearing as an expert in soil analysis.

Dr. Peck testified that the trench was excavated in Type B or C soil (Tr. 44). His testimony is based solely on a visual review of the five 3-by-5 inch photographs taken by Santos at the site (Exhs. C-1 through C-5). Dr. Peck admitted that he could give his opinion only "to a limited extent" and that normally he would determine soil classification by analyzing an actual soil sample (Tr. 42). Dr. Peck stated that additional information would be helpful to him in classifying the soil (Tr. 42, 50). His lack of confidence in his conclusions regarding the trench material is evident in this exchange (Tr. 52-53):

Q.: But again, you're not able, with any reasonable scientific certainty, to make an opinion about the composition of rock in this trench; is that correct?

Dr. Peck: I could make an assumption.

Q.: You could make an assumption?

Dr. Peck: Yes.

Q.: But not an opinion?

Dr. Peck: Well--

Q.: Is that correct?

Dr. Peck: I could give an opinion also.

Q.: Would that be supported by reasonable scientific certainty?

Dr. Peck: It would be supported by one fact.

Q.: One fact?

Dr. Peck: Yes.

Q.: That, in your words, is that reasonable scientific certainty?

Dr. Peck: It's not positive, and it is not certainty.

Q.: So it is not dispositive of the issue?

Dr. Peck: Right.

Dr. Peck's testimony is discounted in its entirety. Although he is an expert in soil analysis, he lacked sufficient information with which to form a reliable opinion. Visual inspection of small photographs is an inadequate method of soil analysis.

The Secretary's case is established, however, due to the uncontradicted testimony of Santos that the trench was excavated in previously disturbed soil. BCC's excavation uncovered a PVC pipe that had been previously installed, and BCC was in the process of replacing an old manhole (Tr. 21-22, 24).

Appendix A to subpart P of the 1926 construction standards states:

Type B means:

...

(iii) Previously disturbed soils except those which would otherwise be classed as Type C soil.

By definition, trenches excavated in previously disturbed soil cannot be dug in anything more stable than Type B soil. They cannot be excavated entirely in solid rock. The Secretary has proven that BCC excavated a trench in Type B soil, that the trench was greater than 5 feet in depth, and that no shoring, sloping, or any other form of protective system was used to prevent a cave-in. At least one employee worked in the trench while it was in this condition. BCC violated §1926.652(a)(1).

The hazard created by the failure to comply with §1926.652(a)(1) is that the trench could cave in, crushing and suffocating any employees working in the trench (Tr. 28). The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

The Secretary failed to put on any evidence regarding size, good faith, and history of violations. The calculation of the proposed penalty was not explained.

The gravity of the violation is low. The trench was open for approximately 4 hours (Tr. 37). The record establishes exposure to only one employee. The 10-foot long trench did not exceed 5 feet for its entire length. A ladder was in the trench (Exh. C-1).

Upon consideration of the low gravity of the violation, and crediting BCC with good faith and with a history of no previous violations, it is determined that a penalty of \$500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of the citation, alleging a serious violation of § 1926.652(a)(1) is affirmed, and a penalty of \$500.00 is assessed; and
2. Item 2 of the citation and its alternative allegation are withdrawn by the Secretary and vacated, and no penalty is assessed.

NANCY J. SPIES
Judge

Date: August 9, 1999