

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

NOVA FEDRICK/AJV, and its successors,

Respondent.

OSHRC DOCKET NO. 99-1511

APPEARANCES:

For the Complainant:

Stephanie Russell, Esq, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:

Robert D. Peterson, Esq., L.C. Rocklin, California

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

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

Respondent, Nova Fedrick /AJV, and its successors (Nova), at all times relevant to this action maintained a place of business at Andersen Air Force Base (AFB), Yigo, Guam, where it was engaged in the installation of a fuel pipeline. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 23, 1999, one of Nova's employees was killed in a trenching accident at Nova's Andersen AFB work site. Between April 23 and July 2, 1999 the Occupational Safety and Health Administration (OSHA) conducted an investigation of the incident. As a result of that investigation, Nova was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Nova brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 24, 2000, a hearing was held in Hagåtña, Guam. Prior to the hearing, Nova withdrew its notice of contest to "other than serious" citation 2, item 1, and that item was affirmed, without

penalty (Tr. 9-10). The parties have submitted briefs addressing the remaining item, which alleges a “serious” violation of §1926.21(b)(2), and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

- a) Andersen AFB, Guam: Employees were not trained in recognition and avoidance of unsafe conditions while working next to the Chin-Type trencher (model 1060).
 1. Employees were working within 12 to 24 inches of the trencher.
 2. Employees were working on the blind side of the trencher.

Facts

OSHA Compliance Officer (CO) David Ramos testified that he began his inspection of Nova’s Andersen AFB work site on April 23, 1999 (Tr. 20, 40). Ramos ascertained that, at the time of the accident, a five man crew consisting of two equipment operators, “Dave” and John Heidenrich, and three laborers, Victor Nauta, Rose Taitingfong, and Candido “Andy” Edu, was excavating a trench into which “sacrificial” anodes would be placed (Tr. 43, 121, 125). The anode bars, which are intended to inhibit corrosion of a nearby fuel pipeline, are placed in forms that are then filled with bentonite and sealed with clay (Tr. 278). A high speed trencher is employed to dig the trench (Tr. 67; Exh. C-3). The trencher crawls along the trench while a boom with a saw-toothed rotating blade cuts through the earth (Tr. 67; Exh. C-3). A “crumb shoe” covers the rotating blade; the crumb shoe acts as a guard for the chain/ blade and also “sucks the dirt up” (Tr. 246, 260-61). The laborers shovel away dirt that accumulates on the edge of the trench behind the trencher, so that it does not contaminate the ditch (Tr. 147, 279-80, 285).

Richard Hansen, Nova’s project superintendent and site safety officer (Tr. 222), introduced Nova’s written safety program, including a site specific accident plan (Tr. 223; Exh. R-2, general work rules (Tr. 224; Exh. R-3), and safety check lists, which Hansen completes daily (Tr. 225; Exh. R-4). Hansen testified that newly hired employees are provided with a copy of the general work rules (Tr. 224). Employees also view a 30 minute video generally discussing construction safety (Tr. 29, 111). In addition, every Friday employees attend a safety meeting conducted by the project manager, Fred Hill (Tr. 228, 232, 257-56; *See also*, testimony of Tony Zottola, Nova’s field superintendent, Tr. 274).

Nova's safety program does not specifically discuss the trencher, inform employees that the trencher operator has a blind spot on one side, or set forth a safe working distance from the trencher (Tr. 30). Hill and Zottola both testified, however, that prior to the installation of the first anode bed, approximately two weeks before the accident, a special meeting was held to train the crew that would be doing the installation (Tr. 261-62, 276). Hill stated that the purpose of the meeting was to show the crew how to install the anodes, but said that the dangers of working around the trencher were also explained at that time (Tr. 261-62, 268). Zottola testified that during the meeting employees were warned to stay behind the crumb shoe once the trencher was in the ground (Tr. 284).

Mr. Nauta was present at the initial meeting. Taitingfong and Edu were not on the anode crew at that time, and were not present (Tr. 125-26, 268, 285). Zottola could not recall if Taitingfong and Edu were provided with any specific safety training when they joined his crew later (Tr. 286). Zottola testified, however, that he did not intend Taitingfong to shovel dirt. He intended her to pick up trash in the area (Tr. 286). Zottola could not recall giving Taitingfong any work instructions personally (Tr. 286). He believed that he did tell her to stay away from the heavy equipment (Tr. 282-83).

Hansen and Zottola both stated that they were present during the Friday morning meetings, and that during every meeting Fred Hill would warn employees to stay away from the equipment (Tr. 247, 274, 297). Zottola testified that Hill told employees to "be aware of your surroundings," and not to "take it for granted that the operator can see you, if he's on a backhoe or if he's on a loader/grader, [or] he's on an excavator" (Tr. 275). Hill testified that he "constantly" discussed keeping clear of the trencher's moving parts with employees (Tr. 260). Hill stated that he did not ask the crews to stay a specific distance from the trencher, but did tell them to stay behind the crumb shoe at all times (Tr. 260, 267; *See also*, Zottola's testimony, Tr 287). On Friday, April 23, 1999, Edu, Nauta and Taitingfong were present at the weekly meeting (Tr. 228-29; Exh. R-6).

Victor Nauta, who was hired as a general laborer for Nova in 1998 (Tr. 109-10), confirmed that he did not receive any safety instruction involving trenching during his initial orientation (Tr. 111-12). Nauta testified that he started to work with the crew that was to install the anode beds approximately a month before the accident (Tr. 120). He had no previous experience with that type of work (Tr. 115-20). Nauta testified that he was present at Tony Zottola's meeting where Zottola explained the anode bed work, but perceived the meeting solely as a "how to" demonstration (Tr. 122-23). Nauta did not recall whether safety was discussed at that meeting (Tr. 122). Nauta testified that no one ever told him not to work on the blind side of the trencher, or to stay back from the trencher while it was in operation (Tr. 131). Nauta stated that he attended Nova's weekly Friday morning meetings (Tr. 139). He

testified that during the meetings, which lasted approximately 15 minutes, the men received their paychecks, and the day's work and safety issues were discussed (Tr. 139-40). Nauta could not recall any mention of the trencher at the April 23, 1999 meeting (Tr. 140). He did not remember anyone warning them to stay away from the trencher, or to avoid the operator's blind spot (Tr. 141).

On cross-examination, however, when asked whether Zottola, Hansen or Hill had ever discussed staying away from the trenching equipment, Nauta replied that "they might have. I can't recall" (Tr. 152). Nauta further admitted that he had probably seen the sign on the trencher that stated: **DANGER - STAND CLEAR WHILE MACHINE IS IN OPERATION**, and that he was concerned about working close to the trencher (Tr. 154-55; Exh. C-1, R-1).

Nauta testified that he generally worked approximately five feet from the trencher while it was operating, though at times he was close enough to touch it (Tr. 129). Nauta recalled one instance where Dick Hansen observed him actually jumping up and down on the trencher's skid plates while it was in operation (Tr. 133-36; Exh. C-3).

Rosita Taitingfong testified that she had no experience with trenching anode beds prior to joining the anode crew the week of the accident (Tr. 163, 177-78). Taitingfong stated that she was given no instruction about her duties on the anode crew, nor was she provided any safety instruction at that time (Tr. 164, 168, 172-74). The only job instructions she recalled receiving were from Mr. Edu (Tr. 186). Taitingfong stated that she was not warned to stay away from the trencher, or told to avoid the operator's blind spot until after Mr. Edu's accident (Tr. 174, 177, 185). Ms. Taitingfong testified that she was present at the April 23rd Friday morning meeting; she believed that the supervisor conducting the meeting "might have mentioned about being cautious in there" (Tr. 182). She could not recall whether the trencher was specifically discussed (Tr. 181-82, 184-85, 211).

On cross-examination Ms. Taitingfong admitted that though she did not remember being warned to stay away from the equipment, she might have been told "because too many tells me watch out for this, and watch out for that" (Tr. 213).

Following his inspection of Nova's Anderson AFB work site, CO Ramos concluded that Andy Edu had been standing in front of the trencher, approximately 12 inches from the edge, when the trench collapsed (Tr. 24). Edu was apparently pulled into the teeth of the trencher and killed (Tr. 24-25).

Discussion

The cited standard requires that “the employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.” The Commission has held that such instructions must address matters specific to the work site about which a reasonably prudent employer would have instructed its employees. *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶29,902, p. 40,810-11 (No. 90-2668, 1992). CO Ramos testified that it would have been sufficient for Nova to warn its employees to stay away from the trencher while it is in operation (Tr. 94). Complainant bears the burden of establishing that Nova failed to so warn its employees. This it has not done.

The record establishes that Nova’s employee orientation did not address the hazards associated with working near the trencher. However, both parties note that the trencher is clearly marked with warning signs which state, **DANGER - STAND CLEAR WHILE MACHINE IS IN OPERATION** (Tr. 36-37, Exh. C-1, R-1), and that the dangers associated with working in its proximity are obvious (Tr. 94). Moreover, Messrs. Hansen, Hill and Zottola all testified that employees were repeatedly warned to stay away from all heavy equipment. Prior to installation of the anode beds, the anode crew was specifically told to stay away from the trencher. The witnesses stated that Hill told employees clearing the edge of the trench to work behind the crumb shoe. Though Nova’s witnesses did not specifically testify as to the contents of the Friday, April 23, 1999 meeting, each of them testified that the employees were warned to stay away from the heavy equipment at every safety meeting.

Neither of Complainant’s witnesses, Victor Nauta and Rosita Taitingfong, had any clear recollection of the safety training that was provided to them. Both admitted that they could have been warned to stay away from the trencher, neither stated with any certainty that they did not receive the warnings Hansen, Hill and Zottola claimed to have provided.

Because the Secretary did not establish, by a preponderance of the evidence, that Nova’s employees were not trained in the hazards associated with the trencher, or the means to avoid those hazards, the cited violation must be vacated.

This judge notes that there *is* evidence in the record establishing that the required instruction was not enforced at Nova’s work site. Mr. Nauta’s testimony that he was not reprimanded after Dick Hansen watched him jump up and down on the trencher’s skid plates dramatically illustrates the absence of an effective disciplinary program. However, it is well settled that the employer’s failure to enforce compliance with work rules on the job does not establish a failure to train or instruct, and this

judge cannot infer on the basis of Nauta's testimony that his training was deficient. *N & N Contractors, Inc.* 18 OSHC (BNA) 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000); *Dravo Engineers and Constructors*, 11 BNA OSHC 2010, 2012, 1984-85 CCH OSHD ¶26,930, p. 34,507 (No. 81-748, 1984) (evidence of failure to enforce a safety rule does not prove a training violation).

Serious citation 1, item 1 will be vacated.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.
2. Other than serious citation 2, item 1, alleging violation of §1926.601(b)(6) is AFFIRMED without penalty.

/s/

Stanley M Schwartz
Judge, OSHRC

Dated: November 9, 2000