

Secretary of Labor,
Complainant,
v
Scarff's Nursery, Inc.,
Respondent.

OSHRC Docket No. **96-1753**

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Scarff's Nursery, Inc., contests a two-item citation issued by the Secretary on November 15, 1996. Scarff's Nursery is a wholesale grower of nursery stock, with a retail garden center and a landscape contracting business (Tr. 155). The Scarff family established the business in New Carlisle, Ohio, in 1881 (Tr. 220).

The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer James Denton on October 3 and 4, 1996. Denton inspected Scarff's Nursery after a trench cave-in at its nursery farm injured two of its employees on September 30, 1996.

The first citation that the Secretary issued to Scarff's Nursery contained five items alleging violations of the Part 1926 Construction Standards of the Occupational Safety and Health Act of 1970 (Act). All of the alleged violations related to safety in trenching operations. Subsequent to an informal settlement conference between the parties, the Secretary withdrew the citation upon determining that the Part 1926 Construction Standards are inapplicable to the nursery business (Tr. 119). Scarff's Nursery is governed by the 1928 Agriculture Standards, which contain no standards relating to trench safety.

The Secretary issued a second citation to Scarff's Nursery, alleging two violations of § 5(a)(1) of the Act, the general duty clause. Item 1 alleges a serious violation of § 5(a)(1) for

failure to protect employees working in an excavation from a cave-in. Item 2 alleges a serious violation of § 5(a)(1) for failure to provide its employees with hard hats while working in an excavation exceeding 5 feet in depth. Scarff's Nursery contests both items of the citation and the proposed penalties.

The hearing was held on August 21, 1997, in Dayton, Ohio. The parties have filed post-hearing briefs. The issue for determination is whether there was a "recognized hazard" under § 5(a)(1). The court finds a recognized hazard in the failure to protect employees working in an excavation violation, but not the hard hat violation.

Background

Every year, Scarff's Nursery constructs new "poly houses" at its nursery farm to store plants during the winter. The poly houses consist of steel ribs covered with poly (plastic) over a peat gravel base (Tr. 16, 157). The poly houses are supplied with water via an irrigation line, which Scarff's Nursery installs prior to constructing the houses (Tr. 16). Scarff's Nursery normally digs the trench for the irrigation line to a depth of 4 feet in order to lay the pipe below Ohio's frost line, which is 3 feet (Tr. 163).

In September 1996, Scarff's Nursery was in the process of installing an irrigation line that would connect to five new poly houses. Scarff's Nursery planned for the trench to be between 100 and 125 yards long (Tr. 169). At the initial connection to the main line, the trench was approximately 6½ feet deep. From that point, the trench was supposed to slant upward to a depth of 4 feet (Tr. 166).

On September 30, 1996, at approximately 7:00 a.m., a crew of six Scarff's Nursery employees began work on the irrigation line. Nursery manager Ken Rowe and container manager E. J. Turner supervised the operation (Tr. 14, 16). Nelson Winthrop operated the backhoe (Tr. 17). Employees Keith Davey and Lupe Martinez worked in the trench, installing the irrigation pipe. Eventually assistant supervisor Brett Ritter replaced Martinez in the trench with Davey (Tr. 19, 37).

The crew noticed early in the day that there was a seam of gravel that ran along the length of the trench near the bottom (Tr. 19-20). As Winthrop dug the trench with the backhoe, Davey

noted that “the gravel would give way, and it would leave the clay just hanging over. So, it wouldn’t have the support on the top of the wall” (Tr. 19).

At approximately 10:00 a.m., supervisor Rowe stated that “if it got any more dangerous, we would have to think of another way to do it” (Tr. 19). The crew talked about a man who had been killed the weekend before in a trench cave-in in Indiana. Davey stated, “All of the guys that were working on the project made jokes all day about somebody getting killed in the hole” (Tr. 21).

At approximately 3:00 p.m., the trench caved in while Davey and Ritter were working in it. Ritter sustained a cracked pelvis and a broken ankle. Davey suffered a broken collar bone, a broken rib, and nerve damage in his hand and arm (Tr. 22-23).

The cave-in occurred about 75 feet from the beginning of the trench (Tr. 75). At that point, the trench was approximately 27 inches wide and 6½ feet deep (Tr. 51). The sides of the trench were vertical (Tr. 15).

None of the employees on the site was wearing a hard hat (Tr. 18). There was no ladder in the trench. Employees exited the trench either by “chinning” themselves on a spud bar (a 6-foot steel bar) laid across the trench, or by walking to the end of the trench and grabbing onto the backhoe (Tr. 17).

The Citation

Item 1

The Secretary alleges that Scarff’s Nursery committed a serious violation of § 5(a)(1).

Section 5(a)(1) provides:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Item 1 of the citation alleges:

(a) The employer failed to protect employees while they worked in a trench installing an irrigation line, in that the excavation was sloped at an angle deeper than 1½ horizontal to 1 vertical, there was no ladder or other safe means of egress out of the trench excavation and there was no daily inspection of the trench excavation by a competent person.

Applicability of § 5(a)(1)

Scarff's Nursery contends that the Secretary improperly cited § 5(a)(1) in an attempt to import the requirements of the construction standards to the agriculture standards. Indeed, the three abatement methods listed by the Secretary in the citation parrot the language of § 1926.651(c)(2) (safe egress from trench), § 1926.651(k)(1) (daily inspections by a competent person), and § 1926.652(a)(1) (protective system to prevent cave-in), with which the Secretary originally cited Scarff's Nursery.

While it may be true that the Secretary cited Scarff's Nursery under § 5(a)(1) for what would be violations of specific construction standards, there is nothing to prohibit her from doing so. The general duty clause was enacted to cover serious hazards to which no specific standard applies. A citation for a violation of § 5(a)(1) will be vacated where a more specific standard applies. In the present case, Scarff's Nursery itself argues that the construction standards do not apply to it, and that there are no agriculture standards that govern trench safety. Therefore, § 5(a)(1) is not preempted by any other standard, and it thus applies to the cited conditions.

Elements of § 5(a)(1)

In order to establish a violation of the general duty clause,

[T]he Secretary must show that (1) a workplace condition or activity presented a hazard, (2) the employer or industry recognized it, (3) it was likely to cause serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate it.

Kokosing Construction Co., Inc., 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996).

Scarff's Nursery does not dispute three of the four elements of the Secretary's burden of proof with regard to item 1. The company concedes that the 6½-foot trench presented a hazard to the employees present in the trench, that a cave-in was likely to cause serious physical harm, and that feasible means of abatement existed. Scarff's Nursery argues, however, that neither the nursery industry nor Scarff's Nursery itself recognized that the trench constituted a hazard to its employees. "A hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry."

Pepperidge Farm, Inc., 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997). The Secretary alleges that Scarff's Nursery had constructive knowledge through the nursery industry and actual knowledge itself that the trench presented a hazard.

Industry Knowledge

The Secretary adduced a number of newsletters and other documents that Peter Scarff, vice-president of Scarff's Nursery, had received from various associations. These associations, of which Scarff was a member, include the American Association of Nurserymen (AAN), the Ohio Nursery and Landscape Association, and the Associated Landscape Contractors of America (ALCA) (Exhs. C-4, C-7 through C-13). At certain points, these exhibits each mention trenches or excavations. The Secretary submits that this is proof of industry recognition of trench hazards. This argument is rejected.

The references to trenches in the exhibits are general. In some cases, only the word "trench" or "excavation" is used. For example, the Secretary cites the "SafetyScapes" Section of Exh. C-7, an ALCA document, as a reference to trench safety. That section deals with fall hazards, not trench safety. It relates the story of an employee who fell into an uncovered manhole at an apartment complex while helping to install an irrigation system. The Secretary cites Exh. C-10, "a newsletter of Ag/Hort safety and employment law compliance," as evidence of industry recognition of trench hazards. Nothing in the newsletter addresses trench safety. It does, however, warn employers about OSHA's general duty clause (Exh. C-10, p. 7).

Industry recognition requires something beyond general references to trenches and broad reminders regarding safety. The Secretary adduced no evidence to show that the hazards associated with working in trenches are recognized within the nursery industry.

Actual knowledge

The Secretary did establish that Scarff's Nursery had actual knowledge of the hazards of working in trenches. Two supervisory employees, Turner and Ritter, were on the site throughout the day of the accident. Manager Rowe was at the trench periodically during the day. The entire crew observed the seam of gravel falling away from the trench wall, leaving the clay overhanging

the bottom of the trench. The crew discussed trench cave-ins, mentioning specifically a man who had been killed in a cave-in the previous weekend in Indiana. The crew joked about one of them getting killed in the trench. Rowe acknowledged the danger, commenting that if the trench conditions got any worse, they would “think of another way to do it” (Tr. 20).

The knowledge of the supervisory employees, Rowe, Turner, and Ritter, is imputed to Scarff’s Nursery. The supervisors are not expected to be conversant with the specific requirements of trench safety as mandated by the construction standards. They were aware, however, that this particular trench under their supervision presented a hazard. They knew that trenches sometimes caved in. They saw that one of the trench walls was unstable. They understood that anyone in a trench at the time of a cave-in was at risk for death or serious physical injury. The Secretary has established that Scarff’s Nursery recognized the hazard of a trench cave-in.

Penalty determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Scarff’s Nursery had approximately 90 employees at the time of the inspection (Tr. 104-105). It had no history of previous violations (Tr. 105). Scarff’s Nursery failed to show good faith. It failed to take action when it became aware of the seam of gravel falling into the trench (Tr.105). The gravity of the violation is high. Two employees were seriously injured in the cave-in. Despite the significant injuries they sustained, the employees were lucky. Trench cave-ins are often fatal.

The Secretary proposed a penalty of \$5000.00 for item 1. The Secretary recommended three methods of abatement which, as noted above, duplicate requirements set out in the construction standards: a ladder for safe egress, daily inspections by competent persons, and a protective system to prevent cave-ins. Scarff’s Nursery is not required to comply with the

construction standards and it should not be penalized for failing to use every protective measure set out in Part 1926. It is not immediately apparent to an employer unfamiliar with the construction standards that it should provide a ladder in a trench so as to require no more than 25 feet of lateral travel, or have a competent person make daily inspections of the trench. Having recognized the hazard of the trench caving in, Scarff's Nursery was required to take steps to prevent such a cave-in. The method of abatement most obvious to a non-construction employer would be some form of protective system.

Upon due consideration of these factors, it is determined that a penalty of \$2000.00 is appropriate.

Item 2

The Secretary charged Scarff's Nursery with a violation of § 5(a)(1) for failing to require the employees working in the trench to wear hard hats. The citation alleges:

- (a) Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns.

Scarff's Nursery argues that the Secretary failed to establish that the absence of hard hats for the employees in the trench was a recognized hazard.

Industry knowledge

The Secretary again cites to the newsletters and other documents to support its contention that the nursery industry recognizes a need to wear hard hats while working in trenches (Exhs. C-7, C-9, C-14). Of these documents, only Exh. C-14 directly addresses wearing hard hats in trenches. The rest are generalized references regarding the need for head protection where there is exposure to overhead hazards (Exhs. C-7, C-9).

Exh. C-14 is a document entitled "Federal OSHA Compliance Manual for the Nursery and Landscape Industry." It contains one page (G-223) that addresses the need to wear hard hats in trenches over 5 feet deep. No one at Scarff's Nursery was aware of this manual's existence. Compliance officer Denton "happened to find [the manual] in the Area Director's office" after his

inspection at Scarff's Nursery (Tr. 87). The Secretary provided no evidence that Scarff's Nursery or any other employer in the nursery industry knew of or used this manual.

The Secretary has failed to establish that the nursery industry recognized that working in a trench over 5 feet deep without head protection was a hazard. The documents that the Secretary adduced as proof of industry recognition did not specifically address trenches, except for Exh. C-14, which the Secretary failed to prove was known in the industry.

Actual knowledge

The Secretary also failed to prove that Scarff's Nursery had actual knowledge that working in a trench without a hard hat presented a hazard. Denton testified that he believed that the employer recognized the need for hard hats because it had hard hats available (Tr. 102). Scarff agreed that the company had hard hats in its landscape tool room, but stated that the hard hats were worn by its employees when they were engaged in commercial landscaping (Tr. 178). The Secretary adduced no other evidence establishing that Scarff's Nursery knew that its employees should be wearing hard hats while working in the trench. Item 2 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of Citation No. 2, alleging a serious violation of § 5(a)(1) for failing to provide an adequate protective system in a trench more than 5 feet deep, is affirmed and a penalty of \$2000.00 is assessed; and
2. Item 2 of Citation No. 2, alleging a serious violation of § 5(a)(1) for failing to provide hard hats to its employees working in a trench, is vacated and no penalty is assessed.

KEN S. WELSCH
Judge

Date: July 9, 1998