

SECRETARY OF LABOR,
Complainant,

v.

BLACK CONSTRUCTION CORPORATION
and its successors,
Respondent.

OSHRC DOCKET
NO. 99-0512

APPEARANCES:

Madeleine T. Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

Jehan 'Ad G. Martinez, Esq., Thomas C. Moody, Esq., Klemm, Blair, Sterling & Johnson,
Agana, Guam

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under §10⁹ 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 issued pursuant to §10(a) of the Act.

Respondent, Black Construction Corporation, at all times relevant to this action maintained a place of business at Guam Main Facility and was engaged in the construction business (Respondent's answer). Respondent does not dispute the jurisdictional allegations contained in the complaint (Respondent's Prehearing Statement).

On February 25, 1999 Respondent was issued one serious citation alleging two violations

with a total proposed penalty of \$4,000.00. The citation was the result of a January 21, 1999 inspection of Respondent's worksite located at Camp Watkins Road, Tamuning, Guam.

Citation 1, item 1

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) Camp Watkins Road: Employees were inside a trench excavation and were not provide (sic) with a ladder inside the excavation. Employees were exposed to caveins.

On January 21, 1999, Respondent's employees were installing form work alongside two parallel sewer lines in an excavation (Exh. C-1). Mr. Anthony Santos, a compliance officer employed by the government of Guam and authorized to conduct inspections under the Act pursuant to an agreement between the United States and the government of Guam, (Tr. 7) arrived at the worksite and observed two of Respondent's employees in the excavation (Tr. 11,45). One of the employees, Mr. Baltra, identified himself as the person in charge of the worksite (Tr. 10,11) and the other person was identified as a carpenter (Tr. 45). Mr. Santos measured the excavation and determined that it was 25 feet long, 13 feet wide and 6 feet deep at its deepest point. Santos established these dimensions by use of a "telescopic measuring device" (Tr. 17,18). A ladder was observed lying at the edge of the excavation (Exh. C-1), however, no ladder was in the trench. When asked whether he observed either of the employees exit the trench, Mr. Santos stated that he did not (Tr. 19); however, he later testified that he observed the carpenter leave the trench by climbing "over the excavation" (Tr. 45). Santos also stated that there was "no such thing as a ramp inside the excavation. I didn't see one"¹ (Tr. 46). *See also* Complainant's Exh. C-1.

In order to establish that Respondent failed to comply with the aforesaid standard, the Secretary must prove that (1) the standard applied, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited conditions and (4) the Respondent knew, or

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For purposes of excavations "ramp" is defined at §1926.650(a) as "an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood."

with the exercise of reasonable diligence, could have known of the violative conditions, *Astra Pharmaceutical Products, Inc.* 1981 CCH OSHC ¶25,578, aff'd 681 F.2d 69 (1st Cir 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991 OSHD ¶29,344 (1991) *Carlisle Equip. Co., v. Secretary of Labor* 24 F.3d 790 (1994).

The evidence establishes, without contradiction, that the excavation was in excess of four feet in depth. Whether the trench had a safe means of egress is a disputed fact. The Secretary relies upon the testimony of the compliance officer regarding his observations of the worksite and his conclusion that the excavation did not contain a stairway, ladder, ramp or other safe means of egress. The photographs entered into evidence by Complainant supports the compliance officer's conclusions. *See* (Exh. C-1,C-2,C-3 and C-4). Thus, Complainant has placed on the record the necessary elements to sustain the violation.

Respondent, on the other hand, attempted to establish, through compliance officer Santos, that a "notch" in the excavation wall (*see* Exh. C-1) was, in fact, a ramp designed to provide a safe exit from the trench. Mr. Santos, however, denied that the so-called notch was a ramp or a safe means of exit from the trench (Tr. 46). Based upon the record in this case, it is clear that Respondent has failed to establish, through the testimony of Mr. Santos, that a stairway, ladder, ramp or other safe means of egress was located in the excavation as required by the standard. Moreover, Respondent declined to call any witnesses regarding this item.

Thus, there is a sufficient basis in the record for concluding that the facts asserted by Complainant are more probably true than false. *See, Ultimate Distrib. Systems, Inc.* 10 BNA OSHC 1569,1570 (1982). I am compelled to reach this conclusion because of Respondent's failure to shed any light on the conditions at the worksite or the activities of the employees involved at the time of the inspection.

As stated by the First Circuit Court of Appeals in *Astra Pharmaceutical Products Inc.* 681 F.2d at 74:

While the Secretary had the burden of proving its case by substantial evidence, what constitutes substantial evidence varies with the circumstances. The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case like this is where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See, e.g., Noranda Aluminum, Inc. v. OSHRC*, 593 F.2d 811, 814 & n.5 (8th Cir. 1979) (decision to leave Secretary's case

unrebutted "a legitimate but always dangerous defense tactic in litigation"); *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1026 (5th Cir. 1978). Thus, thin as the underlying evidence was, we find it sufficient in these circumstances.

Since the Secretary has established a *prima facie* case by credible evidence regarding this item, and Respondent has failed to provide any evidence to rebut the Secretary's case, the violation is affirmed. Moreover, the compliance officer stated that employees in the trench would likely sustain "high severity" injuries such as lacerations (Tr. 24). Accordingly, the violation is a "serious" violation within the meaning of the Act. In view of the high gravity factor, that is, the severity of injury and the likelihood of an injury, the proposed penalty in the amount of \$1,500.00 is assessed for the violation.

Citation 1, Item 2

29 CFR 1926.651(j)(1): Adequate protection was not provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face:

- (a) Camp Watkins Road: Employees were exposed in a trench 6 feet deep and were not provided with trench shields to protection (sic) employees from cave-ins.

With this alleged violation, the Secretary is seeking to force Respondent to protect its employees from loose rock or soil that pose a hazard by falling or rolling from an excavation face.

The cited standard reads as follows:

- (j) *Protection of employees from loose rock or soil.* (1) Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

Most occupational safety and health standards include requirements or prohibitions which, by their terms, must be observed whenever specified conditions, practices or procedures are encountered. These standards are predicated on the existence of a hazard when their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). Certain standards, however, contain requirements or prohibitions which, by their terms, need only be observed when employees are exposed to a hazard described generally

in the standard. See, *Rockwell International Corporation*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶124,979 (No. 12470, 1980) [in order for the Secretary to prove a violation of §1910.212(a)(3)(ii), she must establish that the operation of the machine exposed employees to injury]; *Pratt & Whitney Aircraft v. Donovan and OSAHRC*, 715 F.2d (2nd Cir. 1983)). [To show violation of §1910.94(d)(7)(iii) Secretary must show that substances cited, either alone or in combination, pose significant fire, explosion or chemical reaction hazard]. Section 1926.651(j)(1), the standard cited here, is of the latter type. By its own terms, the standard requires that employees must be protected from being struck by rocks or soil "that could pose a hazard by falling or rolling from an excavation face." It is the Secretary's burden to establish that said hazard existed at the worksite and Respondent's employees were exposed to that hazard. Based upon the record in this matter, the Secretary has failed to meet that burden.

The only witness who testified, compliance officer Santos, stated that the excavation did not present a hazard to employees that required shoring or sloping of the trench walls (Tr. 61). (The Secretary declined to cite Respondent for failing to shore or slope the excavation walls pursuant to §1926.652). Thus, the compliance officer, after viewing the worksite, did not believe that employees were exposed to a "substantial likelihood" of serious injury or death in the absence of shoring or sloping the walls of the excavation (Tr.61). Moreover, Santos did not observe any spillage or loose rocks falling from the trench walls, notwithstanding the fact that automobile and truck traffic traveled in close proximity to the trench wall (Tr. 56,57, Exh. C-2). Furthermore, compliance officer Santos did not know how far a spoils pile had been placed from the trench nor did he know whether the trench walls had been "scaled" to eliminate loose rocks (Tr. 58,59,60). Indeed, the Secretary has failed to establish that loose rocks or soil existed or potentially existed at the worksite. For these reasons, the citation item must be vacated.

Findings of Fact

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. Serious Citation 1, item 1 alleging a violation of 29 CFR 1926.651(c)(2) is **AFFIRMED** and a penalty in the amount of \$1,500.00 is **ASSESSED**.

2. Serious Citation 1, item 2 alleging a violation of 29 CFR 1926.651(j)(1) is VACATED.

Robert A. Yetman
Judge, OSHRC

Dated: April 14, 2000