Secretary of Labor,
Complainant,
v.

Lanzo Construction Co., Inc.,
Respondent.

OSHRC Docket No. **97-1512**

APPEARANCES

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Lanzo Construction Co., Inc., (Lanzo) an underground utility contractor, contests two citations issued to it by the Occupational Safety and Health Administration (OSHA) on August 18, 1997.

Citation No. 1 contains Item 1a, which alleges a serious violation of § 1926.1053(b)(6) for placing a ladder on an unstable surface; Item 1b, which alleges a serious violation of §1926.1053(b)(16) for using a ladder with a missing rung, or, in the alternative, of § 1926.1053(a)(2) for using a ladder whose rungs were not uniformly spaced; and Item 2, which alleges a serious violation of § 1926.651(k)(1) for failing to have a competent person make daily inspections of Lanzo's worksite, or, in the alternative, of § 1926.651(k)(2) for the competent person failing to remove exposed employees from an excavation when the possibility of a cave-in existed. The citation proposes a total penalty of $8,400.00.

Citation No. 2 contains Item 1,[1] which alleges a repeat violation of § 1926.652(a)(1) for failure to implement an adequate protective system for employees working in an excavation whose depth exceeded 5 feet. The citation proposes a penalty of $11,200.00.

Lanzo contends that the excavation was in stable rock and argues that the Secretary failed

[1] Citation No. 2 contains only one item, which is listed as "item 2" in the citation. In her complaint, the Secretary amended this to "item 1" (Tr. 51).

to meet her burden of proof with regard to all of the items. Lanzo also argues that Item 2 of Citation No. 1, citing Lanzo for failure to have a competent person make daily inspections, unfairly charges Lanzo with the same violation that OSHA cited in a separate inspection that occurred only a week before the inspection that gave rise to the present case.

Lanzo admits jurisdiction and coverage. A hearing in this matter was held on June 24, 1998. The parties have submitted post-hearing briefs. For the reasons set out below, the Secretary prevails on Items 1a and 1b of Citation No. 1, and on Item 1 of Citation No. 2 (the classification of the violation is changed from repeat to serious). Item 2 of Citation No. 1 is vacated.

Background

Lanzo was laying underground water and sewer lines for the City of Sunrise, Florida, on February 27, 1997 (Tr. 112). Lanzo had begun the project approximately four months earlier (Tr. 136).

OSHA compliance officer Charles Lankford and OSHA trainee Danezza Quintero arrived at the east end of the worksite, which was approximately 5 miles long, between 11:15 a.m. and 11:30 a.m. on February 27, 1997. Lankford observed an excavation approximately 40 feet long, 12 feet deep, and varying in width from 10 to 27 feet (Exhs. C-1, C-2, and C-3; Tr. 27). Two employees were standing at the bottom of the excavation (Tr. 28).

Lankford held an opening conference with site foreman Ray Fernandez, who identified himself as a competent person to make daily inspections (Tr. 26, 29). Lankford took measurements of the trench and also took a soil sample (Tr. 33). He measured the slope of the excavation at its most horizontal location to be 55 degrees (Tr. 56).

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

> 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).

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Item 1a: Alleged Serious Violation of § 1926.1053(b)(6)

The Secretary alleges that Lanzo committed a serious violation of § 1926.1053(b)(6), which provides:

> Ladders shall be used only on stable and level surfaces unless secured to prevent accidental displacement.

The only means of ingress to and egress from the excavation was a ladder resting on a ledge of soil created when the ground was excavated (Exhs. C-1, C-2, and C-3; Tr. 36, 131-132).

Lanzo concedes the applicability of § 1926.1053(b)(6) to the cited condition (Lanzo's brief, p. 5). Lanzo argues that the ladder was in compliance with the standard because the surface on which the ladder rested was stable rock. Lankford testified that the ladder was resting on previously disturbed soil and a review of the photographs entered into the record as Exhibits C-1, C-2, and C-3 bears this out. The legs of the ladder sank into the soil. Also, Exhibit C-2 shows that the legs were not set firmly on a flat surface. Instead, the ladder was perched on the wall of the excavation itself, with the surface immediately below the legs of the ladder sloping downward. The positioning of the ladder was in noncompliance with § 1926.1053(b)(6).

Lanzo argues that the Secretary failed to prove that employees actually used the ladder because Lankford did not personally observe its use. Lankford testified without contradiction that Quintero observed an employee exiting the trench using the ladder. Furthermore, the employees had access to the ladder, which was the sole means of exit from a trench measuring 12 feet deep and having almost vertical walls.

The ladder was in plain sight, and Lanzo's foreman was on the site. Lanzo had actual

knowledge of the violation.

Lanzo's final defense with regard to this item is that the water at the bottom of the trench "prevented the use of the bottom as a stable level surface to place the ladder" (Lanzo's brief, p. 7). Water in the bottom of a trench does not entitle an employer to disregard the requirements of § 1926.1053(b)(6). The standard requires ladders to be used only on stable and level surfaces, regardless of whether the bottom of the trench is unavailable as such a surface. Lanzo's argument is rejected.

The Secretary has established a violation of the cited standard. The hazard created by placing the ladder on a surface that was neither stable nor level was that an employee could slip off, causing "a strain, a sprain, perhaps up to a broken bone" (Tr. 39). The violation was serious.

Item 1b: Alleged Serious Violation of § 1926.1053(b)(16)
Or, In the Alternative, of § 1926.1053(a)(2)

The Secretary alleges that Lanzo committed a serious violation of § 1926.1053(b)(16), which provides:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

When Lankford observed the ladder at Lanzo's site, he believed that the second rung from the top of the ladder was missing (Exh. C-1; Tr. 43). The Secretary concluded that the ladder was defective and cited Lanzo for violating § 1926.1053(b)(16). Lanzo subsequently represented to the Secretary that the ladder was not defective, but that it was part of an extension ladder and was designed not to have a rung in the space where the Secretary believed a rung was missing. Lanzo general superintendent Glenn Straw testified that the ladder was the base for a two part extension ladder (Tr. 125): "On certain types of these extension ladders, there's a rope and pulley system for extending the ladder, and that is where the rope and pulley would come through the ladder in order to be able to extend the use." The Secretary failed to prove that the ladder was defective.

The Secretary amended the citation to allege, in the alternative, a violation of

§ 1926.1053(a)(2) (Tr. 15). Section 1926.1053(a)(2) provides:

> Ladder rungs, cleats, and steps shall be parallel, level, and uniformly spaced when the ladder is in position for use.

Exhibit C-1 shows that the rungs of the ladder were not uniformly spaced. The ladder was the only means of egress from the trench. The employees used the ladder, which was in plain view of the foreman. The Secretary has established a violation of § 1926.1053(a)(2) for using a ladder whose rungs were not uniformly spaced.

Lankford characterized the hazard created by the unevenly spaced rungs to be "a human factor hazard," in which an employee might misstep because he expected the rungs to be uniformly spaced, causing him to fall back into the excavation. The violation is serious.

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.

Lanzo had approximately 200 employees at the time of the inspection and had been cited for OSHA violations within the previous three years (Tr. 41-42). Lanzo demonstrated good faith during the inspection. The gravity of the violations of § § 1926.1053(a)(2) and (b)(6) is moderate. While the condition of the ladder and its location created the likelihood of an accident, the injuries likely to result from an accident were not severe. A total penalty of $2,800.00 is assessed for Items 1a and 1b.

Item 2: Alleged Serious Violation of § 1926.651(k)(1)
Or, In the Alternative, Of § 1926.651(k)(2)

The Secretary charges Lanzo with violating § 1926.651(k)(1), or, in the alternative, § 1926.651(k)(2). Those sections provide:

> (k) *Inspections.* (1) 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.

(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

Section 1926.650(b) defines a competent person as "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."

When Lankford interviewed foreman Fernandez, Fernandez "indicated a lack of knowledge of the OSHA soil classification system; he indicated that he did not understand the different types of protective options available; he indicated that he had not received any excavation training; and finally, he admitted not knowing anything about excavation safety" (Tr. 48). General superintendent Straw, who testified that he had been at the inspection site before Lankford arrived on February 27, considered himself a competent person within the meaning of the standard but admitted that he did not understand OSHA's soil classification system at that time (Tr. 140, 142-143). The Secretary has established that Lanzo committed a violation of § 1926.651(k)(1).[2]

Lanzo argues that the Secretary unfairly cited the company for this violation because OSHA had inspected Lanzo and found the same violation only a week before Lankford's inspection. Lanzo contends that it is being penalized twice for the same infraction.

On February 20, 1997, OSHA compliance officer Eileen Atkinson inspected an excavation dug by Lanzo on the same project that Lankford inspected. The excavation Atkinson inspected was located approximately 1.9 miles from the excavation at issue in this case (Tr. 92). The Secretary issued a citation for a serious violation of § 1926.651(k)(1) to Lanzo on March 19, 1997, and gave as the "Date By Which Abatement Must be Abated" as May 5, 1997 (Exh. J-1). One week later, on February 27, 1997, Lankford conducted the inspection that gave rise to this

[2] Because the Secretary has established that Lanzo did not have a competent person on the site, the alternative allegation that Lanzo violated § 1926.651(k)(2) must fail. The section presupposes that a competent person within the meaning of § 1926.650(b) is present at the worksite.

proceeding. Lankford recommended citing Lanzo for a serious violation of § 1926.651(k)(1), which the Secretary did on August 18, 1997. Lanzo's supervisory employees completed OSHA competent person training on April 26, 1997 (Exh. R-5). Lanzo argues that the Secretary should not be allowed to cite it for a violation of § 1926.651(k)(1) between the initial February 20 inspection date and the May 5 abatement date.

The Secretary cites *Andrew Catapano Enterprises, Inc.,* 17 BNA OSHC 1776 (Nos. 90-50, 90-189, 90-190, 90-191, 90-192, 90-193, 90-771, 90-772, 91-26, 1996), in support of its position that the abatement period given in a prior citation, at a different worksite with different employees, does not prevent the Secretary from citing the employer for the same violation at a later date at a different worksite. A review of *Catapano,* however, reveals that the case lends more support to Lanzo's position than to that of the Secretary.

In *Catapano,* the Secretary issued nine separate sets of citations to Catapano after inspecting nine separate worksites on the same project over the course of a month. Catapano argued that the Secretary violated its due process rights by "not treating these worksites as one construction project and one case by issuing one citation and proposing one penalty for each instance of a violation. . ." *Ibid.* at 1778. The Review Commission found that the trenches constituted different worksites and were thus subject to multiple citations.

> The worksites were blocks rather than miles apart and the Secretary's inspection of them was separated in time by days rather than months or years, but abating one violation of a standard did not abate the violations of that same standard at other worksites. . .
>
> Violations of some of the standards were alleged at more than one but not all worksites. The facts cited in support of these allegations are peculiar to the worksite where they were observed. The employer's defense to each allegation also would vary with the worksite. Clearly, with the exception of the training standards, which we address *infra,* these cases do not involve the "same offense."

Ibid.

The training standards are what the Commission refers to when it states, "We find that, with one exception, the Secretary's decision to prosecute these cases in the manner he did was within his discretion and did not violate Catapano's due process rights." *Ibid.* The Secretary cited Catapano for violating the § 1926.21(b)(2) training standard at seven separate worksites. The Commission agreed that the record established that Catapano violated the training standard. But, the Commission noted, "[T]he Secretary cited a failure to train in the first inspection for the

same reasons he cited a failure to train in all the succeeding inspections. . . Catapano was cited six more times in the succeeding docket numbers, all for the same failure to train. We find that the evidence adduced in these cases permits only a single citation and penalty assessment under the language of § 1926.21(b)(2)." *Ibid.*

In the present case OSHA found a violation of § 1926.651(k)(1) on February 20, 1997. The failure to have a competent person on the site is more akin to a training violation than to the violations which the Commission found to be "peculiar to the worksite where they were observed." The Secretary recognized this distinction by allowing Lanzo approximately a month and a half to abate its violation of § 1926.651(k)(1) from the time of the issuance of the citation. The Secretary realized that the company needed some time to arrange for the training of its personnel. The failure to have someone at the site who is capable of identifying existing and predictable hazards is not a failure that can be remedied immediately.

Lanzo responded in good faith by arranging the required training within the abatement period given in the citation resulting from the February 20, 1997, inspection. It would be unfair to affirm the Secretary's second citation for a violation of § 1926.651(k)(1) that occurred prior to the May 5 abatement date. Item 2 is vacated.

Citation No. 2
Item 1: Alleged Repeat Violation of § 1926.652(a)(1)

The Secretary alleges that Lanzo committed a repeat violation of § 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The excavation at issue measured 12 feet deep and was 10 to 27 feet wide (Tr. 27). Lanzo used no protective system in the excavation. The excavation was inadequately sloped for

Types A, B, and C soil.[3] Lankford took a soil sample from the spoil pile and had it analyzed at OSHA's laboratory. The OSHA lab classified the soil sample as Type B soil (Tr. 34).

Lanzo contends that the excavation was dug in stable rock. Thomas Kaderabek, a geo-technical and environmental consultant hired by Lanzo, obtained a 15-foot bore sample from the vicinity of the excavation. The bore sample was not taken from the immediate area of the excavation. Kaderabek found that the top 5½ feet of the bore sample consisted of sand. From 5½ feet down to 15 feet, Kaderabek found limestone (Exh. R-6).

Section 1926.652(a)(1) requires excavations deeper than 5 feet to be dug "entirely in stable rock." According to Kaderabek, Lanzo's own witness, the top half of the bore sample he took was in sand. The excavation was not dug entirely in stable rock and was deeper than 5 feet. The Secretary has established a violation of the cited standard.

The Secretary alleges that the violation was a repeat violation. A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996).

The only evidence the Secretary adduced to establish a repeat violation was a computer printout taken from OSHA's web site. The printout summarized a citation issued to Lanzo in 1994. Lankford found the summary by searching OSHA's web site databases. He was not the inspecting compliance officer in that case and knew no details of the inspection. The original citation had apparently been destroyed by OSHA in the regular course of business (Exh. C-4; Tr. 65-67).

The Secretary contends that the computer printout of the summary is sufficient to establish that a final order existed against Lanzo affirming a violation of § 1926.652(a)(1). The Secretary cites *Island Lathing & Plastering, Inc.*, 18 BNA OSHC 1500 (No. 97-1026, 1998), an

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[3] Lanzo contends in its post-hearing brief that the width of the excavation was 27 feet. If the soil was Type B soil, the 12-foot deep excavation needed to be 24 feet wide to achieve the required slope ratio of 1:1 (Pt. 1926, Subpt. P, App. B, Figure B-1.2). Lanzo cites to transcript page 27 for the width measurement, but mis-characterizes Lankford's testimony on that point. Lankford states that the excavation "varied in width from like ten feet at the narrowest to twenty-seven feet at the widest" (Tr. 27).

unreviewed administrative law judge (ALJ) decision with no precedential value, in support of her contention. However, it appears that in *Island* the information regarding the prior inspections provided by the computer printout and the testimony of the compliance officer was more extensive and specific than the information available in the present case. For example, the dates that the citations became final orders were known. *Island*, *Ibid.* at 1501. No final order date is given on the printout in the instant case (Exh. C-4).

Lanzo's general superintendent and its assistant secretary testified at the hearing. The Secretary did not question either one of them regarding a previous citation issued to Lanzo. The Secretary did not adduce admissions made by the employer in response to her request for admissions (as she did in *Island*) establishing that a previous citation had become a final order against Lanzo. Lankford, the Secretary's only witness, had no personal knowledge of the previous citation. Without further evidence, the Secretary cannot establish the authenticity and relevance of the printout. The violation is not shown to be a repeat violation.

The violation of § 1926.651(a)(1) is serious. Lanzo's employee were working in an unsloped 12-foot deep trench excavated in Type B soil with no protective system. The employees were exposed to the possibility of a cave-in, which would likely result in death or serious physical injuries.

Penalty Determination

The gravity of the violation is high. The conditions of the excavation increased the potential for a cave-in. Trench cave-ins generally result in grievous physical injuries or death. A penalty of $6,000.00 is assessed.

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. Items 1a and 1b of Citation No. 1, alleging serious violations of § 1926.1053(b)(6) and (a)(2) respectively, are affirmed and a total penalty of $2,800.00 is assessed;

2. Item 2 of Citation No. 1, alleging a serious violation of § 1926.651(k)(1), is vacated and no penalty is assessed; and

3. Item 1 of Citation No. 2, alleging a repeat violation of § 1926.652(a)(1), is affirmed as serious and a penalty of $6,000.00 is assessed.

KEN S. WELSCH
Judge

Date: May 10, 1999