
SECRETARY OF LABOR,
Complainant,

v.

V & W CONSTRUCTION & SERVICE CO.,
Respondent.

OSHRC Docket No. 97-381

E-Z

APPEARANCES:

Marsha Semon, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

William T. Reed, Esquire
Oswald and Reed
Pascagoula, Mississippi
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

V&W Construction & Service Company (V&W) is a section 8(a)¹ small business contractor from Moss Point, Mississippi. Its principal business is environmental projects such as hazardous waste cleanup and asbestos removal. On February 14, 1997, the Occupational Safety and Health Administration (OSHA) inspected V&W's excavation site at the National Guard base in Jackson, Mississippi. As a result of the inspection, V&W received a serious citation for failing to secure the walls of the excavation from possible cave-in as required by 29 C.F.R. § 1926.652(a)(1). OSHA proposes a penalty of \$1,500.² V&W timely contested the citation.

The case was assigned to E-Z trial proceedings pursuant to Review Commission Rules 200-211, 29 C.F.R. §2200.200-211. On May 12, 1997, a hearing was held in Jackson, Mississippi. V&W stipulates that at all times relevant to this proceeding, it was an employer

¹Section 8(a) of the Small Business Act, 15 U.S.C. §637(a).

²Originally, the penalty proposed was \$2,000. At hearing, the Secretary reduced the proposed penalty to \$1,500 because of a computer error (Tr. 6, 157).

engaged in a business affecting commerce within the meaning of §3(5) of the Occupational Safety and Health Act (Act).

The Inspection

In September 1996, the Mississippi National Guard contracted with V&W to remove and replace six underground oil water separators and three underground collection tanks at Thompson Field, Jackson, Mississippi. The contract is to be completed by August 1997 (Exh. R-3; Tr. 148). The oil water separator prevents jet fuel from leaking into the water system and is being upgraded to double-wall separators for environmental purposes (Tr. 57, 83). To perform the contract, V&W used two employees, Lee Woulard, brother of one of V&W's owners, and Darrell Legans, equipment operator. The employees were supervised on-site by Darrin Miles (Tr. 38, 57, 106). The job requires digging a trench to the appropriate depth, removing the old separator, placing a concrete slab in the bottom of the trench, pouring in a layer of sand, placing the new separator on the slab, securing it with straps bolted to the slab, and replacing the dirt in the trench (Tr. 85). The contract's accident prevention plan requires that "sides of all excavations in which employees are exposed to danger from moving ground shall be guarded by a support system, sloping, or benching of the ground or other equivalent means." Also, it requires that excavations in the vicinity of existing buildings "will not be carved below the existing foundation until underpinning and shoring have been installed" (Exh. C-9, p. 8).

On February 13, 1997, V&W excavated and removed the old oil water separator adjacent to the engine shop (Tr. 85). The old separator had been installed in approximately 1980 (Tr. 86). The trench was 9 feet deep, 8 feet wide at the top, 7 feet wide at the bottom, and 16 feet long (Tr. 16). One side of the trench was adjacent to the foundation wall of the engine shop, and the other side ran along a 4-inch thick concrete sidewalk. The trench extended 4 feet below the foundation wall. Along the sidewalk side of the trench, there was an exposed 8-inch storm drainage pipe buried approximately 4 feet deep (Exhs. C-1 through C-6; Tr. 26, 59). According to V&W, shoring was used during the removal of the old separator. However, because of the size of the concrete slab and the new separator, the shoring was removed at approximately 4:30 p.m. on February 13 (Tr. 108-109, 120). The concrete slab, sand, and the new oil water separator were placed in the trench. Before finishing work on February 13, Darrell Legans entered the unshored trench briefly to place the straps over the separator and on the four to six bolts

protruding from the concrete slab (Tr. 57, 84, 120-121). A ladder was placed in the trench for Legans to use (Tr. 121).

On February 14, 1997, Major Roger Gerrard, deputy base civil engineer, observed the trench upon arriving for work at 6:30 a.m. V&W was not on-site (Tr. 86). He observed the new separator with straps on the bolts, but the nuts not tightened down (Tr. 87). He also noted that dirt was sloughing off from under the foundation of the engine shop and from around the drainage pipe. A chain was wrapped around the drainage pipe and secured to a loader approximately 4 feet from the sidewalk side of the trench. Major Gerrard returned to his office to prepare a report for the contracting officer (Exh. C-2; Tr. 87-88).

Upon arriving at the site at 7:30 a.m. with Woulard and Legans, Darrin Miles, V&W's project supervisor, noted the "additional back fill material or additional caving in on the tank" (Tr. 111). He decided to telephone his office for instructions on how to proceed (Tr. 111, 120).

At approximately 8:00 a.m., Major Gerrard and Lt. William Markham, contract specialist with the National Guard, went to the trench site and observed Woulard standing in the bottom of the trench next to the separator (Exh. C-6; Tr. 65-66, 88). Woulard testified that he was standing at the bottom of the ladder attempting to retrieve a chain which had fallen into the trench while lifting the separator (Tr. 126). Woulard exited the trench (Tr. 70, 89). Major Gerrard and Lt. Markham proceeded to locate Darrin Miles who was standing approximately 200 feet from the trench (Tr. 70, 89-90, 111). The three men returned to the trench site and saw Woulard in the bottom of the trench at the ladder (Exh. C-6; Tr. 70, 112). Miles assumed that Woulard had entered the trench to tighten the nuts on the bolts in order to secure the separator to the slab (Tr. 112-113). Miles instructed Woulard to exit the trench (Exh. C-7; Tr. 71).

Upon returning to his office, Major Gerrard telephoned OSHA. Safety Specialist Nathaniel Williams received the call and arrived at the trench site at approximately 9 a.m. (Tr. 14, 57). He observed that the trench was dug in previously disturbed soil and there was "sloughing off" from the sides of the trench. He also noted different colorations of the soil, the soil's high moisture content, and the chain attached to the loader holding the drainage pipe (Tr. 17-18, 26). He classified the soil as Type C and saw no sloping, shoring, or other protective system to prevent cave-ins (Tr. 16-17, 23). No employees were in the trench during Williams' inspection (Tr. 57).

As a result of the inspection, V&W received a citation for violating § 1926.652(a)(1) for failing to protect the walls of the excavation from cave-ins by an adequate protective system designed in accordance with §§ 1926.652(b) and 1926.652(c). In addition to contesting the alleged violation, V&W asserts that the inspection was the result of harassment; it was not in accordance with OSHA's procedures; and the employees were not complying with V&W's safety rules when entering the unshored trench.

Discussion

Preliminary Matters

Harassment

V&W asserts that OSHA's inspection was the result of Major Gerrard's personal animosity towards V&W and its part-owner, Willie Woulard. According to Willie Woulard, Major Gerrard had ongoing verbal disagreements and difficulties with him during contract negotiations and V&W's contract performance (Tr. 149-151). He likened Major Gerrard's action to a "personal vendetta" (Tr. 151). In challenging Major Gerrard's safety concerns, V&W presented evidence that Major Gerrard allowed the base plumber to work in an excavation without shoring or sloping three weeks prior to the hearing (Exhs. R-1, R-2; Tr. 114-115). Major Gerrard, although not V&W's contracting officer, acknowledged prior disputes involving safety concerns with V&W. He admitted to being present when the base plumber entered a partially unshored trench (Tr. 93, 95).

There is no assertion, nor does the record show, that OSHA acted improperly or in an unreasonable manner in its inspection of V&W's trench site. See § 8(a) of the Act, 29 U.S.C. § 657(a). The allegation of harassment involves the motives of Major Gerrard in reporting the trench to OSHA. Willie Woulard's testimony regarding verbal disagreements and difficulties involve matters with the National Guard. It is not shown that there was any unlawful motivation in Major Gerrard's contact with OSHA. Even if personal animosity existed, it does not change the nature of the violative conditions found by OSHA during the inspection, and for the most part, not disputed by V&W. Willie Woulard acknowledges that the trench was a "dangerous situation" (Tr. 149, 152). V&W's allegation of harassment is not sufficient to invalidate the inspection. *See Reich v. Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994). Even an improper motivation on the part of a person filing a complaint is not itself sufficient grounds for

invalidating an OSHA inspection. *Quality Stamping Products*, 7 BNA OSHC 1285, 1289, 1979 CCH OSHD ¶ 23,520, p. 28,504-05 (No.78-235, 1979). Under the Act, OSHA has the duty to inspect work sites even though the inspection is not in response to an employee complaint. See *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1986-87 CCH OSHD ¶ 27,815 (No. 77-3804, 1987) (an anonymous complaint). The issue is not who filed the complaint or his motivation. Rather, the issue is whether there is a reasonable basis to assume the alleged conditions in the complaint exist at the workplace. The complaint by Major Gerrard alleged employees were exposed to a risk of cave-ins (Tr. 13-14). His complaint was supported by OSHA's findings. V&W does not dispute that there was no shoring; an employee was in the trench; or that it was a dangerous situation (Tr. 108, 112, 149). OSHA was justified in responding to the complaint.

Accordingly, V&W's request to dismiss the citation based on harassment is denied.

Validity of the Inspection

OSHA classified the inspection of V&W as a nonformal complaint from the National Guard (Tr. 46). V&W asserts that as a nonformal complaint, the Area Director is required to notify the employer by letter of the complaint and allow the employer to respond before conducting an on-site inspection (Tr. 142). It is undisputed that V&W was not notified in writing prior to OSHA's inspection.

OSHA's internal written procedures for conducting inspections, OSHA Instruction CPL 2.103, *Field Operations Manual (FOM)*, Chapter 1, section C.7.a (Sept. 26, 1994), provides that "if a decision is made to handle a serious nonformal complaint by letter, a certified letter shall be sent to the employer advising the employer of the complaint items and the need to respond to OSHA within a specified time." The plain wording of the FOM permits the Area Director to exercise discretion in scheduling on-site inspections even for nonformal complaints. The FOM allows the Area Director to schedule an on-site inspection if the nonformal referral identifies a hazard of a potentially high gravity in nature, and the inspection can be performed with efficient use of resources. *Id.* at section C.7.d (2). An unprotected excavation which is 9 feet deep certainly presents a hazard of potentially high gravity. As Williams explained, trenching is one of OSHA's national emphasis programs requiring an inspection (Tr. 55).

The Review Commission, in *Mautz & Oren Inc.*, 16 BNA OSHC 1007 (No. 89-1366, 1993), rejected a similar argument regarding a nonformal complaint from the Army Corps of

Engineers. The Commission concluded that section 8(a) of the Act gives OSHA the authority to conduct inspections in response to nonformal complaints and that OSHA's internal written procedures do not give an employer particular rights or defenses in adjudicatory proceedings. *See also FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060, p. 26,573 (No. 13155, 1977)(The guidelines provided by the FOM are intended to promote internal efficiency and not to create an administrative straightjacket.).

Accordingly, V&W's request to dismiss the citation because of an invalid inspection is denied.

The Citation

Alleged Violation of § 1926.652(a)(1)

In litigating an OSHA citation, the Secretary has the burden of proving a violation of a safety standard by a preponderance of the evidence. The Secretary must show that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221-22, 1991-93 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). In contesting the citation, V&W asserts that it did not know the employee was in the unshored trench.

The citation alleges that V&W failed to protect the walls of an excavation from possible cave-in by sloping, shoring, or other protective means. Section 1926.652(a)(1) 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 the section.³

V&W does not dispute, and the record supports a finding, that § 1926.652(a)(1) is applicable to V&W's trench at the National Guard base. An "excavation" is defined as any man-made cut, cavity, or trench formed by earth removal. See 29 C.F.R. § 1926.650(b). The trench dug by V&W was 9 feet deep, 16 feet long, 8 feet wide at the top, and 7 feet wide at the bottom. It was dug in previously disturbed soil. There was dirt sloughing off from the walls of the trench and around the 8-inch drainage pipe. Also, the trench was dug to a level below the

³The two exceptions to requiring a protective system in an excavation involve stable rock or a trench less than 5 feet deep which are not applicable in this case.

foundation wall of the engine shop (Exhs. C-1 through C-6). The lack of sloping, shoring or other protective system to prevent cave-ins on February 13 and 14, 1997, is also not disputed.⁴ V&W was aware of the lack of protective systems at the trench, and employees were observed in the trench by the project supervisor on at least two occasions. Safety specialist Williams classified the soil at the excavation as Type C⁵ soil. V&W's part owner and its project supervisor on-site do not dispute that the condition of the trench was "hazardous" and "dangerous" (Tr. 121, 149, 152).

The issue remaining to establish a violation is whether V&W knew or should have known of the employees in the trench. Miles was not present at the trench when Lee Woulard entered the trench on February 14. He was on the telephone approximately 200 feet away (Tr. 111). Miles was aware of the hazardous condition of the trench, the sloughing off of dirt into the trench, and that two employees were at the trench site (Tr. 111, 121). He testified that he did not instruct Woulard to enter the trench (Tr. 121). However, there is no dispute that Woulard entered the trench twice on February 14, 1997.

An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998, 2000, 1994 CCH OSHD ¶ 30,554 (No. 92-1022, 1994). Miles was within 200 feet of the trench site. He was aware of the condition of the trench and the lack of shoring, sloping or other protection. The trench was in plain view (Tr. 14). Further, Miles knew a ladder was in the trench (Tr. 121). There is no evidence that Miles instructed the employees not to enter the trench (Tr. 121). Miles failed to exercise reasonable diligence in avoiding violative conditions. *See Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2056, 1991-93 CCH OSHD ¶ 29,923 (No. 90-2873, 1992).

In that V&W failed to exercise reasonable diligence, constructive knowledge of Woulard's presence in the trench is imputed to V&W. Additionally, the record establishes V&W had actual knowledge of an employee's exposure in the unshored trench on February 13. Miles acknowledged being present when Darrell Legans entered the trench on the evening of February

⁴ V&W does not raise the affirmative defense of infeasibility in failing to comply with the shoring or other protective requirements of § 1926.652(a)(1).

⁵Type C soil is considered the most unstable soil and is defined at Appendix A, §1926.652. V&W does not dispute the classification. Further, since there was no sloping, shoring or bracing at the excavation which is required for any soil classification except for solid rock, the soil classification is not important to this decision.

13 to place the straps over the separator (Tr. 120-121). The exposure of Legans and Woulard to the unprotected trench is sufficient to establish V&W's knowledge of the violative condition.

Accordingly, a violation of § 1926.652(a)(1) is established.

Unpreventable Employee Misconduct Defense

V&W asserts that the employees violated its safety rules when they entered the unshored trench. Lee Woulard acknowledged that working in an unshored trench violated V&W's safety rules. Darrin Miles testified that V&W has a strict written policy against employees working in an unshored trench. The policy has been in effect for at least five years and is communicated to employees (Tr. 107, 149).

An employer may defend against a violation of a safety standard by establishing the affirmative defense of unpreventable employee misconduct. In order to prevail, the employer must show that it (1) has established work rules designed to prevent the violation, (2) has adequately communicated the work rules to its employees, (3) has taken steps to discover violations, and (4) has effectively enforced the work rules when violations have been discovered. *Capform Inc.*, 16 BNA OSHC 2040, 2043, 1993-95 CCH OSHD ¶ 30,589, p. 42,358 (No. 91-1613, 1994); *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578, 1993-95 CCH OSHD ¶ 30,345, p. 41,841 (No. 91-237, 1994).

The Secretary does not dispute that V&W maintained a safety program, including a safety rule prohibiting employees from entering unprotected trenches. Although a copy of the safety rules was not made part of the record, safety specialist Williams described V&W's safety program as "average" (Tr. 45). There was no citation issued to V&W for an inadequate safety program. Lee Woulard, the employee in the unshored trench on February 14, acknowledged that he was aware of the safety rule and had received safety training (Tr. 125-126). His explanation for being in the trench was to retrieve a chain which had fallen into the trench while installing the new separator.

Even assuming V&W has an adequate safety rule prohibiting employees from working in an unprotected trench, and such rule was communicated to employees, V&W's employee misconduct defense still fails. There is no showing that the safety rule was enforced by V&W, and steps were taken to discover violations of the safety rule. V&W offers no evidence of its enforcement of safety rules including showing a disciplinary program for violations of the rules.

Lee Woulard has been employed by V&W for ten years and is the brother of its part owner (Tr. 124-125). It is not shown that Woulard was reprimanded or suffered any repercussion for entering the trench. Woulard did not show concern about being disciplined. In fact, Woulard is currently supervising work at another site (Tr. 119). On February 13, the record is also clear that Darrell Legans entered the unshored trench with the knowledge of Miles, project supervisor (Tr. 120-121).

To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred. *Capform, Inc.*, 16 BNA OSHC at 2043, 1993-95 CCH OSHD at p. 42,358 (evidence that one of two employees in violation was “chewed out” was not sufficient); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2008, 1991-93 CCH OSHD ¶ 29,223, pp. 39,129-30 (No. 85-369, 1991) (evidence showed “no set policy on enforcement”). Here, the record fails to show that V&W has a policy of enforcement or disciplinary action for violations of safety rules.

Also, V&W offered no evidence as to steps taken to uncover violations of its rules. V&W has “an obligation to inspect the work area, to anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence.” *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶ 25,129, p. 31032 (No. 76-4627, 1981). The lack of protection from cave-ins was open and clearly observable. There was a ladder in the trench providing access.

Accordingly, a defense of unpreventable employee misconduct is not established

Serious Classification

In determining whether the violation of § 1926.652(a)(1) is serious within § 17(k) of the Act, the record must show that V&W knew or should have known, with the exercise of reasonable diligence, of the presence of the violation and there was a substantial probability that death or serious physical harm could result from the condition.

As discussed, V&W knew of the lack of a protective system in the trench and knew or should have known of employees’ exposure to the unshored trench. The lack of sloping or shoring and employee exposure were visible and detectable by V&W.

As for the expected injury, the issue is whether the resulting injury would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157, 1989 CCH OSHD ¶ 30,148, p. 41,478, n. 5 (No. 91-862, 1993). The failure to provide adequate protection for the walls of a 9-foot deep trench exposed two employees to possible cave-in which could have reasonably been expected to cause serious injury or death. Although considered brief exposures by compliance specialist Williams, there is no way to predict a possible trench cave-in or collapse. Williams determined the exposures to be ten minutes and two minutes (Tr. 57). The duration of an employee's exposure is not determined by the seriousness of the violation; it relates rather to the gravity factor in assessing a penalty. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1047, 1981 CCH OSHD ¶ 32,057 (No. 76-4765, 1981) (five to ten minutes in an unsafe trench resulted in a serious violation and a \$1,000 penalty). *See also Flint Engineering & Const. Co.*, 15 BNA OSHC 2052, 2056, 1991-93 CCH OSHD ¶ 29,923 (No. 90-2873, 1992).

Accordingly, a serious violation is established.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

OSHA proposes a penalty of \$1,500. V&W is a small employer with twenty employees, three employees were working at the National Guard base (Tr. 156). V&W has been in business for ten years and has no prior history of violations (Tr. 147, 157). Willie Woulard testified V&W has had no accidents, lost work hours, or workers' compensation claims (Tr. 147). OSHA described V&W's written safety programs as average. As for the gravity, the record establishes that two employees were exposed to the unprotected trench and that their exposure was brief, ten minutes and two minutes. The court finds a penalty of \$1,000 reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Item 1 of the serious citation, in violation of § 1926.652(a)(1), is affirmed and a penalty of \$1,000 is assessed.

KEN S. WELSCH
Judge

Date: June 13, 1997