



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

E. P. GUIDI, INC.,

and

HAINES & KIBBLEHOUSE, INC.,

Respondent.

OSHRC DOCKET NOS. 04-1055 &
04-1056

APPEARANCES:

For the Complainant:

Judson H. P. Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania

For the Respondent:

James L. Curtis, Esq., Seyfarth Shaw LLP, Chicago, Illinois

Before: Administrative Law Judge: Covette Rooney

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondents, E. P. Guidi, Inc. (Guidi) and Haines & Kibblehouse, Inc. (H&K), at all times relevant to this action maintained a place of business at the site of a Walgreen's store under construction at 12052 Bustleton Avenue, Philadelphia, Pennsylvania, where they were engaged in the installation of a sewer line. Respondents admit they are employers engaged in a business affecting commerce and are subject to the requirements of the Act.

On April 15, 2004, a H&K employee was injured when a trench at the Walgreen's worksite collapsed. Following the accident, the Occupational Safety and Health Administration (OSHA) initiated an inspection. As a result of that inspection, both H&K and the general contractor on the site, E.P. Guidi, were issued citations alleging violations of the Act. By filing a timely notice of contest Respondents brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Prior to the hearing, the Secretary withdrew Citation 1, item 2. Citation 1, item 1, alleging a "serious" violation of §1926.652(a)(1) of the Act remains at issue. On March 21-23, 2005, a hearing was held on

that matter in Philadelphia, Pennsylvania. The parties have submitted briefs on the issue and this matter is ready for disposition.

OSHRC Docket 04-1056

FACTS

Prior to April 15, 2005, H&K completed a 12 foot deep sewer hookup to the sanitary sewer main in Byberry Street running in front of the Walgreen's building site (Tr. 451-52). On April 15, H&K intended to run a gravity fed four inch cast iron sewer line up to the building under construction (Tr. 54, 452). The line was to slope at a 1% or 2% slope, or 3/4 of an inch per each three foot section towards the street (Tr. 456, 465). The trench, therefore, was up to a couple of feet deeper at the Byberry end of the trench than at the building site (Tr. 82-83). Charles Morgan, H&K's general foreman (Tr. 385), testified that after the trench is dug, between 3 and 6 inches of stone bedding is placed in the trench (Tr. 453). The sling man sets the pipe in the trench, and the pipesetter guides the pipe into the bell end of the previous length of pipe (Tr. 454-55, 457). A third man follows behind and smooths and compacts the backfill (Tr. 457).

On April 15, 2005, George Illingworth a laborer employed by H&K (Tr. 44), testified that no bedding was used in this trench (Tr. 57; Exh. R-13, pp. 2, 3, 4, 5; R-12, pp. 3, 4, 6). Illingworth stated that he used the Ramex, or compactor to compact the dirt (Tr. 71). It was also his job to break up the backfill after it was dumped onto the pipe to make it easier for Morgan to run the Ramex over it (Tr. 55, 58, 60, 68). Illingworth testified that he was in every portion of the trench at some point on April 15 (Tr. 71, 130; Exh. GX6-14). He stood away from the front end loader, standing either on the backfill on the Byberry end of the trench, or on the trench floor nearer the building site, while backfill was added to the trench (Tr. 130, 133, 137). In addition to Charles Morgan, he observed another laborer, Jimmy Evers, and a plumber also working in the trench (Tr. 80; Exh. GX6-18). Illingworth worked in the trench for approximately three hours, entering and exiting the trench a number of times during the day (Tr. 69-71, 80). He would climb out from either the Byberry end or the building end of the trench, depending on his reason for exiting (Tr. 69-71).

The trench walls were vertical, and no protective measures were in place (Tr. 87). Illingworth noted that, as one faced Byberry, a portion of the right hand wall of the trench was wet (Tr. 91). Illingworth, who is 5'9", did not know how deep the trench was, but stated that it came approximately to his chin (Tr. 84-85, 118-21). Illingworth's chin was measured at 61" (Tr. 128). Illingworth testified that he was working in the trench watching the backhoe operator throw backfill into the trench when he saw the trench start to crack (Tr. 55, 58, 60-61, 77). When the trench collapsed, Illingworth was buried up to

the bottom of his rib cage, and suffered serious injuries including a lacerated liver, a bruised spleen, a cracked rib and four lumbar fractures of his back (Tr. 61-63).

Wylie Hinson, the OSHA Compliance Officer (CO) testified that when he arrived at the Walgreen's worksite at noon on April 15, 2005, after the accident, he measured and diagramed the cited trench (Tr. 187; Exh. R-3, p. 8). According to Hinson, the trench was excavated in Type B soil (Tr. 219). It was 63 feet, 6 inches from the building to the street, and was between 42 and 45 inches wide (Tr. 187). Hinson used a tape measure to measure the depth and width of the trench while standing on an area of "blacktop" across the trench from the portion of the trench which collapsed. At that point, the trench was 32 feet in from the street (Tr. 188-89, 193, 279, 306, 353, 365, 463; Exh. GX6-3, GX6-4). Hinson found that the trench was 5 feet, 6 inches at that point (Tr. 182, 189, 194). Hinson further testified that he took a second measurement three feet towards Byberry Street; at that point the trench was 4 feet, 6 inches deep (Tr. 192). The trench walls were not benched, sloped or shored (Tr. 201, 222). A portion of the trench wall on the side which collapsed was wet, and a small amount of water pooled in the bottom of another portion of the trench (Tr. 211, 214, 223; Exh. GX6-6, GX6-7, GX6-8).

Charles Morgan, the foreman, identified himself as the "competent person" on the site (Tr. 296-97, 359, 443-48; Exh. R-25). Morgan testified that he was responsible for the job safety of H&K employees (Tr. 387), and conducted an inspection of the trench the morning of the collapse (Tr. 298, 449). Though CO Hinson testified that Morgan told him that his thumb test showed the soil to be type C, Morgan testified at the hearing that he found the soil was Type B (Tr. 299, 413, 450). Morgan testified that without bedding or backfill, the trench at the Walgreen's site was 5 feet deep (Tr. 391). He did not measure the trench, but believed he could tell the depth of the trench from his previous experience in trenches (Tr. 459-60). Morgan further stated that the trench was necessarily less than 5 feet deep once the bedding and fill was added (Tr. 391). Morgan stated that there was no reason for anyone to be in the trench before the fill was added (Tr. 453-454). After observing the condition of the soil and estimating the depth of the trench at 5 feet, Morgan determined that it was unnecessary to use any protective system in the trench (Tr. 392-93, 407-08).

Morgan testified that backfill had already been placed over the pipe in the portion of the trench which collapsed, but admitted that photographs showed that the area which should have been about 4 feet deep actually appeared to be approximately 5 feet deep (Tr. 476-85; Exh. GX8-7; *see also* testimony of Joseph Pyott, Tr. 612-615). Morgan further admitted that there did not appear to be any bedding underneath or beyond the end of the pipe in the cited trench (Tr. 503-04; Exh. R-13, p. 3).

Joseph Pyott, H&K's risk manager (Tr. 599), testified that he measured and photographed the cited trench on April 15, 2004 (Tr. 601). Pyott testified that the walls of the trench were vertical and that there was no benching or sloping visible in the area of the collapse (Tr. 606-608, 619). He also stated that an area on the same side of the trench which collapsed was wet, and that he could see water dripping down the wall (Tr. 609-10). Pyott testified that although the photograph of the trench measurement in the area of the collapse appears to show that the trench was 5 feet deep, the tape measure actually read 4 foot, 9 inches (Tr. 615-16, 640; Exh. GX8, p. 5). Pyott further stated that a photograph showing the depth of the trench at 5 feet, 1 inch (Exh. GX8, p. 6) was inaccurate, because the shovel handle he was using to mark the lip of the trench was "concave" and was not sitting flush (Tr. 632-33, 644). Pyott testified that had he wanted to take a specific measurement of the depth of the trench he would not have used the shovel handle (Tr. 633). Pyott testified that he did not believe that there was any three foot stretch of the trench where the depth would have varied a foot in depth, except at the end of the pipe (Tr. 642-43). He testified, however, that where the backfill ended, at "the point where they were working it would have dropped off, yes." (Tr. 642).

John Edwards, the site superintendent for E.P. Guidi, filled out an accident report on April 15, 2004, in which he estimated the depth of the vertical trench at between 4 feet, 6 inches and 5 feet, 6 inches (Tr. 341; Exh. GX4, HKG000324). During the inspection, he told CO Hinson that he had seen Illingworth working in the trench, which, at that point, was approximately shoulder height, or around 5 feet deep (Tr. 340). At the hearing Edwards testified that he did not inspect the trench until after the collapse, and never actually measured the trench (Tr. 665, 701). Finally, Edwards' reports describe heavy rain throughout the day on the two days preceding the accident (Tr. 691, 695-97; Exh. GX4, HKG000322, HKG000323).

DISCUSSION

Serious citation 1, item 1 alleges:

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 29 CFR 1926.652(c):

a) 12052 Bustleton Avenue – An employee making a connection in an excavation with vertical walls approximately 5 feet 3 inches in depth¹ was not protected from cave-ins by an adequate protective system on or about 4/15/04.

¹ CO Hinson testified that the specific description of the violation in the citation, indicating that the cited trench was 5 feet 3 inches in depth was a cut and paste word processing error (Tr. 315, 354). Hinson obtained depth measurements of the trench at 5 feet 6 inches, and 4 feet 6 inches, and intended the citation to read 5 feet 6 inches (Tr. 319-20). Because the depth of the trench was fully tried at the hearing, Respondent's suffered no prejudice from the clerical error in the citation.

The cited standard 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 the ground by a competent person provides no indication of a potential cave-in.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.

Respondent's argue that the cited standard is not applicable in this case because the cited trench meets the criteria of subparagraph (ii), in that it was less than 5 feet in depth, and gave no indication of having a potential to cave in.

In order to establish the applicability of §1926.652(a)(1) the Secretary has the initial burden of showing that an employee in an excavation was not protected from cave-ins by a protective system. The record establishes that H&K's employees moved freely throughout the trench. Illingworth testified that he worked in the trench all morning, exiting from both the street and the building ends of the trench. *See, Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶30,303, p. 38,886, (No. 86-0274, 1993)(Exposure element is shown when employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces). Illingworth testified that another laborer, and the foreman, Morgan, also worked in the trench. Morgan testified that, as the pipesetter, he fit the new sections of pipe into the previously laid section while standing in the trench. Employee exposure has been established.

The Secretary's assertion that the vertically walled trench had no protective systems in place is uncontested.

Once these facts are established, the burden of proof shifts to H&K to establish by a preponderance of the evidence that it falls under the exception provided in subparagraph (ii). *See C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1996 CCH OSHD ¶31,129 (No. 93-3177, 1996); *Revoli Constr. Co, Inc.*, 19 BNA OSHC 1262, 2000 CCH OSHD ¶32,189 (No. 00-315, 2001)(ALJ); *Drum Constr.*, 18 BNA OSHC 1927, 1999 CCH OSHD ¶31,900 (No. 98-1501, 1999)(ALJ). CO Hinson testified that he measured the trench at 5 feet 6 inches at one point. The Secretary provided the COs contemporaneous documentation

of his measurements. Hinson had no reason to fabricate his testimony, and appeared sincere on the witness stand. Respondent itself provided photographs documenting that the trench was, at one point at least, 5 feet 1 inch deep. Respondent's attempts to impeach the accuracy of its own documentation are unconvincing. Respondent's witnesses were not forthcoming during their testimony, which appeared rehearsed. Moreover, it is inconceivable that H&K's own risk manager would not try to get an accurate measurement of the trench depth during an accident investigation. It is further noted that the measurements provided at the hearing were taken near the area of the collapse, 32 feet in from Byberry Road. The record shows that H&K tied the line being buried into the deeper main in the street. The witnesses testified that the gravity fed sanitary sewer was laid at a 1% to 2% grade, and that the trench was shallower at the point where it collapsed, and where it was measured, than it had been nearer the street, where the employees had been working earlier that morning.

Taken in the light most favorable to Respondent, the evidence does not show that the cited trench was less than 5 feet in depth. The standard, therefore, is applicable. Because employees worked in the trench without benefit of a protective system designed in accordance with paragraph (b) or (c) of the standard, non-compliance with the standard is established. Finally, it is clear that H&K's foreman knew, or should have known of the violative condition. In order to show employer knowledge of a violation the Secretary need only show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). Reasonable diligence involves several factors, including an employer's "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. 31,032 (No. 76-4627, 1981). Morgan and his pipe crew were working in a trench which Morgan himself judged to be about 5 feet deep. It had been raining heavily during the two days preceding April 15, and a portion of the trench wall was wet. Under these conditions, a reasonably diligent employer would have ascertained the exact depth of the trench to make sure that its employees were protected and that the requirements of §1926.652(a)(1) were being met.

The violation is established.² H&K stipulates that the violation is "serious" (Tr. 63). The record establishes that the gravity of the violation is high. Three H&K employees worked in the cited trench throughout the morning of April 15, 2004. No means were taken to protect employees, resulting in a cave-

² The Secretary also alleges that H&K's competent person failed to accurately assess the cave-in potential resulting from wet conditions on the job site. Because the cited trench was not shown to be less than 5 feet in depth, it is unnecessary to address this issue further.

in, which caused severe injuries to one of H&K's employees. The proposed penalty of \$4,500.00 is deemed appropriate and will be assessed.

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FACTS

Respondent E.P. Guidi, Inc. was the controlling, or prime contractor on the Walgreen's site (Tr. 50, 177; Exh. GX5). Guidi acted as the contract manager for the developer, scheduling the work, and coordinating the subcontractors' performance (Tr. 423-25, 473, 475; Exh. GX5). Guidi's superintendent, John Edwards, was on the site every day (Tr. 51, 178, 473). Edwards ensured that the work was done according to the drawings, helping H&K identify existing piping and directing H&K's placement of the new pipe they were burying (Tr. 51, 102-03). H&K's contract with Guidi provides that Guidi has the authority to direct H&K in the time, order, and manner of its performance of the contract (Tr. 561-62; Exh. GX5, p. 5, Art. 13). It had authority to direct changes in the work (Exh. GX5, p. 4, Art. 10). It has the express authority to determine whether H&K's performance might delay the completion of the project, and to withhold payment in that event (Exh. GX5, p. 3 ¶E.6). In regard to employee safety, the contract states that:

. . . it is the responsibility of the SUBCONTRACTOR to proceed with all operations in accordance with the prescribed accident prevention program, and GUIDI will monitor such compliance.

The SUBCONTRACTOR shall be responsible for the safety of persons and property, and compliance with all Federal State, and Local statutes, rules regulations and orders, relating to the conduct of his work, and shall not wait for, or expect, direction from GUIDI for compliance with said statutes, rules regulations and orders. The SUBCONTRACTOR shall be responsible for the payment of fines, levied against the Principal A/E or GUIDI for deficiencies relating to SUBCONTRACTOR's conduct of his work. The SUBCONTRACTOR shall indemnify and hold harmless the Principal, A/E or GUIDI in accordance with the provisions of this article.

Dennis Detweiler, an estimator/project manager with H&K (Tr. 543), testified that he negotiated H&K's contract with Guidi (Tr. 544; Exh. GX5). According to Detweiler, it was the parties intent that H&K be responsible for the safety of its own employees at the Walgreen's site (Tr. 545). H&K did not intend to give any control or authority to Guidi on safety issues (Tr. 545).

The subcontract between EPG and H&K incorporates the prime contract between Guidi and the developer, BB Development (Exh. GX5, p. 3, Art. 2). The prime contract states, *inter alia*, that:

10.1.1 The contractor [GUIDI] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

* * *

10.2 The Contractor [GUIDI] shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
1. employees of the work and other persons who may be affected thereby; . . .

* * *

10.2.6 The Contractor [GUIDI] shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated . . .

(GX7, Exh. H at p. 34-35).

John Edwards testified that it was his job to make sure that the work at the Walgreen's site was proceeding in accordance with the plans (Tr. 671-72). Edwards was not designated as a safety coordinator at the site, though he had the authority to make safety recommendations should he observe a dangerous condition (Tr. 673-75, 684, 704). Although he had the authority to do so, Edwards did not believe he had any responsibility to ensure that H&K complied with its own safety program (Tr. 678-69, 681). Edwards, Guidi's sole representative on the site, did not, in fact, advise H&K's pipe crew in safety matters (Tr. 103, 674, 676, 682). Specifically, Edwards did not make any recommendations about using protective measures in the cited trench prior to its collapse, as he did not observe a hazardous condition (Tr. 674, 710). Moreover, had he observed a hazardous condition, he did not believe he had the authority to stop H&K's work (Tr. 704). Although Edwards observed the trench on April 15, he did not inspect it until after the collapse had occurred (Tr. 700-01, 708). Edwards told CO Hinson that he was not a trencher, and was not familiar with OSHA trenching regulations (Tr. 326). He relied on H&K to comply with the safety regulations specifically applicable to their industry (Tr. 709, 719). Finally, H&K's foreman did not believe that Guidi had the authority to order him to take additional safety precautions (Tr. 474).

Christopher Bleeker, a project manager with Guidi, testified that Guidi performs no construction work, and acts solely as a construction manager, not a general contractor (Tr. 736-38). It subcontracted out all the work on the Walgreen's site; its sole function was to monitor schedules and costs and to act as the owners' intermediary (Tr. 739). Bleeker testified that it did not attempt to monitor H&K's compliance with its safety program (Tr. 731).

Discussion

The facts tend establish that Guidi had overall contractual authority for all aspects of the project management. In terms of the breadth and scope of the functions which Guidi contracted to perform, its

role at the site was not appreciably different from that of the employers in the other cases whom the Commission found to have broad administrative and coordination responsibility. Guidi's responsibility for the administration and coordination of the construction work, inspection for conformity to contract specifications, certification of work for payment, processing of change orders, and monitoring the schedule and maintaining job progress, are all indicia of what the Commission has termed "far-reaching or global responsibility for diverse activities at the site". See, *Kulka Constr. Mgmt. Corp.*, 15 BNA OSHC 1870, 1991-93 CCH OSHD ¶29,829 (No. 88-1167, 1992); *Fleming Constr. Inc.*, 18 BNA OSHC 1708, 1999 CCH OSHD ¶31,809 (No. 97-0017, 1999).

Nonetheless, its contractual authority lacks those indicia of control on which the Commission has relied in those cases in which the construction standards were found applicable to employers performing solely administrative duties on a construction site. While it is true that Guidi's contract with BBD includes an obligation to review and approve the safety programs developed by its subcontractors, there is no evidence that Guidi was expected to examine the subcontractor's safety programs for either content or substantive adequacy. In practice, Guidi did not prescribe safety measures for the worksite; it merely ensured that the subcontractors had their own safety programs, in the course of performing its contractual obligations to inspect the work and to "coordinate" the safety programs of the trade contractors. The contract does not establish that Guidi had any authority to stop work, or was empowered in any way to compel compliance by contractors even in those areas for which it had contractual responsibility. Neither Guidi and H&K employees believed that Guidi's superintendent had any authority to direct the means or methods by which H&K accomplished its work. See, *Kulka Constr. Mgmt. Corp.*, *Fleming Constr. Inc.*, *supra*.

The Secretary has not shown that Guidi was a "controlling employer" for purposes of liability under the Act.

Moreover, assuming arguendo, that Guidi was ultimately responsible for safety on the Walgreen's site, Guidi can only be held liable for H&K's violation of §1926.652(a)(1), if the Secretary establishes that Guidi knew or should have known of the violative conditions. The Secretary asserts that Guidi had constructive knowledge of the violations because Edwards could have known of the hazard if he had inspected the trench. However, a controlling employer is not required to make continuous inspections of the worksite to fulfill its supervisory responsibilities. When a task is routine and employees are experienced, a supervisor should normally be permitted to rely upon the employees to perform their work correctly without the need to inspect their work in every instance. Cf. *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1982 CCH OSHD ¶26,128, (No. 76-2636, 1982). It is particularly unnecessary to

impose an inspection duty upon a supervisor when there is no indication that employees in the past had failed to perform their tasks correctly. H&K was an experienced trenching firm. Guidi had no trenching expertise. H&K had the primary responsibility for the safety of its employees, in this case, to ascertain the integrity of the soil, and to ensure that the depth of the trench did not exceed 5 feet. Nothing in the record suggests that H&K had shown themselves to be incompetent. The record establishes only that Edwards observed employees working in the cited trench, which appeared to be approximately shoulder height. Nothing in the record suggests that the violation should have been readily apparent at that point, or that the sight of an employee in the trench should have triggered further investigation.

Because there is no evidence that Edwards was should have been aware that H&K had exceeded the 5 foot limit imposed by the cited standard, or that he knew of the wet soil conditions in the trench, Guidi's knowledge of the violation has not been established, and citation 1, item 1 must be dismissed.

ORDER

OSHRC Docket 04-1055

1. Citation 1, item 1, alleging violation of 29 CFR 1926.652(a)(1) is AFFIRMED and a penalty of \$4,500.00 is ASSESSED.
2. Citation 1, item 2, alleging violation of 29 CFR 1926.651(h)(1) is VACATED.

OSHRC Docket 04-1056

1. Citation 1, item 1, alleging violation of 29 CFR 1926.652(a)(1) is VACATED.
2. Citation 1, item 2, alleging violation of 29 CFR 1926.651(h)(1) is VACATED.

/s/

Covette Rooney
Judge, OSHRC

Dated: August 16, 2005