



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

Phone: (202) 606-5100

Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
HUMBERT SANITARY SERVICE
Respondent.

OSHRC DOCKET
NO. 95-1437

**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 January 22, 1996. The decision of the Judge will become a final order of the Commission on February 21, 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 February 12, 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: January 22, 1996

DOCKET NO. 95-1437

NOTICE IS GIVEN TO THE FOLLOWING:

Benjamin T. Chinni
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Mike Humbert, President
Humbert Sanitary Service, Inc.
PO Box 2126
1581 Applegrove Road, N.W.
North Canton, OH 44721

Robert L. Burch, President
Burch and Associates
6254 Market Avenue, North
North Canton, OH 44721

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1365 Peachtree Street, N.E., Suite 240
 Atlanta, Georgia 30309-3119

Phone: (404) 347-4197

Fax: (404) 347-0113

SECRETARY OF LABOR,
 Complainant,

v.

HUMBERT SANITARY SERVICE, INC.,
 Respondent.

OSHRC Docket No. 95-1437

E-Z

Appearances:

Betty Klaric, Esquire
 Office of the Solicitor
 U. S. Department of Labor
 Cleveland, Ohio
 For Complainant

Robert L. Burch, President
 Burch and Associates
 North Canton, Ohio
 For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Humbert Sanitary Service, Inc., is a small construction contractor engaged in installing and cleaning septic tanks, laying sewer pipe, and performing related activities (Tr. 166). Occupational Safety and Health Administration (OSHA) compliance officer Thomas Henry inspected one of Humbert's worksites on August 3, 1995. As a result of Henry's inspection, the Secretary issued two citations to Humbert on August 11, 1995. Humbert contests the four items contained in citation No. 1, involving trenching violations. Humbert did not contest the "other" violations contained in citation No. 2.

This case was heard on December 1, 1995, pursuant to the "E-Z" trial procedures set out in Commission Rules 200-211, 29 C.F.R. §§2200.200-211. The E-Z trial is a pilot program designed

to provide simplified proceedings for resolving contests under the Occupational Safety and Health Act of 1970 (Act).

Background

Humbert contracted to work on a sewer construction project at 9474 Cleveland Avenue in North Canton, Ohio (Tr. 6). Humbert's assignment was to tap a main sewer line and install a lateral connection to it. On August 3, 1995, OSHA compliance officer Henry inspected Humbert's worksite in response to a complaint that Humbert's employees were working in an unsafe trench (Tr. 7, 59).

Cleveland Avenue runs north-south, with two lanes going in each direction. The trench began at the southbound lane on the west side of Cleveland Avenue and ran east-west. Cleveland Avenue was kept open. The Stark County Sheriff's office detoured the southbound traffic into the northbound lanes. The trench exposed a pipe line that had been previously installed (Exh. C-5). The trench was excavated in previously disturbed soil. The trench was 10 to 12 feet deep (Tr. 16-17, 66-68). It was 17 feet long and 5 to 6 feet wide (Tr. 69). The sides of the trench were vertical (Tr. 15, 70). A trench box was on the site but was not used (Tr. 12-13).

On August 2, 1995, the day before Henry's inspection, John Crawford visited the worksite. Crawford is a construction inspector for the Stark County Engineering Department (Tr. 6). Crawford observed Humbert employee Chris Rothwell working in the bottom of the trench. Humbert had no protection against a trench cave-in. Crawford and his supervisor, Pat Danley, advised Humbert's foreman Larry Froelic to use a trench box (Tr. 10-11, 53). Crawford noted in his work diary that "Contractor elected to use no trench box nor road plates in trench" (Exh. C-1; Tr. 11).

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.21(b)(2)

The Secretary alleges that Humbert violated § 1926.21(b)(2) which provides:

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.

Henry interviewed the three Humbert employees present at the worksite: the foreman, Larry Froelic, and the laborers Chris Rothwell and Bernard Cromi (Tr. 61). Henry determined that

Humbert had not instructed the employees in the recognition and avoidance of unsafe conditions. Rothwell was working in an unprotected trench, 10 to 12 feet deep with vertical walls, which was excavated in previously disturbed soil. Neither Rothwell nor Cromi were aware of the requirements of the trenching standards (Tr. 63-64). Henry testified that Rothwell and Cromi “stated they had not had any training in trenching” (Tr. 63).

The Secretary has established a violation of §1926.21(b)(2). The hazard created by the violation of the cited standard is that of a cave-in, which would likely result in death or serious physical injuries. Humbert committed a serious violation of 11926.21(b)(2).

Item 2: Alleged Serious Violation of §1926.651(k)(1)

The Secretary alleges Humbert violated § 1926.651(k)(1) which provides:

Daily inspections 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. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Section 1926.650 defines “competent person” as:

[O]ne 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.

Humbert claims that its foreman, Larry Froelic, was its competent person on the site. Henry testified that Froelic was not competent within the meaning of the Act because Froelic had not received any formal training in trench safety and did not appear to understand the requirements of the excavation standards (Tr. 65).

At the hearing, Humbert submitted a signed statement handwritten by Froelic which reads (Exh. R-10; Tr. 135):

Under the definitions as explained by Bob Burch the instructor of our safety classes [and Humbert’s representative at the hearing] I believe I was the competent person on the project.

Thursday Aug. 3 1995 I inspected the job & the soil & believed it to be at least type A now that I know the terms out of the CFR 1926.650 Reg.

Froelic's statement immediately raises two issues regarding his status as a competent person. First, the safety classes to which Froelic refers started approximately one month before the hearing, three months after the inspection (Tr. 136). At the time of the inspection, Froelic had not received any safety instruction. This point is emphasized by Froelic's statement that he believed the soil in the trench was Type A "now that I know the terms out of the CFR 1926.650 Reg." The implication is clear that prior to Burch's safety classes, Froelic was unfamiliar with the requirements of the OSHA standards.

Second, Froelic states that he believes that the soil was Type A. Henry did not conduct a test on a soil sample, but he stated that the soil was at best Type B. Henry's assessment is supported by Appendix A to Subpart P ("Soil Classification"). Paragraph (b) of the Appendix provides in pertinent part:

[N]o soil is Type A if:

...

- (ii) The soil is subject to vibration from heavy traffic, pile driving, or similar effects; or
- (iii) The soil has been previously disturbed [.]

The trench was immediately adjacent to a four lane roadway, where traffic was maintained. Thus, it was subject to vibrations. The soil was also previously disturbed, as evidenced by the existence of a previously installed pipe (Exh. C-5; Tr.17). Froelic's belief that the soil was Type A, despite these two obviously disqualifying conditions, demonstrates that he was not "one who is capable of identifying existing and predictable hazards." See *E. L. Davis Contracting Co.*, 16 BNA OSHC 2046 (No. 92-35, 1994).

The Secretary has established that Humbert was in violation of §1926.651(k)(1). The failure to have a competent person inspect the trench exposed the employee working in the trench to the possibility of a cave-in. The violation was serious.

Item 3: Alleged Serious Violation of §1926.652(a)(1)

The Secretary alleges that Humbert violated §1926.652(a)(1) which provides:

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 except when:

- (I) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Crawford gave unrefuted evidence that he observed Rothwell working in the unprotected trench, which was at least 10 feet deep and excavated in previously disturbed soil, on August 2, 1995 (Tr. 10-11, 53). Humbert had a trench box at the worksite but did not use it in the trench (Tr. 12-13). No other means of protection was used.¹

The Secretary has established that Humbert violated §1926.652(a)(1). Humbert exposed its employee in the trench to death or serious physical injury caused by a cave-in. The violation was serious.

Item 4: Alleged Serious Violation of §1926.1053(b)(1)

The Secretary asserts a violation of § 1926.1053(b)(1), which provides:

When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

Humbert had a ladder in the trench which extended 12 to 14 inches above the trench's opening (Exhs. C-2, C-3; Tr. 80). The Secretary argues that the ladder needed to extend at least 3 feet above the opening, in accordance with §1926.1053(b)(1).

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

¹ At the hearing, Humbert's representative spent a great deal of time questioning the method of abatement, conditionally approved by Henry, which Humbert subsequently used. The concern of this court is whether Humbert was in violation of the cited standard at the time of the inspection.

have known of it with the exercise of reasonable diligence. See, e.g., *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD 29,239, p. 39,157 (No. 87-1359, 1991).

Seibel Manufacturing & Welding Corporation, 15 BNA OSHC 1218, 1221-1222 (No. 88-821).

The Secretary has failed to prove that the cited standard applies in this case. Section 1926.1053(b)(1) states that ladders used to reach “an upper landing surface” must extend 3 feet above the landing surface. “Landing” is defined as “[a]n intermediate platform on a flight of stairs” or “[t]he area at the top or bottom of a staircase.” *The American Heritage Dictionary*, 2d ed., 1982. By using the word “landing,” the standard would appear to apply to ladders used to access an area of a structure. The standard does not apply to a ladder used as a means of egress from a trench to the upper ground. Otherwise, the drafters of the standard could have worded the standard to read “an upper surface.” The use of the word “landing” is redundant if the application of the standard is not restricted in this way.

Humbert was not in violation of §1926.1053(b)(1).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under section 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.

Humbert employed eight employees at the time of the hearing. The company had no history of previous violations. Humbert demonstrated a lack of good faith in ignoring Crawford and Danley’s advice to use some form of trench protection (Tr. 83). The gravity of items 1, 2, and 3 is high. The hazard created by each of these violations was the possibility of a trench cave-in.

Upon due consideration of these factors, the court determines that the appropriate penalties are \$600.00 each for items 1 and 2, and \$1500.00 for item 3.

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. 1, alleging a serious violation of §1926.21(b)(2) is affirmed, and a penalty of \$600.00 is assessed;
2. Item 2 of citation No. 1, alleging a serious violation of §1926.651(k)(1) is affirmed, and a penalty of \$600.00 is assessed;
3. Item 3 of citation No. 1, alleging a serious violation of §1926.652(a)(1) is affirmed, and a penalty of \$1500.00 is assessed; and
4. Item 4 of citation No. 1, alleging a serious violation of §1926.1053(b)(1) is vacated, and no penalty is assessed.

/s/ NANCY J. SPIES

NANCY J. SPIES
Judge

Date: January 11, 1996
Atlanta, Georgia