Secretary of Labor,
Complainant,

v.

Complete General Construction Co.,
Respondent.

OSHRC Docket No. **99-1557**

APPEARANCES

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U. S. Department of Labor
Columbus, Ohio
For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Complete General Construction Co. (CGC) is a large highway construction contractor whose headquarters is in Columbus, Ohio. On June 11, 1999, Occupational Safety and Health Administration (OSHA) compliance officers James Denton and Charles Shelton inspected an excavation dug by CGC at a worksite in Waverly, Ohio. As a result of their inspection, the Secretary issued two citations to CGC on August 20, 1999.

Citation no. 1 alleges a serious violation of 29 C.F.R. § 1926.651(j)(2) for failing to locate a spoil pile at least 2 feet away from the excavation. Citation no. 2 alleges a willful violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect employees in an excavation with an adequate protective system.

CGC denies the Secretary's allegations. A hearing was held in this case on April 27 and 28, 2000, in Columbus, Ohio. The parties stipulate jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs.

Background

CGC is a highway construction contractor that employs approximately 500 people. In June 1999 CGC was engaged in widening State Route 23 from four to five lanes, pursuant to a contract with the City of Waverly, Ohio. In order to widen the highway, CGC had to relocate underground water and sewer lines (Tr. 14-15).

On June 11, 1999, CGC was in the process of relocating water lines at the intersection of State Route 23 and Victory Drive (Tr. 275). CGC had dug an excavation that ran approximately 25 to 30 feet north to south along State Route 23 (Tr. 111-112). The south end of the trench terminated at Victory Drive (Tr. 59). CGC's crew consisted of crew leader Gilbert Stevens and laborers Joe Monteith, John Weeks, and a backhoe operator (Tr. 216-217).

OSHA compliance officers James Denton and Charles Shelton arrived at CGC's Waverly worksite at approximately 10:00 a.m. OSHA's Columbus area office had received a telephone call the previous day reporting that employees were exposed to unsafe conditions while working in the trench (Tr. 113, 157). Shelton videotaped the site (Tr. 68). Denton held an opening conference with crew leader Stevens (Tr. 163-164). Shelton took various measurements with an engineering rod (Tr. 73-74).

Shortly after the compliance officers began their inspection, CGC superintendent John Davis arrived. Davis asked Denton and Shelton to stop their inspection until Al Tambini, CGC's safety director, arrived at the site. The compliance officers agreed, and waited approximately 2 hours until Tambini arrived (Tr. 114-115). While they were waiting, Denton and Shelton observed CGC's crew backfill the south end of the trench and move a spoil pile away from the edge of the east wall of the south end of the trench (Tr. 59, 199).

Larry Chitwood, the distribution supervisor for the City of Waverly Water Department, was at the worksite the day of OSHA's inspection. He had videotaped the employees in the excavation prior to the arrival of the compliance officers. Chitwood gave a copy of the videotape to Denton (Exh. C-1; Tr. 16, 34).

Citation No. 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).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.651(j)(2)

The Secretary alleges that CGC committed a serious violation of 29 C.F.R. § 1926.651(j)(2), which provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

It is undisputed that the cited standard applies and that the spoil pile was located directly at the edge of the east wall of the excavation. The spoil pile was approximately 2 feet high (Exh. C-2; Tr. 86, 95). It was composed of soil and small stones. Two employees were working inside the excavation within 2 or 3 feet of the east wall where the spoil pile was located. The spoil pile was in plain sight of anyone at the worksite. Crew leader Stevens was present during the employees' exposure in the excavation (Tr. 119, 121).

CGC argues that 29 C.F.R. § 1926.651(j)(2) does not require employers to place all spoil piles at least 2 feet from the edge of excavations, but only those spoil piles "that could pose a hazard by falling or rolling into excavations." CGC claims that the spoil pile was sloped and "the soil was very stable and there was no sloughing off back into the trench" (CGC's brief, p. 12).

CGC's argument is rejected. The soil in a spoil pile is, by definition, previously disturbed. It is inherently unstable. The court disagrees with CGC's interpretation of the cited standard, whereby the employer first determines whether materials from the spoil pile could fall or roll into the excavation, and then places the spoil pile according to this determination. The court

interprets the standard to require all spoil piles to be placed at least 2 feet from the edge of the excavation.

Sloping the spoil pile does not bring CGC into compliance with 29 C.F.R. § 1926.651(j)(2). The standard requires that the spoil pile either be placed at least 2 feet from the edge of the excavation or that a retaining device be used, or that a combination of both be used. Sloping is not an option under the standard.

The Secretary has established a violation of 29 C.F.R. § 1926.651(j)(2). The Secretary alleges that the violation is serious. 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 physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Compliance officer Denton testified that the hazard created by CGC's noncompliance "is that the loose material could fall in the excavation and strike an employee that's working within the excavation and cause injury" (Tr. 120). The violation is properly classified as 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.

CGC employs approximately 500 employees. The Secretary adduced no evidence of bad faith. CGC has a written safety and health program, and provides safety training to its employees. The Secretary proposed a penalty of $3,500.00 for this item. Denton testified that he gave no credit for history because the Secretary had cited CGC in 1998. Subsequently, Denton discovered that the 1998 citation had been vacated. The Secretary concedes that CGC is entitled to a reduction in penalty based on its history (Tr. 201-203).

The gravity of the violation is moderately high. The presence of the spoil pile directly at the edge of the excavation creates the hazard of soil and rocks falling into the excavation. The excavation was located in an area of heavy vehicular traffic, resulting in vibrations that could increase the likelihood that the spoil pile material would fall into the trench. The hazard is moderated by the fact that CGC sloped back the 2-foot high pile. It is determined that a penalty of $3,000.00 is appropriate.

Citation No. 2

Item 1: Alleged Willful Violation of 29 C.F.R. § 1926.652(a)(1)

The Secretary alleges that CGC committed a willful violation of 29 C.F.R. § 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Paragraph (b) describes the design of sloping and benching systems. CGC did not slope the trench, but the northern part of the trench was benched. The south end of the trench, where CGC employees were observed working, was not benched (Tr. 124-125). The trench walls were vertical (Exhs. C-1, C-2; Tr. 41, 134). Paragraph (c) describes the use of support systems. CGC did not use a protective system in the excavation, although it did have trench boxes available for use on the site (Tr. 141-142).

The excavation does not meet the exception provided for in subsection (i) of the cited standard. It was not made entirely in stable rock. The excavation was dug in previously disturbed soil. Denton described the soil as crumbly, loose, and granular (Tr. 132). He classified the soil as Type B (Tr. 133). John Davis, CGC's superintendent, agreed with this classification (Tr. 306).

The issue is whether the excavation meets the exception provided in subsection (ii) of the standard, *i.e.*, whether the excavation was less than 5 feet in depth. CGC claims that the excavation was not deeper than 4 feet, 9 inches at any point, except for the sump hole, where

CGC contends its employees did not work. CGC concedes that the sump hole was deeper than 5 feet.

The Secretary argues that its compliance officers took three separate depth measurements with an engineering rod in the south end of the trench. The first measurement, taken from the top of the new 6-inch water line installed by CGC, was approximately 6 feet (Tr. 76-78). The second measurement, taken along the south wall of the south end of the trench, was approximately 6 ½ feet deep (Tr. 78). The third measurement, taken at the south end's east wall, was 7 feet deep (Tr. 94). Chitwood observed two employees working in the south end of the trench (Tr. 26).

CGC contends that Tambini and Davis both took measurements at multiple locations in the excavation that ranged from 4 feet, 3 inches to 4 feet, 11 inches (Tr. 278, 387). The company argues that the Secretary's measurements that were over 5 feet were taken in the sump hole.

CGC dug a sump hole in the trench to collect the water draining from the water line when it was disconnected. The sump hole was approximately 2 feet long, 2 feet wide, and 2 feet deep. It was located in the southeast corner of the excavation and was filled with water (Tr. 225-226, 228). There is no evidence that any employee ever stood in the sump hole (Tr. 146, 284-285). To do so would result in being "stuck in mud up to your knees," according to CGC laborer Monteith (Tr. 340).

Regardless of where the compliance officers took the depth measurements, the Secretary is estopped from proving that the excavation exceeded 5 feet anywhere but the sump hole. Rule 36(b) of the Federal Rules of Civil Procedure provides:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

The Secretary admitted in her answer to CGC's request for admission that "the trench referred to in the Citation was less than five feet in depth, except for the sump hole" (Exhs. R-1A, R-1B, request and answer number 5).

Although this admission plainly refers to the 2 foot by 2 foot hole dug to collect the draining water, the Secretary attempts to expand the boundaries of her admission to include areas of the trench where employees were working. At the hearing, Denton stated that he considered

the sump hole to be the entire south end of the trench (Tr. 169). In her post-hearing brief, the Secretary refers to the south end of the trench as the "sump area" (Secretary's brief, p. 9).

The Secretary is bound by her original admission. The admission addresses "the sump hole." The sump hole was identified at the hearing as a specific hole dug by a 2 foot by 2 foot bucket in the trench floor (Tr. 225-227). The dimensions of the hole are demarcated in the record and do not include the entire south end of the trench. It is determined, in accordance with the Secretary's admission, that the depth of the trench exceeded 5 feet only when measured in the 2 foot by 2 foot sump hole.

Exception (ii) under 29 C.F.R. § 1926.652(a)(1) provides that no protective system is required in excavations that are less than 5 feet in depth and where "examination of the ground by a competent person provides no indication of a potential cave-in." Tambini, who is certified as a competent person, inspected the excavation and determined that there was no indication of a potential cave-in (Exhs. R-12, R-13; Tr. 369, 380-381).

Exception (ii) applies to excavations less than 5 feet in depth. According to the Secretary's admission, the trench walls as measured from the trench floor were less than 5 feet. Even though the depth exceeded 5 feet when measured from the sump hole, the trench walls did not exceed 5 feet. The trench was 6½ feet wide at the south end (Tr. 87). The sump hole took up approximately of the width of the trench floor. It is the court's determination that the presence of the sump hole in the trench floor did not remove the trench from the category of excavations less than 5 feet in depth. There was no showing that the hole was immediately adjacent to one of the trench walls. The stability of the trench walls was not compromised by a hole in the trench floor in the way it would be if one side of the hole was coterminous with one of the walls. There is no evidence that employees stood or had reason to stand in the sump hole.

The excavation was less than 5 feet in depth. No protective system was required. Item 1 of citation no. 2 is vacated.

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 citation no. 1, alleging a serious violation of 29 C.F.R. § 1926.651(j)(2), is affirmed and a penalty of $3,000.00 is assessed; and

2. Item 1 of citation no. 2, alleging a willful violation of 29 C.F.R. § 1926.651(a)(1), is vacated and no penalty is assessed.

KEN S. WELSCH
Judge

Date: October 12, 2000