



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

AUGUST WINTER & SONS, INC.,

Respondent.

OSHRC DOCKET NO. 05-0536

APPEARANCES:

For the Complainant:

Leonard A. Grossman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Gary Winter, pro se, August Winter & Sons, Inc., Appleton, Wisconsin

Before: Administrative Law Judge: James H. Barkley

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").

Respondent, August Winter & Sons, Inc. (Winter), at all times relevant to this action maintained a place of business at 230 S. Madison Street, Green Bay, Wisconsin, where it was installing drain tiles as part of a renovation project for the YMCA. Winter admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 6).

On March 3, 2005, the Occupational Safety and Health Administration (OSHA) conducted an inspection at Winter's Green Bay work site. As a result of that inspection, OSHA issued a citation alleging violation of §1926.651(e) of the Act. By filing a timely notice of contest Winter brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On August 10, 2005, a hearing was held in Milwaukee, Wisconsin. No briefs were requested and this matter is ready for disposition.

Alleged Violation of §1926.651(e)

Serious citation 1, item 1 alleges:

29 CFR 1926.651(e): Employee was not prohibited to be underneath loads handled by lifting or digging equipment:

a) At the site, an employee installing drainage tiles was under the load while directing the operator placing gravel/stone.

The cited standard provides:

Exposure to falling loads. No employee shall be permitted underneath loads handled by lifting or digging equipment. Employees shall be required to stand away from any vehicle being loaded or unloaded to avoid being struck by any spillage or falling materials. . . .

Facts

On March 3, 2005, OSHA Compliance Officer (CO) Kelly Bubolz conducted a scheduled construction inspection at Winter's YMCA construction site in Green Bay (Tr. 18). As Bubolz passed through the construction staging area, she could see into an open excavation where employees were working in front of the existing building (Tr. 19-20; Exh. C-1). Bubolz testified that Winter's foreman, Chris Fezatte, was on his knees in a shallow trench at the bottom of the excavation holding down a length of plastic corrugated tubing (Tr. 21-22, 31, 34, 77-78). Fezatte held the drain tubing with one foot while he waved in an excavator bucket of stone fill (Tr. 21-22, 24, 81). According to Bubolz, Steve Renikow, an excavator operator for Ostrenga Excavating, brought the bucket over Fezatte's head before dumping it onto the tubing in the trench (Tr. 22, 25, 76).

After Bubolz completed her opening conference with the general contractor, she entered the excavation where Fezatte and Renikow were working (Tr. 103, 106). Bubolz told Fezatte she had observed the bucket going over his head (Tr. 105). Fezatte disputed Bubolz's observation, stating that only the excavator's knuckle had gone over his head, not the load or the bucket (Tr. 105). Nonetheless, Fezatte signed a statement Bubolz had previously prepared, which said he had the load brought in over his head (Tr. 115).

Steve Renikow also signed the statement Bubolz had prepared (Tr. 115). In July, 2005, however, Bubolz's office, believing the statement to be inadequate, had Renikow fill out a statement form (Tr. 116-17; Exh. C-3). On that form, and at the hearing, Renikow stated that the bucket never passed over Fezatte's head (Tr. 82, 93-94, 99). As Fezatte knelt in the trench to Renikow's left, Renikow swung the excavator bucket to his right rear, where he picked up a bucket of fill (Tr. 80, 85-86). Renikow then watched for Fezatte's signal, and when he was ready, Renikow swung the bucket towards the end of the

trench on the side of the excavation opposite Fezatte. He then began sprinkling stone over the tubing, gradually bringing the bucket in towards Fezatte's position (Tr. 60, 77, 80). Renikow could see Fezatte the entire time he was laying the stone (Tr. 81, 88). He brought the bucket in at Fezatte's eye level, until the teeth of the bucket came to within two feet of Fezatte (Tr. 85, 87). Renikow then emptied the remainder of the bucket at Fezatte's feet (Tr. 82-83).

At the hearing Fezatte likewise testified that the bucket was never over his head, stating that he could see the bucket coming as he looked over his right shoulder while facing away from the excavator (Tr. 81, 124). As Renikow brought it towards him, the bucket got to within approximately two feet of him (Tr. 85, 88, 124). Fezatte testified he did not know he had the option *not* to sign the statement prepared by, and presented to him by CO Bubolz (Tr. 134). According to Fezatte, Bubolz presented the statement to him on a clipboard, indicated that she had seen something he was unaware of and told him to sign it (Tr. 134).

Discussion

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. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). In this case, the Secretary failed to demonstrate that Winter failed to comply with the cited standard.

Both the employees involved in the cited activity convincingly described the manner in which the fill operation was conducted, stating that the excavator bucket never passed over Mr. Fezatte's head. The CO's testimony, on the other hand, does not entirely conform either to the physical layout of the job site as depicted in her photograph, or to the description of the job being performed. The testimony establishes that Fezatte was at the end of the trench closest to the excavator, and that the bucket was dumping gravel in front of him (Tr. 25-26, 31, 59-60). It appears from the testimony, the photograph of the site, and Renikow's diagram of the work area that the excavator operator would most likely have swung the bucket to the far end of the drain pipe in front of Fezatte without ever passing the bucket over Fezatte's head (Exh. C-1, C-3). Both the CO and the employees stated that the bucket was spreading stone down the length of the trench towards Fezatte. As the operation was described, the only time the bucket might have passed over Fezatte's head would have been as Renikow drew it back, empty, to refill. There would be no reason for the bucket to pause over Fezatte's head for two minutes as Bubolz states (Tr. 27, 33, 61).

As CO Bubolz faced the excavation, the excavator was located to her left on a ramp accessing the excavation. The trench where Fezatte was kneeling was located in front of her, further into the excavation (Tr. 28-29). Bubolz estimated that she was in a staging area 35 feet away and 10 feet above Fezatte (Tr. 28-29, 102). Her belief that the excavator bucket passed over Fezatte's head could have been the result of her perspective. From her vantage point, an excavator bucket suspended above the excavation immediately to Fezatte's right side could have appeared to be directly over his head. Both Renikow and Fezatte had a superior view of the excavator bucket's location, and their version of the events of March 3, 2005 is credited.

The statement, which both Fezatte and Renikow signed, carries little probative weight, in that it was drafted by the CO and merely presented to employees for their signature (Tr. 38; Exh. C-2). Clearly, neither employee agreed with the statement or understood that it was an admission of culpability.

Finally, CO Bubolz testified that although the load poses a hazard, should the excavator's hydraulics fail, the whole arm could jerk and catch Fezatte against the excavation wall, or it could fall and crush him (Tr. 41-43). Section 1926.651(e) however, is clear in its scope. The cited standard is intended to protect employees from the hazard posed by loads falling from lifting or digging equipment, not from the failure of the lifting equipment itself.

The Secretary failed to establish a violation of the cited standard, and the citation is VACATED.

ORDER

1. Serious citation 1, item 1 is DISMISSED.

/s/

James H. Barkley
Judge, OSHRC

Dated: October 10, 2005