
Secretary of Labor, :
Complainant, :
v. :
Bovis Construction Corporation, :
Respondent. :

OSHRC Docket No. **98-0275**

Appearances:

Leslie John Rodriguez, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Richard D. Wayne, Esquire
Hinckley, Allen & Snyder
Boston, Massachusetts
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Bovis Construction Corporation (Bovis) is a general contractor with a construction jobsite in Atlanta, Georgia, where it is building air cargo facilities at the Atlanta Airport. The Occupational Safety and Health Administration (OSHA) conducted an inspection of this jobsite on January 29, 1998. As a result of this inspection, a citation was issued to the respondent on February 10, 1998. A hearing was held in this matter in Atlanta, Georgia, on May 18, 1998. At the hearing, the Secretary withdrew item 3 of the citation. The parties stipulated at the hearing that no Bovis employees were exposed to any of the alleged violative conditions.

Background

Bovis, as general contractor, has overall responsibility for excavation and concrete work on this jobsite. This project involves the construction of three air cargo facilities covering 140 acres. On the day of the inspection, two subcontractors were performing excavation work. One subcontractor, Plateau Excavation, Inc. (Plateau), was excavating and preparing to install utility lines in a 45- by 50-foot excavation with a depth of up to 15 feet.

At approximately 7:15 a.m. on January 29, 1998, Michael Queen, respondent's assistant

superintendent, inspected this excavation prior to the start of the workday. The area was still dark, and employees were arriving onsite. Mr. Queen did not see Plateau's foreman, Rick Hall, at that time but spoke to Mr. Hall about two hours later by telephone. During that telephone conversation, Mr. Queen told Mr. Hall to secure a trench box for that excavation and to bench back the sides until the trench box arrived. Mr. Queen testified at the hearing that the soil in the bottom of the excavation was Type "C" and Type "B" above it. Mr. Hall considered this soil to be Type "C" and had attempted to bench the sides of the excavation. The sides could not be sufficiently sloped due to the proximity of a fire station.

Between 9:30 a.m. and 10:00 a.m., Robert Ardizzoni, a compliance officer for OSHA, arrived at the excavation and conducted an inspection. He observed Plateau employees in the excavation with no trench box and with unsloped soil. Some portions of the excavation sides were benched. He estimated the depths of the vertical sides to be 6 to 15 feet. He performed a hand compression test and determined the soil to be Type "C". Employees jumped into the excavation and worked in the 45- by 50-foot excavation with no ladder or other means of safe egress. Mr. Ardizzoni found a 2- by 5-foot pool of water or liquid, several inches deep, in the middle section of the excavation. He testified that this liquid could undermine the face of the excavation causing a collapse. Although the excavation had been open for three days prior to January 29, 1998, no evidence was presented at the hearing that any employees had worked in this excavation prior to that date. After observing these conditions, the compliance officer met with Mr. Queen at the general contractor's trailer, which was 800 to 1,000 feet from the excavation.

Alleged Violations

The Secretary alleges that Bovis committed serious violations of the standards set forth in 29 C.F.R. Part 1926 as follows:

Citation 1 Item 1

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more than 25 feet (7.62m) of lateral travel for employees:

- (a) Excavation at 4550 Airport Services Road: Employees were working in an excavation which was 50' long without a ladder.

Citation 1 Item 2

29 CFR 1926.651(h)(1): Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation :

- (a) Excavation at 4550 Airport Services Road: Water accumulation was not dealt with.

Citation 1 Item 4

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from caveins [sic] by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one half horizontal to one vertical (34 degrees measured from the horizontal):

- (a) Excavation at 4550 Airport Services Road: Employees were observed working in an excavation 15' deep which was not properly sloped or shored.

Discussion

The Secretary has the burden of proving the violation.

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).

The Secretary's uncontroverted evidence clearly established the excavation conditions, which are the basis for the alleged violations. The following evidence is undisputed: At the time of the inspection, employees were working in the 50-foot excavation without a ladder or other safe

means of egress, requiring more than 25 feet of lateral travel. Employees exited by ramp at one end of the excavation. Also, water had accumulated in this excavation, and no precautions were taken to protect employees from the hazards posed by this accumulation. Employees worked in the excavation at depths of 6 to 15 feet with vertical walls and no shoring or trench box in Type “C” soil. Only employees of Plateau were exposed to these conditions. No employees of Bovis, the general contractor, were exposed to these conditions.

The issues remaining involve Bovis’s responsibility as a general contractor and whether it knew or could have known of the excavation conditions discussed above.

In addressing a general contractor’s responsibility, the Review Commission has long recognized that:

The general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

Grossman Steel & Aluminum Corp., 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976).

In this case, the record establishes that Bovis maintained sufficient supervisory capacity over the jobsite to require compliance with the Act. It had overall responsibility for safety on the site, maintained a safety staff, and inspected the site several times each day. In addition, by contract, it required its subcontractors to comply with all safety laws and regulations and to establish their own safety measures, policies, and standards in addition to any safety program established by Bovis.

As discussed more fully above, no evidence presented at the hearing indicated that any employee of any contractor worked in the excavation prior to the date of the inspection. This excavation was open for three days prior to the inspection, and Bovis’s assistant superintendent, Michael Queen, inspected the site several times each day. When Mr. Queen inspected the excavation on January 29, 1998, no work had begun and there was no indication that employees would enter the excavation that day without a trench box. Mr. Queen testified that later that

morning he told Plateau's foreman by phone to bench back the excavation sides until the trench box arrived. This box was scheduled to arrive onsite that day. Mr. Queen explained that no employees were to work in the excavation during the benching process or until the trench box was installed. Mr. Queen stated that he did not authorize employees to work in the excavation without a trench box; that he saw no employees in the unprotected excavation; and that he did not know employees were in the unprotected excavation until told by the compliance officer. He further testified that benching gives greater soil compaction, but understands that benching provides no adequate protection for employees working in excavations in Type "C" soil. This testimony was essentially uncontroverted at the hearing and is found to be credible.

Respondent's assistant superintendent inspected the excavation about two hours before the OSHA inspection. At the time of the inspection, Mr. Queen was in his trailer which was about 800 to 1,000 feet away from the excavation. After completion of the walk-around portion of the inspection, the compliance officer came to the trailer and told Mr. Queen of the alleged violative conditions. Mr. Queen told the compliance officer he had instructed the subcontractor to bench back until the trench box arrived. This statement alone does not require an inference that Mr. Queen expected employees to be in the excavation while it was benched without the protection of a trench box. Mr. Queen clarified this statement at the hearing. He testified that the benching was done to allow more working room to set the trench box and to provide greater soil compaction in the corners of the excavation. He anticipated employees to enter the excavation only after the trench box was in place. The compliance officer testified that during the inspection Mr. Queen was not present when employees were in the excavation, and he has no information that Mr. Queen or any other manager of respondent saw any employees in the excavation.

This large jobsite covers about 140 acres. Mr. Queen inspected the job three times each day. He inspected this excavation less than three hours before the OSHA inspection, finding no employees in the excavation. The evidence of record establishes that employees were working in this excavation after Bovis's last inspection. Respondent's trailer was remote to the excavation, and work at that location was not observable from the trailer. The record reflects that Bovis took reasonable measures to detect and prevent unsafe conditions at the excavation.

Based on the totality of the evidence presented in this case, I must conclude that Bovis did

not, and could not, with the exercise of reasonable diligence, know of the presence of the violations alleged by the Secretary. The alleged violations of 29 C.F.R. §§ 1926.651(c)(2), 1926.651(h)(1), and 1926.652(a)(1) are vacated.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, item 1, alleging a serious violation of 29 C.F.R. § 1926.651(c)(2), is vacated.
2. Citation No. 1, item 2, alleging a serious violation of 29 C.F.R. § 1926.651(h)(1), is vacated.
3. Citation No. 1, item 3, alleging a serious violation of 29 C.F.R. § 1926.651(k)(1), was withdrawn by the Secretary.
4. Citation No. 1, item 4, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1), is vacated.

STEPHEN J. SIMKO, JR.
Judge

Date: August 3, 1998