



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
CITADEL CORPORATION
Respondent.

OSHRC DOCKET
NO. 95-0221

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 2, 1996. The decision of the Judge will become a final order of the Commission on June 3, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before May 22, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Handwritten signature of Ray H. Darling, Jr. in black ink, written over the typed name and title.
Ray H. Darling, Jr.
Executive Secretary

Date: May 2, 1996

DOCKET NO. 95-0221

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SECRETARY OF LABOR,
Complainant,

v.

CITADEL CORPORATION,
Respondent.

OSHR Docket No. 95-221

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (Act). Citadel Corporation (Citadel) contests two citations issued by the Occupational Safety and Health Administration (OSHA) alleging three serious violations and one willful violation of the Act.

Citadel was the general contractor on a project to construct two five-story apartment buildings known as the Sixth Street Apartments on the Georgia Tech campus in Atlanta, Georgia. Compliance Officer Tom Harvey conducted an inspection of the worksite on August 31, 1994, resulting in issuance of the citations.

Before commencement of the hearing in this matter, the Secretary withdrew Item 2 of Citation No. 1, which alleged a serious violation of 29 C.F.R. § 1926.651(a). At the close of the Secretary's case, Citadel moved to dismiss the citations asserting a failure to prove a prima facie case. A ruling on the motion was held in abeyance to be made part of the decision pending review of the record. Citadel then proceeded to present evidence.

Citation No. 1, Item 1

Alleged Violation of 29 C.F.R. § 1926.21(b)(2)

The standard states as follows:

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 citation alleges that employees were "working in and around excavation without employee training to recognize and avoid unsafe conditions."

Compliance Officer Harvey testified that the alleged violation was based on interviews with employees Bennie Stewart and David McGaughey. He was informed that "they had not received any instructional training relative to safety and health issues in trenching and excavations." This included training in the recognition of hazards (Tr. 166, 168). On cross-examination, Harvey admitted that he did not ask Citadel's superintendent or assistant superintendent on the worksite about the Company's safety training or its documentation (Tr. 179, 184).

Citadel argues that if the compliance officer had inquired, he would have learned its safety training complied with the standard. In support of its argument, Citadel points out that Superintendent Greg Thomas testified on cross-examination as follows (Tr. 35):

Q Now, Citadel didn't train its employees on this job site to recognize and avoid unsafe excavations, did it?

A That's not true. Yes. We did.

Q And who provided the training?

A I did. We have a safety package that each employee signs when they're hired. We also have a Citadel Safety Manual that each employee has and is given when he is employed, that he has to read and sign, and I witness it.

Then we have toolbox safety meetings, which we have every Monday morning, usually Monday. It depends on the schedule, once a week. And we discuss the different items for the job. And we had one that Monday, I believe, before that, before the inspection.

* * *

Q You didn't train employees to recognize and to avoid unsafe excavations that were not trenches, did you?

A Oh, yes, we did. We have a safety manual that has all sorts of topics in it. We talked about all of it and whatever pertains to the situation that's going on at that time in the construction phase.

Thomas also testified that employees were given orientation safety training which included a copy of the Citadel Job Site Safety Manual (Tr. 271-272; Exh. R-12). After completion of the orientation training, each employee signed a Safety Agreement indicating that he had received training, would attend weekly safety meetings, and would comply with all OSHA regulations (Tr. 197-198; Exh. R-2). Evidence showed that both Bennie Stewart and David McGaughey had signed the Safety Agreement (Tr. 198, 200, 271; Exh. R-2).

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, P. 39,678 (No. 88-821, 1991). To establish the violation, the Secretary relied solely on the compliance officer's testimony that two employees told him they had received no training. Citadel's project superintendent at the jobsite, however, stated that he provided the necessary training. Although it is not clear when the training was given, his testimony sufficiently refutes the compliance officer's testimony.

Clearly, the record shows the Secretary failed to establish by a preponderance of the evidence that the standard was violated.

Citation No. 1, Item 3

Alleged Violation of 29 C.F.R. § 1926.651(k)(1)

The standard provides in pertinent part that:

Daily inspection 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. . . .

The alleged violation is described in the citation as follows:

- (a) 875 Northside Drive, Atlanta, GA - 6th Street Apartments - East side elevator pit and west side earth wall - Employees, working in and around excavation without a trained competent person on site to preform [*sic*] daily inspection prior to employees entering excavations. On or about August 23-31, 1994.

The record discloses that some of the initial work on the project involved excavations in two different areas. At the time of the inspection, neither location was shored or sloped.

In answer to the question as to why he believed the standard was violated, Mr. Harvey stated:

- A Because of the conversation I had with Mr. Thomas, as well as with Mr. Cadle, that Mr. Thomas stated that he did not have a trench, he had an excavation and he saw no problem with it. With Mr. Cadle, he stated to me that he made no inspections of that location on a daily basis and so, therefore -- and also, if there was a competent person on site, and he stated to me, "No," there was not (Tr. 170-171).

Section 1926.650(b) provides that "Competent person means 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."

Mr. Thomas, the project superintendent, testified that he has over 25 years' experience in the construction industry with about 80% of his experience involving projects with excavation and grading work. Employed in various capacities over that period of time, he had never been on a job site that received a citation from OSHA for excavation or trenching violations (Tr. 13, 17-18, 195-196).

Citadel also shows that Assistant Superintendent Danny Cadle had been in the construction industry for over 24 years, with experience in a variety of construction projects, all of which involved grading and excavation (Tr. 312). In addition, Cadle testified he received formal

Competent Person training sponsored by the Associated General Contractors of Georgia in June, 1993. He received a certificate which he carries with him at all times (Tr. 313; Exh. R-13). Cadle testified that he conducted daily inspections of the entire job site noting anything that appeared unsafe. He stated that the compliance officer never asked him if there was a competent person on the worksite (Tr. 313-314, 333).

Compliance Officer Harvey concluded the standard was violated based on discussions with Citadel's superintendent and assistant superintendent at the site. His testimony, which was contradicted by Cadle, must be resolved in favor of Citadel. If Cadle had reasonably understood that his status as a Competent Person was in question, he more than likely would have produced his certificate. Also, the fact that Superintendent Thomas did not see a problem with the existing excavation is not crucial in determining whether the standard was violated. Certainly, competent persons may disagree, or even commit errors in judgment, yet fully meet the requirements of the standard.

Citadel's evidence convincingly shows that inspections were conducted in a manner consistent with the standard and that Mr. Thomas and Mr. Cadle as competent persons had the authority to take "prompt corrective measures" whenever hazardous conditions were discovered (Tr. 24, 39, 206, 208). The standard was not violated as alleged.

Citation No. 2

Alleged Willful Violation of 29 C.F.R. § 1926.652(a)(1)

The standard, which pertains to protection of employees in excavations, provides in pertinent part:

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 . . .

Paragraph (b) requires that excavations be sloped at an angle not steeper than one and one-half horizontal to one vertical, or in accordance with Appendices A and B to the standard. Appendix B specifies the method for classifying types of soil and provides that Type A soil shall not be sloped at an angle steeper than three-fourths horizontal to one vertical; Type B soil shall not be sloped steeper than one horizontal to one vertical; and Type C soil shall not be sloped steeper than one-half horizontal to one vertical. As an alternative to sloping in accordance with Paragraph (b), an

employer may use another protective system designed in accordance with Paragraph (c). The citation alleges as follows:

Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer has 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) 875 Northside Drive, Atlanta, GA - 6th Street Apartments - East side elevator pit and west side earth wall - Employees, exposed to cave-in hazards on or about August 23-31, 1994.

In this case, there is no dispute the areas in question were excavations (Tr. 286). Compliance Officer Lawrence Harvey testified why he believed the standard was violated. He stated:

A I noted an excavation on the west side of the job site that was approximately 100 feet in length, that was approximately four and a half to 18 feet in height and that was a near vertical plane and that there was employees at the time working adjacent to this excavation. There was no protective systems that were used. There was no sloping that met the standard.

I then also noted an elevator pit that had similar conditions with vertical walls and no shoring or sloping that was provided. At the time, I did not note any employees who was working in that area of the elevator pit, but there was indications that there had been employees working adjacent to those walls (Tr. 121).

Harvey was told by Cadle that the pit measured 30 by 40 and 12 to 14 feet in depth (Tr. 155). He also observed surface cracks in the west wall and "some sloughing off of material that had failed within the wall" (Tr. 121-122). The cracks and failures were pointed out to Cadle (Tr. 157).

Testimony revealed that a retaining wall was to be built at the west earth wall. Concrete for the footings was poured into trenches approximately one to two feet deep and three and one-half feet wide (Tr. 122, Exhs. C-1, C-10). Citadel employees had placed engineering stakes next to the earth wall as part of the construction work (Tr. 130-131; Exhs. C-2, C-15). In the East Building elevator pit, the edge of the footing was constructed a few feet from the earth wall. It is asserted Citadel employees worked in the area placing engineering stakes against the wall (Tr. 293-193; Exhs. C-6, C-7).

Morteza Astanehasl, an engineer technician for a consulting firm at the worksite, testified that on three occasions he spoke with Thomas about the need for sloping the west wall. He stated Thomas told him “some people” were “going to give him a price about the shoring” (Tr. 110). Ashton Conover, inspector for the project owner, Georgia State Finance and Investment Commission, testified that he advised Thomas the earth wall needed shoring. He stated Thomas responded that it would cost a fortune to shore the area (Tr. 61-62). Conover also told Richard Rogers, Citadel’s project manager, that the wall needed shoring (Tr. 66). Another witness, Belal Jarun, project manager for another subcontractor, told Rogers the wall appeared unsafe. Rogers indicated something would be done about the wall (Tr. 87-88).

Jarun testified that his company’s safety director investigated the matter and advised that the two excavation sites needed sloping and were in violation of OSHA standards (Tr. 90, Exh. C-8). Compliance Officer Harvey classified the citation as willful because Citadel disregarded repeated warnings about the dangers of the West Building earth wall and permitted employees to continue working next to it (Tr. 150). He also believed that if the wall collapsed, it could cause death or serious injury (Tr. 148-149).

Citadel argues that the Secretary relies on a series of photographs to establish the underlying violation. In questioning the foundation testimony, Citadel revealed that the west wall was 240 or 280 feet in length and not 100 feet, as indicated by the compliance officer. In addition, the height of the wall did not range from 4 ½ to 18 feet in height, but did not exceed 12 feet (Tr. 211, 213). The inspecting officer admittedly made no measurements of the excavated areas. He further admitted that the only soil test he performed was when he picked up some soil “adjacent” to the wall that had no “cohesiveness” and fell apart in his hand. He contended it could not have been Type A soil because it had been disturbed--showing “cracks and failures.” He admitted he did not know where it came from and he did not see any soil in the west wall fall and crumble (Tr. 141, 182-183).

Superintendent Thomas stated that the soil of the west wall was “hard clay, packed cohesive soil that had never been disturbed” and that he considered it to be Type A or Type B+ based on his observation and discussions with others about soil on the Georgia Tech property (Tr. 47, 48). In addition, Thomas explained that a 32 - 38 inch diameter oak tree was cut down and fell across the

edge of the west wall three days after the inspection with no affect on the stability of the wall (Tr. 214, Exh. R-9).

Neither Thomas or Cadle had seen any surface cracks in the excavation walls during their daily inspections (Tr. 268-327). They stated that at no time during the inspection did the compliance officer indicate he saw surface cracks (Tr. 268-269, 328). In addition Citadel argues that “cracks” in the surfaces of the excavation were not mentioned in the compliance officer’s 1-B report of the OSHA investigative file. Similarly, surface cracks are not apparent in photographs of the west wall (Exhs. C-1, 2, 10-15).

Greg Thomas took measurements at the east elevator pit. He testified that the south wall was eight feet high from the top of the column footing to the base of the wall and 15 feet from the edge of the concrete platform in the bottom of the excavation to the top of the south wall (Tr. 262, 328). Thomas further testified that the west wall of the east elevator pit shown in Exhibit C-5 is six feet from the top the column footing to the base of the wall and 15 feet from the edge of the concrete platform to the edge of the top of the wall (Tr. 263, 264, 330-331). Thus, it is argued these dimensions constitute a slope of approximately 1½:1 as required for the least stable soil identified in 29 C.F.R. § 1926.652(b)(1). These dimensions are not refuted.

The Secretary satisfies his burden of proof if the record, when considered as a whole, contains preponderating evidence in support of his allegations. *See Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), *Ultimate Distribution Systems, Inc.*, 10 BNA OSHC 1570:

[A] “preponderance of the evidence” is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.”

In this case, the Secretary’s evidence of the violation is based on the observations and subjective views of the compliance officer and employees of subcontractors at the site. It was not shown that measurements were taken or soil tests performed at the excavation. On the other hand, Citadel took some measurements and presented testimony that refuted the Secretary’s case. In light of all the evidence, the Secretary is less than convincing that the violation occurred as alleged.

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 on the foregoing decision, it is hereby ORDERED:

- (1) Citation No. 1 is hereby VACATED.
- (2) Citation No. 2 is hereby VACATED.

/S/ PAUL L. BRADY

PAUL L. BRADY

Judge

Date: April 29, 1996