Secretary of Labor,
Complainant,

v.

Reynolds, Inc.
Respondent

OSHRC Docket No. **00-0982**

APPEARANCES

Elizabeth R. Ashley, Esq.; Office of the Solicitor; U. S. Department of Labor
Cleveland, Ohio
For Complainant

Corey V. Crognale, Esq.; Schottenstein, Zox & Dunn, P.A; Columbus, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Reynolds, Inc. (Reynolds) is a large utility contractor primarily engaged in underground utility installation. In May, 1999, Reynolds began work on a contract with Montgomery County, Ohio, to install 6,000 feet of gravity sewer line and 6,000 feet of force main sewer line and to construct a pump station in Miamisburg, Ohio. On December 3, 1999, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Charles Shelton inspected Reynolds' project. As a result of this inspection, Reynolds was issued serious, willful and repeat citations on May 4, 2000. Reynolds timely contested the citations.

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.651(j)(2) for failing to protect employees in an excavation from falling materials by maintaining a spoil pile at least two feet from the edge of the excavation; the proposed penalty is $7,000. Citation 2, Item 1, alleges a willful violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect employees working in an excavation that was 8-11 feet deep, by sloping or shoring the walls of the excavation or utilizing a trench box; the proposed penalty is $70,000. Citation 3, Item 1, alleges a repeat violation of 29 C.F.R. § 1926.651(k)(1) for failing to have daily inspections of an excavation by a competent person before the start of work and as needed throughout the day; the proposed penalty is

$12,500. The hearing was held on February 7 and 8, 2001, in Columbus, Ohio. The parties stipulated jurisdiction and coverage. Both parties filed post-hearing briefs.

Reynolds denies it violated these standards. Although Reynolds admits that employees were in an excavation over five feet deep without protection, it asserts the affirmative defense of unpreventable employee misconduct.

For the following reasons, Reynolds' employee misconduct defense is rejected and the three violations are affirmed for a total penalty of $44,000.

Background

Reynolds is based in Middleton, Ohio, and operates in Ohio, Indiana, Kentucky, Iowa, Alabama, and Georgia (Tr. 244). It has approximately 750 employees.

The sewer installation project with Montgomery County began in May, 1999, and took approximately one year to complete. It was referred to as the Blackbird Lane project. Reynolds had as many as 20 employees working on the project (Tr. 253).

On the morning of December 3, 1999 (the inspection date), two Reynolds' crews (consisting of two foreman and five employees) were locating and repairing a leaking pipe at Station 6675 (Exh. C-1, Tr. 17, 325). The two foremen were Brandon L. Drake and Terry A. Hendershot (Tr. 28, 260, 319). Hendershot was there for a short time and left at approximately 8:00 a.m. to go to another job site, leaving Drake in charge of the crews (Tr. 328). Also on site was James Schultz, the inspector for Montgomery County Sanitary Engineering Department, who was assigned to oversee the Blackbird project on a full-time basis (Tr. 14, 44).

As the crews were finishing with the leak repair work at Station 6675, around 2:30 p.m., foreman Drake drove his backhoe to Station 5950 to remove a valve and fuse pipe (Tr. 19, 272-273). Employees Wayne Baker, Becky Shearn, and David Patrick followed Drake in the crew truck (Tr. 194-195). County Inspector Schultz followed the crew truck (Tr. 20).

Using the backhoe, foreman Drake uncovered the valve (Tr. 195). Baker climbed into the trench and dug out the dirt from around the valve and pipe (Tr. 196). Prior to digging, the trench was approximately 5 feet deep (Tr. 197-198, 279). Baker hooked a strap around the valve and Drake wiggled the valve out with his backhoe (Tr. 278-279). Baker then cut out the bad pipe and

Drake removed it (Tr. 201). When cut, water came out of the pipe. A sump pump was used to remove the water (Tr. 198, 215, 293).

After finishing at Station 6675, trackhoe operator Bob Street went to Station 5950 to help. Street and Drake continued digging to make room for the fusion machine, which is used to fuse pipe (Tr. 291). Bob Street lowered the fusion machine into the trench with his trackhoe (Tr. 23, 291). Foreman Drake and Baker went into the trench to level the fusion machine by placing blocks and boards under it (Tr. 199-200, 204, 291-292). The trench was now over six feet deep and was not sloped or shored and did not have a trench box (Tr. 200, 208, 292).

At approximately 4:00 p.m., CO Shelton was driving by the site on Interstate Highway 75 on his way from the Cincinnati OSHA office to an inspection site in Dayton, Ohio (Tr. 70). He observed the excavation activities and pulled onto the berm for a better look. He was approximately 300 feet from the trench (Tr. 70-71). CO Shelton exited the highway to locate the site and initiate an inspection based on OSHA's national emphasis program on trenching (Tr. 74).

CO Shelton parked his car about 500 feet away from the trench (Tr. 72). On his way to the trench, CO Shelton saw foreman Hendershot, who had just returned to the site (Tr. 329). As he was walking toward Hendershot, he saw an employee on a ladder coming out of the trench (Tr. 73-74). He held an opening conference with Hendershot and inspected the excavation (Tr. 74). CO Shelton asked County Inspector Schultz to take measurements of the trench while he videotaped (Tr. 19, 32). The trench measured 30 feet long, 10 feet wide, and 4 to 11 feet deep (Exh. C-2; Tr. 47, 59). The walls of the trench were vertical (Exh. C-2).

Foreman Drake told CO Shelton that he had classified the soil as Class C (Tr. 173-174, 205-207, 293-294). County Inspector Schultz classified the soil as Class B (Tr. 41). Shelton saw water in the bottom of the trench. Baker and Drake testified that the water came from the cut pipe (Tr. 205-207, 293-294).

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard.

> 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).

Reynolds' knowledge of the violative conditions is imputed to it through its foreman, Drake. Drake was the Reynolds' foreman on this job site and responsible for the trench. Drake operated the backhoe and was in charge of the activities to remove the valve and fuse the pipe at Station 5950. He was supervising Baker. Drake himself was working in the trench. "(W)hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer." *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

ALLEGED VIOLATIONS

Citation 1, Item 1 – Alleged Serious Violation of § 1926.651(j)(2)

The citation alleges that Reynolds did not protect employees from excavated material by keeping it at least two feet away from the edge of the excavation. Section 1926.651(j)(2) provides:

> (j) *Protection of employees from loose rock or soil.* (2) 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.

CO Shelton testified that there was a spoil pile at the edge of the trench along the north side (Exh. C-2 at 4:28:21 and 4:28:27; Tr. 95). He stated that the spoil pile was about two feet high and consisted of excavated material from the trench (Tr. 95).

Reynolds alleges that the dirt on the north side of the trench was the bank of the retention pond and not a spoil pile; however, even if it was a spoil pile, Baker was working in the trench several feet away from it. Drake stated that he put the excavated material he was digging along the bank of a retention/holding pond[1] next to the trench, two to three feet away from the edge of the trench (Exh. R-2; Tr. 283-286). Drake said that the pond was about two to three feet lower than the existing grade (Tr. 275).

Drake, however, admitted that there was no elevation around the trench when he began digging and that "(t)he only elevation change was where the spoil pile was" (Tr. 284). The videotape shows what appears to be a spoil pile along the entire length of the north edge of the trench, including the area above the fusion machine where Baker was working (Exh. C-2). The testimony of Reynolds' own employee disproves its attempt to characterize the pile of dirt alongside the trench as the bank of the retention pond.

Under § 17(k) of the Occupational Safety and Health Act (Act), a violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U. S. C. § 666(k). The violation is serious because part or all of the spoil pile could fall into the excavation and strike an employee working in the excavation, causing serious injury and possibly death.

Accordingly, the violation of § 1926.651(j)(2) is affirmed as serious.

Citation 2, Item 1 – Alleged Willful Violation of § 1926.652(a)(1)

The citation alleges that Reynolds failed to ensure adequate sloping and/or use of trench box protection while employees were working in a trench that was eight feet deep or greater. Section 1926.652(a)(1) provides:

> (j) *Protection of employees in excavations.* (1) 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.

[1] Although the testimony of Baker, Drake, and Hendershot referenced the retention/holding pond, there was no water in the pond.

There is no dispute that the trench was over five feet deep with vertical walls and two employees, Baker and foreman Drake, were in the trench without a protective system (Exh. C-2; Tr. 34, 100, 208, 266, 335).

The Secretary has established a violation of 29 C.F.R. § 1926.652(a)(1). The violation was serious because, without a protective system, employees were exposed to serious injury or death from a potential cave-in.

Unpreventable Employee Misconduct Defense

Reynolds claims the affirmative defense of unpreventable employee misconduct because it would be unfair to hold it responsible for Drake's misconduct, since it had an adequate safety program.

In order to establish the unpreventable employee misconduct defense, an employer must show that it has:

> (1) established work rules designed to prevent the violation; (2) adequately communicated the rules to its employers; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

In addition, when a supervisor is involved, such as in this case, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors, Ltd.,* 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). "(A) supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *Ceco Corp.,* 17 BNA OSHC 1173, 1176 (No. 91-3235, 1995).

The employer must first show that it has established work rules designed to implement the requirements of the standard. *Wheeling-Pittsburgh Steel Corp.,* 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994). In this case Reynolds had written safety rules designed to prevent a violation of § 1926.652(a)(1). Specifically, "Section C" of Reynolds' safety rules quotes this standard for excavation safety (Exh. C-10, at p. C-18).

The second requirement to prove the affirmative defense is that an employer must show that it has adequately communicated the rules to its employees. Reynolds' employees are required to take annual safety training that is work site specific (Tr. 242). Baker testified that he had training in various courses, including confined spaces and excavation standards (Tr. 213-214). However, there is no evidence that he took the courses before the December 3, 1999, incident. He had only been working for Reynolds for a few months prior to that date (Tr. 192). Foreman Drake stated that he had training on excavation safety and permit-required, confined spaces (Tr. 262). "When the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-Western, supra,* at 1017. Clearly, Reynolds failed to adequately communicate its safety rules to its employees.

Third, an employer must show that it has taken steps to discover violations. "Effective implementation of a safety program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" *Propellex Corp.,* 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999). Reynolds has a director of risk management, Bill Kessler, who supervises four full-time safety representatives (Tr. 236-237). The safety representatives conduct surprise audits of the various job sites to ensure that Reynolds' safety rules are followed (Tr. 237). There were three documented audits of the Blackbird project (Exhs. R-3, R-4, R-5). Kessler stated that there was no injury on the year-long Blackbird project as a result of cave-in or falling materials from the spoil piles or sidewalls (Tr. 241). County Inspector Schultz stated that Reynolds was one of the county's safest contractors (Tr. 39).

Even though there were three audits, there was no other evidence of a more frequent effort to oversee the safe operations of this year-long project involving 20 employees. "Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards. It is not enough that an employer has developed an exemplary safety program on paper." *American Sterilizer Co.,* 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). There is insufficient evidence to establish that Reynolds attempted to discover violations.

Finally, the employer must show that it effectively enforced the rules when violations were discovered. "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." *GEM Industrial, Inc.,* 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996). Reynolds' discipline system was inadequate.

Baker stated he received discipline on the day of the inspection in the form of a verbal reprimand from foreman Hendershot to the effect that "he knew I had known better than to be in there and thought I had better sense" (Tr. 211, 337). This is hardly what can be classified as a reprimand or discipline and employees would not take such a remark seriously. In any case, "(e)vidence of verbal reprimands alone suggests an ineffective disciplinary system." *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd. without published opinion,* 106 F.3d 401 (6th Cir. 1997).

Drake was suspended from work for three weeks without pay for the safety violations that transpired on December 3, 1999 (Tr. 265). This discipline occurred *after* OSHA issued the citations in this case on May 4, 2000 (Tr. 245). This is *five months* after the violation. Kessler was aware of the alleged violations a couple of days after they occurred; nonetheless, he admitted that Reynolds waited five months after the incident to discipline Drake (Tr. 246, 308). It is apparent that Reynolds was not going to discipline Drake, in violation of its own rules, and only did so upon receipt of the OSHA citations. Besides, waiting such an extensive period of time after an incident occurs to discipline an employee greatly diminishes the effectiveness of the discipline.

Moreover, both employees were working in the unprotected trench. "Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *GEM Industrial, Inc.,* 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996).

Reynolds also failed to introduce evidence of an enforcement program prior to the OSHA inspection. Although Kessler mentioned a written discipline policy, it is not clear exactly when it became effective (Exh. C-13). Hendershot stated that he did not know if the discipline policy was in effect on December 3, 1999 (Tr. 345). A foreman who had been with the company for six years

should be aware of how long the discipline policy has been in effect. Kessler testified that the discipline policy was only communicated "recently" (Tr. 239).[2]

Therefore, Reynolds' employee misconduct defense is rejected because it did not establish that it took steps to discover violations and that it adequately communicated and enforced its safety rules. The violation of § 1926.652(a)(1) is affirmed.

Willful Classification

The violation of § 1926.652(a)(1) is classified as willful. "It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.,* 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation. "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.,* 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

Foreman Drake allowed Baker to work in the unprotected trench and even worked in it himself despite his knowledge of the excavation standards and the company's safety rules. The Commission has held that a supervisor's "intentional disregard of the standards is imputable to his employer." *Pentacost Contracting Corp.,* 17 BNA OSHC 1953, 1955 (No. 92-3788, 1997). *See also Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1539 (No. 86-360 and 86-469, 1992).

Drake's reason for permitting work in the trench without a trench box was because he felt the trench was safe and he was in a hurry to finish the work (Tr. 297). *See Donovan v. Capital City Excavating Co., Inc.,* 712 F.2d 1008, 1010 (6th Cir. 1983) (fact that foreman had ordered a trench box did not preclude a willful finding because he "consciously continued the trenching operations" while awaiting the arrival of the trench box).

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[2] Even if the discipline policy was effective on December 3, 1999, Reynolds did not follow its own rules. The first rule states that for the first offense, a written warning shall be issued and placed in the personnel file (Exh. C-13). This was not done for Baker. Kessler testified that the company leaves it up to its foremen to decide whether a verbal warning is sufficient discipline, even though he is aware that this is contrary to the written discipline policy (Tr. 239).

Additionally, Reynolds has previously been cited, at least four times, for violations of § 1926.652(a)(1) (Exhs. C-8, C-9, C-12). Prior citations for the same or similar standards are proof of the employer's intentional disregard of or plain indifference to its safety obligations under the Act. *See Cedar Construction Co. v OSHRC,* 587 F.2d 1303, 1305-1306 (D.C. Cir. 1978) (employer found to have willfully violated excavation safety standards because it was aware of standards since it had been cited three times before for the same standards) and *F. X. Messina Construction Corp. v. OSHRC,* 505 F.2d 701, 702 (1st Cir. 1974) (because employer had been convicted of violation of same excavation standard within a year, it was held to have willfully violated the standard).

Reynolds is responsible for the plain indifference to employee safety that its foreman showed. Therefore, Reynolds willfully violated § 1926.652(a)(1).

Citation 3, Item 1 – Alleged Repeat Violation of § 1926.651(k)(1)

The citation alleges that Reynolds failed to perform an inspection of the excavation to identify unsafe conditions by a competent person. Section 1926.651(k)(1) provides:

> (k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

A competent person is defined as "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.650(b).

There is no dispute that foreman Drake was a competent person. He received the competent person training and as foreman, he had authority to take corrective measures (Exh. C-5, Tr. 262). CO Shelton considered Drake a competent person (Tr. 155).

Reynolds requires its foremen to fill out a daily inspection checklist. Drake testified that he did not fill one out for Station 5950 because he was operating the backhoe and was in a hurry

(Tr. 297). Drake stated that he did a visual and physical inspection of the trench at Station 5950 while he was digging it (Tr. 292). He stated that his physical inspection involved "when I'm digging it, I can feel how hard the ground is" (Tr. 292). He found that the ground was hard. Drake did not perform a manual test of the soil in conformance with Appendix A to Subpart P, "Soil Classificiation." Drake's observations while operating the backhoe do not constitute an inspection prior to the start of work.

Accordingly, the violation of § 1926.651(k)(1) is affirmed.

Repeat Classification

The violation of § 1926.651(k)(1) is classified as repeat. Under the Commission's long stated test, a repeat violation under § 17(a) of the Act occurs if the Secretary shows "a Commission final order against the same employer for a substantially similar violation." *Potlatch Corporation,* 7 BNA OSHC 061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity "by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing." *Monitor Construction Co.,* 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The repeat classification is based on a citation issued to Reynolds on June 12, 1997, for violations including § 1926.651(k)(1) (Exh. C-8). That citation involved failure to properly inspect a trench that was 8 feet deep and 6 feet wide, with no sloping, shoring or box protection for employees working in the trench (Exh. C-8). The citation became a final order based on an informal settlement agreement dated June 30, 1997 (Exh. C-9). This prior citation was for violation of the same standard under similar conditions as the instant case. Reynolds does not dispute the similarity of the violations.

The violation of § 1926.651(k)(1) is properly classified as repeat.

PENALTY ASSESSMENT

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U.S.C.

§ 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.,* 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Reynolds is a large corporation that employed approximately 750 employees at the time of the inspection. Reynolds is not entitled to credit for size.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In this case, the gravity is low. Only two employees were in the trench for less than 30 minutes. Drake believed that the trench was safe. There was no evidence of fissures or cracks in the trench walls (Tr. 41, 292). During the Blackbird Lane project, there was no injury or trench collapse. A reduction in the proposed penalties is appropriate.

Reynolds exhibited good faith. It was cooperative throughout the inspection and immediately installed a trench box. Credit is given for good faith.

Reynolds has a prior history of OSHA violations for lack of excavation protection; therefore, no credit for good history is given.

Based on these factors, a penalty of $5000 is reasonable for Citation 1; a penalty of $35,000 is reasonable for Citation 2; and a penalty of $4,000 is reasonable for Citation 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 on the preceding decision, it is ORDERED that:

1. Citation 1, Item 1, alleging serious violation of § 1926.651(j)(2), is affirmed and a penalty of $5,000 is assessed.

2. Citation 2, Item 1, alleging willful violation of § 1926.652(a)(1), is affirmed and a penalty of $35,000 is assessed.
3. Citation 3, Item 1, alleging repeat violation of § 1926.651(k)(1), is affirmed and a penalty of $4,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: July 16, 2001