
SECRETARY OF LABOR,
Complainant,

v.

ROCKY MOUNTAIN MATERIALS
& ASPHALT, INC.,
Respondent.

OSHRC DOCKET
NO. 99-0441

DECISION AND ORDER

This proceeding arises under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq* (the Act) to review a citation issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to §10(a) of the Act. On January 22, 1999 Respondent was issued one serious citation alleging two violations. First, a violation of the standard set forth at 29 C.F.R. §1986.651(j)(2) with a proposed penalty in the amount of \$825.00. Second, a violation of 29 C.F.R. §1926.652(a)(1) with a proposed penalty of \$3,500.00.

Respondent filed a timely notice of contest and this matter was assigned for E-Z Trial Proceedings pursuant to Commission Rule 29 C.F.R. §2200.200 *et seq*. By order dated April 9, 1999, the parties were directed to participate in a pretrial telephone conference with the undersigned on May 4, 1999. The pretrial telephone conference was conducted as scheduled and Respondent was represented by Mr. Terry L. Burch, Respondent's Chief Financial Officer. Mr. Burch stated that Respondent had defenses to the alleged violations and, therefore, Respondent intended to defend itself at a hearing. Accordingly, by order dated May 5, 1999, a hearing was scheduled to commence at 11:00 a.m., June 15, 1999 in Denver, Colorado. At no time did Respondent object to the time or place of hearing.

The hearing was opened and placed on the record at 11:35 a.m., June 15, 1999. Complainant's representative was present; however, no person representing Respondent was present at the hearing room. Notwithstanding Respondent's failure to appear at the hearing, Complainant's counsel was directed to present evidence in support of a *prima facie* case. The Secretary presented testimony from the compliance officer who observed the alleged violations as well as a video tape of the worksite taken at the time of the inspection. The hearing concluded at 12:20 p.m. No representative of Respondent appeared at the hearing room nor has the undersigned received any message or correspondence from Respondent since the close of the hearing to the date of this order.

The citation issued to Respondent alleges the following violations:

- (1) 29 CFR 1926.651(j)(2): Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary:

- a) 1675 Moveen Hts. Monument, Co.; As the creating contractor, Rocky Mountain Asphalt did not ensure that a 2 foot clearance was maintained between the spoil pile and the edge of the excavation, thus exposing employees to hazards while working in the excavation.

The evidence establishes that Respondent is engaged in construction and falls within the jurisdiction of the Act and the Commission. *See Usery v. Lacy* 628 F.2d 1226 (9th Cir. 1980); *Clarence M. Jones* 11 OSHC (BNA) 1529 (1983). The compliance officer testified that Respondent's employee, Antone Bertram, dug an excavation for the purpose of constructing foundation forms. The excavation was 71 feet long, 9 feet 10 inches deep, eight feet, 5 inches wide and dug in type C soil (Tr. 9,10). Spoils from the excavation were placed within two feet of the excavation wall (Tr. 14). Moreover, employees were observed working in the trench in close proximity to the wall where the spoils were stored and, therefor, exposed to the hazard of falling spoil material (Tr. 11,16,17). According to the compliance officer, the violation had a low gravity factor; that is, a low probability of an injury and a low severity injury (Tr. 19). Moreover, a reduction in the penalty was given due to Respondent's small size. Thus, the proposed penalty in the amount of \$825.00 is assessed for the violation.

- (2) 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 paragraph (b) or (c) of this section:

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a) 1675 Moveen Hts, Monument, Co.: As the creating contractor, Rocky Mountain Asphalt did not ensure that the excavation was dug in accordance with the regulations, thus exposing employees to cave-in hazards.

According to the testimony of the compliance officer who observed this violation as well as the video tape of the worksite taken at the time of the inspection, the south wall of the excavation was approximately ten feet high (Tr. 21) with an employee working in close proximity to the wall (Tr.22,24). The wall was not sloped and consisted of type C soil (Tr. 26). The employee at the bottom of the trench was exposed to the collapse of the trench wall (Tr. 27) with resulting serious injury or death (Tr. 27). The wall was not shored (Tr. 29). The compliance officer considered the violation to present a high gravity factor with a high probability of injury (Tr. 30). Based upon that gravity factor, the Secretary proposes a penalty in the amount of \$3,500.00. Based upon the evidence of record, the citation is affirmed and a penalty in the amount of \$3,500.00 is assessed.

Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are DENIED.

ORDER

1. Respondent is found in default pursuant to Rule 41 of the Commission's Rules of Procedure for its failure to appear at the hearing scheduled in this matter.
2. The evidence of record sustains the Secretary's allegations contained in the complaint and citation.
3. Accordingly, citation 1, item 1, is AFFIRMED and a penalty in the amount of \$825.00 is ASSESSED thereto.
4. Citation 1, item 2, is AFFIRMED and a penalty in the amount of \$3,500.00 is ASSESSED thereto.

Robert A. Yetman
Judge, OSHRC

Dated: September 20, 1999