

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
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 Complainant, :
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 v. :
 :
 A.M.C.C. CORPORATION, INC., :
 :
 Respondent. :

OSHRC DOCKET NO. 96-0080

APPEARANCES:

Esther Curtwright, Esquire
New York, New York
For the Complainant.

Ronald G. Dunn, Esquire
Albany, New York
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected an excavation that was part of a construction project in Brooklyn, New York, on July 21, 1995, after a complaint the excavation was inadequately sloped; as a result, Respondent A.M.C.C. (“AMCC”) was issued a serious citation alleging a violation of 29 C.F.R. 1926.651(j)(2) and a willful citation alleging a violation of 29 C.F.R. 1926.652(a)(1). AMCC contested the citations, and the hearing in this matter was held on October 29-30, 1996. Both parties have filed post-hearing briefs.

Background

The subject project was an addition to a school building. The New York City School Construction Authority (“SCA”) awarded the primary contract to AMCC, and the project, called PS 244, was begun in November 1994. SCA had a project officer and a trailer on the premises, and URS Consultants (“URS”), which also had an office on the premises, provided construction management

services at the site. Before starting the job, AMCC employed a structural engineer to examine the contract documents and facilitate the securing of the necessary permit from the City of New York Department of Buildings; the engineer determined that “one-to-one” or 45-degree sloping was appropriate for the project’s excavations based on soil borings taken from the site, and AMCC, SCA and URS representatives agreed with this determination at a December 1994 meeting.

On July 21, 1995, AMCC was working in an excavation in which a detention tank was to be installed. Rafique Rahman, the acting project manager for URS that day, observed two AMCC employees working in front of the west wall of the pit shortly after 8:00 a.m.; the wall appeared to him to be nearly vertical, and the excavation, based on his measurement, was about 11 feet deep. Rahman advised Robert Rusy, AMCC’s project superintendent, that the pit was a hazard and needed to be corrected. The situation was the same when Rahman returned about twenty minutes later, and he gave Rusy written notice that if it was not corrected work would be stopped; Rusy gave the notice to Chad Hershman, AMCC’s quality control officer, who was also present. The condition remained unchanged, and at 10:15 a.m. Rahman gave Hershman a “stop work order” pursuant to the instruction of Ted Chandler, SCA’s on-site project officer, who also discussed the excavation with Rusy. Rusy removed the employees and phoned Charles Marino, AMCC’s president, after which the employees resumed working in the pit. Chandler phoned SCA and then tried to call Marino himself, and, after being unable to reach him, spoke with AMCC office manager Everett and asked him to tell Marino to remove the employees immediately because the excavation was unsafe; Chandler also spoke with Stan Petrow, SCA’s chief project officer, who in turn called Marino, and Chandler, on the instruction of Jay Moneta, SCA’s safety engineer, called OSHA.

OSHA compliance officer (“CO”) Robert Stewart arrived about 2:00 p.m., by which time some adjustments had been made to the sloping. The CO saw two employees working in the southwest corner of the pit in view of Rusy, and the employees exited the pit on the CO’s request, after which Rusy, and later Hershman, approached; the CO knew both of these individuals due to his prior visit to the site in February 1995. The CO told Rusy why he was there, and Rusy responded that the walls were adequately sloped; however, when the CO asked about the west wall, Rusy indicated it could not be sloped further due to the sidewalk and fencing next to the wall. The CO also asked Rusy if he knew what type of soil was at the site and Rusy replied he did not. CO Stewart then

measured the pit, which was approximately 45 feet long by 40 feet wide and 10.5 feet deep, and the west wall slope, which he found to be 53 degrees; he also noted that in the corner where the employees had been the wall was almost vertical for the first 7 feet, that the spoil piles on either side of the west wall were both about 12 feet high, and that the one above the area where the employees had been was on the edge of the excavation. The CO tested the soil from the other pile, which Rusy told him was from the excavation, using a penetrometer and a torvane and determined it was Type C; however, he also took samples from the pile and sent them to the OSHA lab in Salt Lake City for analysis, and based on C-19, the results, the soil was actually Type B. C-1-5 are photos of the pit Rahman took that morning, C-6 is a photo he took after the CO's arrival, and C-11-15 are photos of the pit taken by the trainee accompanying CO Stewart. C-7-8 are Rahman's notices to Rusy.

Willful Citation 2

This citation alleges a violation of 29 C.F.R. 1926.652(a)(1), which requires employees in excavations over 5 feet deep to be protected from cave-ins by appropriate sloping or other means. Table B-1 in Appendix B to Subpart P, OSHA's excavations standard, sets out the following maximum allowable slopes for the various soil types:

Stable Rock	Vertical	(90 degrees)
Type A	3/4:1	(53 degrees)
Type B	1:1	(45 degrees)
Type C	1 1/2:1	(34 degrees)

The parties have stipulated that the OSHA lab results show that the soil taken from the site was Type B, and CO Stewart testified Robert Rusy told him that the spoil pile from which he took his samples came from the subject excavation. (Tr. 138-39; 154; 171-73). Further, as noted above, Dr. Farid Noorai, the structural engineer AMCC employed before beginning the job, determined one-to-one or 45-degree sloping was appropriate, and AMCC, SCA and URS agreed with this determination at a December 1994 meeting. (Tr. 98-102; 161-62; 184-94; 296-301). AMCC should consequently have been using 45-degree sloping in the subject excavation. However, CO Stewart testified that when he measured the west wall slope it was 53 degrees. (Tr. 145-47). Rusy testified he believed the west wall was sloped one to one. (Tr. 256-57; 263-64; 270). Regardless, the only evidence of measurement of the west wall slope, which AMCC did not rebut, was that of the CO. I find, therefore, that the west wall was in fact sloped at 53 degrees at the time of the inspection.

AMCC contends the west wall was adequately sloped based on the testimony of Dr. Noorai. Dr. Noorai testified his initial determination was based on soil borings taken from the site and soil reference books; he also visited the job monthly up to the time of the inspection, which confirmed his determination. Dr. Noorai further testified he took soil from the upper part of the west wall in December 1995, after the pit was partly filled in, and washed it through a sieve, which indicated the soil was silt with very little sand and more cohesive than the borings had revealed; he applied this determination to an accepted formula and concluded the sloping at the site was safe. Dr. Noorai said his methods did not indicate what type the soil was, that he was unaware OSHA defined cohesive soil as soil containing clay, and that he did no tests to determine clay content; however, he noted that the soil held together when washed through the sieve, indicating it was greasy, and that the remainder, which he kept in plastic bags, also held together. (Tr. 184-248; 350-53; R-4).

Dr. Alan Peck, OSHA's senior soil scientist and the individual who analyzed the samples in this case, testified that Dr. Noorai's conclusion assumed the soil was cohesive and that he should have performed a plasticity test to determine its cohesiveness, which is done by taking a piece of soil and attempting to roll it into a stable 1/8-inch thread. Dr. Peck further testified that silt is ultra-fine sand with apparent but no true cohesiveness, meaning it can stick together temporarily but cannot be relied on, and that the OSHA regulations define cohesive soils as those containing clay. He said his analysis of the soil revealed it to be cohesionless silty sand, although it was Type B; he also said that while the evidence indicated the pit had two distinct layers, a sandy bottom layer and a silty top layer, and he had no way of knowing which area the CO's sampling had come from, other witnesses had described the soil at the site as sandy and containing no clay. (Tr. 321-49; C-19).

I conclude AMCC has not shown that the west wall slope at the time of the inspection was adequate. Dr. Noorai's analysis of the upper part of the wall, which he found to be silt, included no testing for cohesiveness, and Dr. Peck's testimony, which was based on the OSHA standard, was that cohesive soil by definition contains clay and that silt is a cohesionless soil. *See* Appendix A to Subpart P. That the soil lacked cohesion is supported by the testimony of Rafique Rahman, the acting project manager for URS that day, and Jose Aranda, a senior consultant with AIG, SCA's insurance carrier, who was at the site that day between noon and 2 p.m. after being contacted by SCA. Rahman, who has an architecture degree and some experience in soil classification, testified the soil

was sandy with some silt and that it was easily crushed and not plastic; he also testified he saw soil sliding down the slopes as the excavator moved along. (Tr. 7-9; 28-29; 42-47). Jose Aranda, a civil engineer familiar with OSHA soil types, testified the soil appeared to be a loose, Type C material with no clay. (Tr. 105-08; 112-13; 122-24). Robert Rusy, who has many years of construction experience but no training in soil types, testified the soil at the site was hard and stable, noting the west wall stood up without cracking during excavation and that the excavator left teeth marks in it. (Tr. 250-51; 262-69; 273-75; 280; 284; 287). However, Dr. Peck testified that these are not reliable indicators of a wall's stability, and, as a soil expert, his opinion clearly carries more weight than that of Rusy. (Tr. 328; 342). His opinion also carries more weight than that of Dr. Noorai, whose after-the-fact conclusion that the wall was safe is unpersuasive in light of his own previous determination that 45-degree sloping was the appropriate protection for excavations at the site. Moreover, the standard unequivocally requires 45-degree sloping for Type B soil, and an employer choosing sloping as the protective method to be used must conform to the standard. *Conie Constr., Inc.*, 16 BNA OSHC 1870 (No. 92-0264, 1994), *aff'd sub nom. Conie Constr., Inc. v. Reich*, No. 94-1592 (D.C. Cir., October 30, 1995). AMCC was therefore in violation of the standard.

The Secretary has characterized this citation as serious/willful. The serious nature of the violation is apparent. In regard to the willful characterization, a violation is properly classified as willful if it was committed "with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). The Secretary contends the violation was willful based on AMCC's knowledge of the standard's requirements and the circumstances at the subject site. AMCC, on the other hand, contends the violation was not willful.

Ted Chandler, SCA's on-site project officer, has been in the construction business for sixteen years and is familiar with soil types and sloping requirements; he testified that C-9, SCA's safety manual, is provided to all contractors of SCA, that he provided it to AMCC, and that C-9 requires compliance with the OSHA excavations standard. (Tr. 68-70; 80-81). Charles Marino, AMCC's president, testified that his contract with SCA required his company to follow the OSHA excavation requirements and that he was familiar with those requirements due to AMCC's ten previous projects with SCA and his eighteen years in the construction business. (Tr. 319-20). Marino also testified

about AMCC's determination that 45-degree sloping was the appropriate protection to use at the site, based on the conclusions of Dr. Noorai, and both he and Chandler discussed the December 1994 meeting in which AMCC, SCA and URS agreed with this determination. (Tr. 98-102; 296-301).

It is clear from the above that AMCC was aware of the OSHA excavation requirements and that it made a determination that 45-degree sloping was appropriate for the site. However, it is not clear whether Robert Rusy, the project superintendent, was ever provided this information. Marino testified he could not specifically remember doing so, although he thought he had, and he noted that while AMCC's general superintendent, Sol Kessler, had been at the December 1994 meeting and that it would have been Kessler's job to inform Rusy of the sloping decision he himself had no actual knowledge this had occurred. (Tr. 300-01; 318-19). Further, Rusy never testified he was told of the decision, stating only that he concluded 45-degree sloping was appropriate due to the nature of the soil and that this was the sloping he used at the site. (Tr. 253-57; 263-64; 270-71). Regardless, it is apparent from the record that Rusy did not follow the 45-degree sloping requirement at the site.

CO Stewart testified that an excavation he saw in another area of the site in February 1995 was gently sloped on one side but very steeply sloped on the other side, with an angle greater than 45 degrees, and that Rusy told him he did not know what type the soil was; the CO advised Rusy the soil should have been treated as Type C and the excavation sloped accordingly, since Rusy did not know the soil type and that area typically had Type C soil, but no citation was issued because there were no employees in the excavation. The CO further testified Rusy told him again on July 21 that he did not know what the soil type was but that he thought the walls were sloped properly; however, when the CO asked about the west wall, Rusy responded that to slope the wall any further he would have to take the fence down and cut into the sidewalk, which would require a few days' delay as he would have to get a permit, whereas otherwise he could be out of the pit by the end of the day. (Tr. 133-36; 152-53; 159-60; 167-68; 176-77). Rusy did not remember discussing soil type or sloping with the CO in February 1995, but his recall as to what he said about sloping the west wall further on July 21 was not materially different from the CO's testimony. (Tr. 255-56; 270-71; 274).

The background portion of this decision describing the circumstances leading up to the July 21 inspection is based on the testimony of Rafique Rahman, the acting project manager of URS that day, and Ted Chandler, SCA's project officer; it is apparent from their testimony that they advised

Rusy of their concerns about the west wall, which both described as almost vertical at that time, that they considered the condition sufficiently hazardous to stop the work, and that when the employees resumed working in the excavation after Rusy phoned Marino Chandler called OSHA after first contacting SCA and AMCC. (Tr. 13-16; 26-41; 57-61; 70-79; 85-87; 91-96). In addition, Chandler testified that no changes were made to the sloping until after he called OSHA, and Jose Aranda, the AIG consultant who was at the site between noon and 2:00 p.m. after being contacted by SCA, testified the west wall was nearly vertical when he saw it and that he considered the pit a hazard. (Tr. 95-96; 103-04; 107-08; 115-17). Rusy, however, indicated he believed the west wall was “safe” from the outset and that it was sloped one to one at the time of the inspection. He also indicated that adjustments were made to the wall right after the “stop work order” was issued and that he did not know OSHA was contacted, but he then conceded that the employees resumed working in the excavation before any changes were made to the sloping. (Tr. 258-64; 270-71; 278-88).

Charles Marino testified he first became aware of the situation at the site when Rusy called to tell him Rahman had concerns about the excavation; he asked Rusy if he felt the excavation was safe, Rusy said he did, and Marino told Rusy he wanted him to do what was “obviously safe.” A few minutes later Marino learned that Chandler had tried to call him, and he then received a phone call from Stan Petrow, SCA’s chief project officer, who wanted to know what the problem was; Marino advised him there were complaints about the sloping but that Rusy had told him the slopes were safe, after which Petrow asked Marino to tell Rusy to work on the slopes and get back to work, and Marino did so. Marino said he was unaware of the “stop work order” then, that he did not know about the OSHA visit until Hershman called him and told him the CO was there, and that he had no information the sloping was unsafe and gave no instructions to resume work in an unsafe excavation; he also said he did not go to the site himself as he had confidence in Rusy’s ability and safety based on the many years he had worked with him and that he believed Rusy’s statements over those of the on-site SCA and URS personnel due to previous problems he had had with them. (Tr. 302-20).

Based on the record, the violation was willful. Despite AMCC’s determination 45-degree sloping was appropriate for the site, it would appear that Rusy was never told of this determination, or, if he was, that he chose not to follow it, in light of the sloping in both the earlier and the subject excavation. Rusy, and apparently Hershman, also chose to do nothing about the west wall after an

oral and then a written notice from Rahman, and Rusy did not even contact Marino until receipt of the “stop work order” countersigned by Chandler. According to Marino, Rusy told him only that Rahman had “some concerns” about the excavation and did not say that work had been stopped; however, this is contrary to Rusy’s testimony that he advised Marino of the order. (Tr. 283; 302-05). Marino therefore directed Rusy to resume work in the excavation knowing its safety was questionable, in spite of his testimony indicating he did not, and even after the subsequent calls from Chandler and Petrow, Marino’s only action, based on his testimony, was to tell Rusy to “work the banks some more” and “resume work.” (Tr. 304-07; 318). Moreover, while Rusy and Marino testified they did not know OSHA had been called, Chandler indicated that both were aware of the call; Chandler also specifically testified that no changes were made to the west wall until after he contacted OSHA, and his testimony is supported by that of Aranda that the wall was nearly vertical when he was at the site between noon and 2:00 p.m. (Tr. 79; 96; 103-04; 107-08; 115).

A conclusion that the violation was willful is also supported by one of Rusy’s statements to the CO. As noted above, Rusy initially told the CO he thought the excavation was sloped properly; however, when asked about the west wall, his response was that to slope the wall any further he would have to take the fence down and cut into the sidewalk, which would require a few days’ delay as he would have to get a permit, whereas otherwise he could be out of the excavation by the end of the day. (Tr. 135-36; 153; 176-77; 270-71). This statement shows the reason for AMCC’s failure to properly slope the west wall. It also undermines Rusy’s testimony as to his belief that the wall was “safe” and, as adjusted, sloped one to one, which was not credible in any case in view of the contrary testimony of the CO, Aranda, Chandler and Rahman. I find that AMCC’s actions in regard to the excavation at the site exhibit both intentional disregard of the Act and plain indifference to employee safety, and the citation is affirmed as a willful violation. I also find the proposed penalty appropriate based on the CO’s testimony about the gravity of the violation and the company’s size, history and good faith. (Tr. 143-44; 149-53; 173-77). A penalty of \$44,000 is accordingly assessed.

Serious Citation 1

This citation alleges a violation of 29 C.F.R. 1926.651(j)(2), which requires excavated or other material or equipment that could pose a hazard by falling or rolling into excavations to be kept

at least 2 feet from the edge, retained by a retaining device, or both. The testimony of CO Stewart and photos C-11-15 establish that the spoil pile above the area where the employees were working was on the edge of the excavation and was not retained in any way; the CO also testified the pile showed signs of material beginning to slough off into the excavation and that a cubic foot of soil falling on a worker could cause serious injury or death. (Tr. 140-44). AMCC concedes the spoil pile was within 2 feet of the edge of the excavation but contends there is no proof that employees were exposed to material falling from the pile. I disagree, based on the CO's testimony and the photos, which clearly demonstrate the violative condition and employee exposure. This citation is therefore affirmed as a serious violation, and the proposed penalty of \$3,000.00 is appropriate in view of the CO's testimony with respect to the gravity of the condition and AMCC's size, history and good faith. (Tr. 143-44; 173-74). The proposed penalty of \$3,000.00 is accordingly assessed.

Conclusions of Law

1. Respondent AMCC is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent AMCC was in serious violation of 29 C.F.R. 1926.651(j)(2) and willful violation of 29 C.F.R. 1926.652(a)(1).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 is AFFIRMED as a serious violation, and a penalty of \$3,000.00 is assessed.
2. Citation 2 is AFFIRMED as a willful violation, and a penalty of \$44,000.00 is assessed.

Irving Sommer
Chief Judge

Date: