

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Saiia Construction, LLC,

Respondent.

OSHRC Docket No. **03-0391**

Appearances:

Brian W. Dougherty, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee
For Complainant

Kathleen Henderson, Esq., King & Ballou, Nashville, Tennessee
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Saiia Construction, LLC (Saiia), is a Birmingham, Alabama, construction contractor which specializes in underground storm and sewer pipe installation. On December 12, 2002, two supervisors of the Occupational Safety & Health Administration (OSHA) observed a pipelaying operation as they drove past on Greensprings Road in greater Birmingham, Alabama. They assigned compliance officer Eric Harbin to inspect the excavation worksite. As a result of that inspection, on February 4, 2003, the Secretary issued Saiia a five-item citation, which the company timely contested. The case was originally designated for EZ trial procedures.

Before the scheduled hearing could be held, Harbin's military reserve unit was activated, and he was deployed to Iraq. Harbin served his country in the armed services for over a year. During that time the case was removed from EZ trial, a limited stay was entered, modified, and extended several times. Saiia strongly objected to removing the case from EZ trial, to entry of the stay, or to its extension. At Saiia's requests, while the limited stay was in effect, the parties conducted substantial discovery, including videotaped depositions and written discovery.

Shortly after Harbin returned to the United States and was released from immediate military service, the limited stay was lifted. Saiia deposed Harbin at length. On July 1, 2004, the Secretary

withdrew item 1a of the citation.¹ Also, on July 1, 2004, the parties entered into a partial stipulation whereby they settled the allegations of items 1b and 1c.² The two remaining items were the subject of the hearing conducted on August 19 and 20, 2004. The parties filed briefs, and the case is ready for decision.

The Secretary contends that Saiia did not sufficiently slope the excavation to protect the employees from a potential cave-in (item 2a) and that Saiia's competent person realized that the excavation presented a hazardous condition but failed to remove the employees (item 2b). Saiia denies that it violated the standards. For the reasons that follow, the Secretary established violations for items 2a and 2b.

Background

Approximately six months before the OSHA inspection, Saiia began installing the storm sewer system for construction of a new shopping center, the Edgewood Towncenter. As part of that project, on December 12, 2002, seven crewmembers excavated and laid 32-inch drainage pipe for a grocery store and parking lot under construction (Tr. 336). Jerry Robinson was the pipe superintendent and competent person; L.V. Johnson and Javier Gonzalez were pipelayers; Javier's brother Ramon Gonzalez was a helper; Juan Henderson was the trackhoe operator; Ron Underwood was the bankman; and an unnamed operator ran the front end loader.

The area where the crew was excavating was wet and muddy but was not so wet as to effect the stability of the excavation (Tr. 238). Apartments, now demolished, had been built on the land. The crew was dealing with the existence of many underground utilities dug in previously disturbed soil. In addition to Robinson's concern for the buried utilities, he knew that the excavation was very visible from the roadway. He told his crew several times that day that they had not sloped the excavation sufficiently wide.

¹ For item 1a (§ 1926.651(e)) Saiia filed an Equal Access to Justice Act application for reimbursement of its fees and expenses. A decision on the EAJA claim for item 1a is issued this date.

² The parties' motion to approve the terms of settlement for items 1b (§ 1926.251(a)(4)) and 1c (§ 1926.251(b)(1)) is granted. The parties agree to bear their own litigation expenses for the items; to amend the citation to change the classification of item 1b to "other than serious;" and to amend the description of item 1b as follows:

(a) A lifting accessory used to lift sections of concrete pipe was of sufficient capacity for lifting concrete pipe sections weighing about 2,000 pounds but was not labeled to indicate its capacity.

Discussion

The excavation standards of Subpart P address protection from cave-ins. The standards provide for alternative procedures and types of protective methods to be used in excavations. In order to establish a violation of the standard, the Secretary bears the burden to prove: (a) the standard applies to the condition cited; (b) the terms of the standard were not met; (c) employees had access to the violative conditions; and (d) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171 (No. 99-0257, 2000).

Serious Citation No. 1: Item 2a, § 1926.652(a)(1)

The Secretary asserts at item 2a that Saiia did not properly slope the excavation in violation of § 1926.652(a)(1). The standard 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 . . .

Saiia chose to slope the banks of the excavations as one of the approved methods of cave-in protection. Whether the excavation was sloped to the degree the standard requires depends not only on its dimensions but also on the type of soil into which it is dug. Other than solid rock, soils are classified as Type A (generally the most stable types of clay), Type B (angular gravel, silt, or silt or sandy or clay loam), or Type C (the least stable gravel, sand, loamy sand, water soaked soils) (Subpart P, App. A). The more unstable the soil, the more the employer must slope the walls of the excavation.

Soil Classification

Harbin sent a soil sample to an approved laboratory to establish the soil classification. The results showed “sandy clay” Type B soil (Exh. R-4). Nevertheless, claiming that Saiia choose not to test the soil, the Secretary makes a legal argument that the subject trench must be considered as if it were dug in Type C soil.

The standard offers an employer options on how to protect employees in an excavation. Under §1926.652 an employer may choose among several approved methods to protect employees from cave-ins, if they are “designed in accordance with paragraph (b) or (c).” Paragraph (b) governs sloping, and paragraph (c) relates to shields and physical barriers. Saiia chose sloping. Accordingly,

the excavation must comply with paragraph (b), titled “*Design of sloping and benching systems.*” An employer may comply with paragraph (b) sloping requirements by meeting any one of four “options.” Only options (1) and (2) arguably apply here. Option (1), “*Allowable configurations and slopes*” is sometimes referred to as the “default” option. Using option (1), an employer need not test or classify the soil, but it must treat all soils *as if* they were the least stable Type C.³ Option (2), “*Determination of slopes and configurations using Appendices A and B,*” applies if the employer tests the soil and classifies it under Appendices A and B. The requirements of Appendices A and B are mandatory. *See Conie Construction Inc. v. Secretary*, 73 F.3d 382, 385 (D.C. Cir. 1995). The Appendices require soil classifications be based on at least one visual and one manual test.⁴

The Secretary contends (and superintendent Robinson agrees) that Saiia chose to follow Option 1. According to Harbin, use of this “default” option is so common in the locality that “it’s so rare to ever hear any competent person claim other than Type C soil, that if I were to hear anyone say that . . . it would just stand out completely in your mind . . .” (Tr. 534).

Saiia does not dispute that *if* it intentionally refrained from testing and classifying the soil, the soil should be considered as if it were Type C. It contends that it did not rely on the default option. Rather, it asserts that it tested and classified the soil as Type B in accordance with Option 2. Purportedly, pipelayer L.V. Johnson performed the mandatory manual and visual soil tests and properly classified the soil.

Credibility Determination: This judge considered former employee L.V. Johnson to be an articulate and intelligent witness. However, he was found not to be a fully credible witness. Johnson’s testimony became increasingly nuanced. He appeared to the undersigned to craft his testimony so as to aid Saiia’s case. Pipelayer Johnson testified for Saiia to facts which often contradicted other testimony.

³ “(1) *Option (1) – Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of [the other] options listed below.”

⁴ “*Option (2) – Determination of slopes and configurations using Appendices A and B.* Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.” Appendix A classifies soils as Types A, B, or C and at ¶(c)(2) provides: “*Basis of classification.* The classification of the deposits shall be made based on the results of at least one visual and at least one manual analysis.”

Harbin described his inspection. Superintendent Robinson identified himself to Harbin as the competent person. He advised Harbin that the soil was Type C. It was Saiia's policy to treat all excavations as if they were Type C soil. Robinson stated that he had not manually tested the soil. Harbin indicated that the excavation appeared "a little narrow," and Robinson stated that it appeared to be "about 5 feet narrow" (Tr. 23-26). After speaking with Robinson, Harbin interviewed the Gonzalez brothers in Spanish. He interviewed Johnson in English. Harbin wanted to determine if the employees understood about the trenching hazards and the cave-in protections that employers are required to impart. Harbin asked Johnson about the soil classification. Johnson stated that the soil was Type C soil. When asked how he knew that, Johnson explained that he was an experienced pipelayer and "[w]ell, look at it" (Tr. 33, 97, 199).

Through further questioning Harbin determined that Johnson had a good understanding of the OSHA trenching requirements. Harbin asked Johnson about the competent person for the crew (Tr. 35):

Q. At any time in your conversation, did Mr. Johnson identify himself to you as the competent person for Saiia?

A. Oh, I did ask him if he was a competent person for Saiia, and he said, no, he was not. He said he had been the competent [person] before for other employers, but he was not for Saiia.

Q. Did he identify who the competent person was on that particular excavation?

A. Yes, he identified Jerry Robinson.

Johnson testified to a far different conversation. He allegedly advised Harbin that (1) he was also the crew's competent person; (2) that he performed the tests necessary to classify the soil; and (3) that he had classified the soil as Type B. Johnson stated his only comment to Harbin about Type C soil was that Saiia treats all soils as if there were Type C, not that the soil *was* Type C (Tr. 436, 450, 502). Johnson testified that he repeatedly measured the excavation and performed manual soil tests that morning: the "rope test," the "thumb penetration test," and the "shovel test" (Tr. 432).

Johnson never advised Robinson of the results of his tests, or even that he had performed them (Tr. 218, 278, 481, 485). Johnson explained why Robinson was unaware that he had tested the soil, stating that Robinson happened to be away from the excavation at those specific times (Tr. 433). Johnson “only discussed [the test and soil classification] as Type B with Juan Henderson and perhaps Ron [Underwood]” (Tr. 482, 501). However, Juan Henderson, who had the operator’s view of the excavation, stated that he did not see anyone perform manual soil tests or hear anyone talk to him about what type the soil was (Henderson Dep. pp 24, 61). Underwood did not testify.

The manner in which Harbin continued his inspection, the information he provided to Saiia during the remainder of that inspection, and the information which Saiia provided to OSHA at the time are inconsistent with Johnson’s version of events. Further, shortly after the inspection and once again after Saiia received the citation, Saiia’s safety director Richard Leehemus conducted an internal investigation on the specifics of OSHA’s conclusions. He spoke with L.V. Johnson both times. Johnson did not mention such relevant information to Leehemus at either time. It was only after the case was in full litigation that Johnson told anyone about having conducted manual soil tests or reclassifying the soil (Tr. 481- 482, 526-527).

As far as measurements of the excavation, Johnson testified that his view was better than either Harbin’s or Robinson’s. Johnson criticizes the manner in which his supervisor placed and held the survey rod for Harbin. (Robinson may have stood two feet onto the side of the trench; did not hold the survey rod fully perpendicular; and, according to Johnson, failed to find the accurate measurements.) Robinson measures excavations as part of his daily responsibilities. He is presumed to know how to measure accurately. Johnson asserts he measured the excavation several times that morning, allegedly using the method he criticizes (Tr. 451). Although obviously impractical, Johnson would have had Harbin remove the pipe section to measure that location (Tr. 466).

Johnson displayed annoyance with the OSHA inspection. He attempted to explain why Harbin’s and his own testimony differed so dramatically. According to Johnson, he could tell “by the expression on [Harbin’s] face” that Harbin “ignored” what he said, apparently believing that “I was just guessing or whatever” (Tr. 537). Harbin is an experienced OSHA inspector. His investigation appeared respectful of input from the employees. His testimony was careful and was consistent with the notes he made during the inspection. Harbin’s demeanor at the hearing was

conscientious and professional. The testimony of Harbin and all other witnesses evidenced a marked degree of co-operation between Harbin and Saiia's employees during the inspection. None of the testimony of other Saiia employees bore out Johnson's version of a dismissive attitude.

At the conclusion of his inspection, Harbin discussed with Robinson (and "Mr. Johnson who stood around") that the slope was too narrow (Tr. 60). Allegedly disagreeing with OSHA's conclusions in his own mind, Johnson failed to tell his supervisor or Harbin about his manual soil tests, his earlier measurements, or his perceived problems with Harbin's measurements. He made no attempt to re-measure the slope.

Johnson is not a retiring individual. Among other occupations, he was a professional wrestler for 10 years, and he owned his own excavation company (Tr. 484). Johnson's surety and self-possession during his testimony was at odds with an individual who would stand silently by while conclusions contrary to those he reached were drawn. Also considered was the confidence with which Johnson testified to unlikely events, such as the general contractor warning him that OSHA had been called and was on the way. In fact, the OSHA supervisors merely drove past the site and assigned Harbin to immediately inspect it (Tr. 17). Johnson testified that, although his line of sight was below the top of the excavation, he recognized Harbin as an OSHA inspector while he parked his car and approached the excavation. Johnson believed that 6 feet of top soil had been removed from the site, while other witnesses testified to a more realistic figure of 8 inches (Tr. 233, 443). The undersigned does not find L.V. Johnson to be a credible witness.

L.V. Johnson lacked the authority of a competent person

Even had the credibility determination been otherwise, L.V. Johnson was not the crew's competent person. Robinson classified the soil as Type C. He understood that unless he tested the soil, he could not reclassify it. Robinson had no wish to test or to reclassify the soil (Tr. 217). When Robinson left the site for short periods, Henderson or Johnson had the ability to keep the project moving and the slopes correct. While one or the other was put "in charge" at those times, they were expected to perform the work within the parameters Robinson set. This is not the same thing as having the responsibility and authority to test the soil, take measurements, and direct changes in, for example, the soil classification. Saiia's competent person fills out an excavation field report, which Johnson did not fill out because "it wasn't my responsibility to do that" (Exh. C-16; Tr. 214, 472).

He stated he did not need to tell Robinson about the measurements “because it was available to him anyway” (Tr. 485). Even if employees “shared responsibility for safety at the work site, [the named employees] lacked the requisite authority to abate hazards,” and thus were not competent persons to inspect the specific trench site. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000), *aff’d* without pub’d opinion, 277 F.3d 1374 (5th Cir. 2001). Johnson did not function as Saia’s competent person for purposes of compliance with the standard.

Saia chose to avail itself of Option (1), and the soil must be considered Type C. To allow another result would frustrate the performance scheme of the standard. However, as discussed below, whether the soil is classified as Type C or Type B does not affect the existence of a violation.

Measurement and Slope of the Excavation

With assistance from superintendent Robinson (who suggested using the survey rod and who placed and held the survey rod), Harbin measured the excavation as 9 feet deep and 15 feet wide at the top of the excavation. The bottom width was 3 feet. Harbin and Robinson measured where Johnson had been working. By necessity, Robinson could not hold the survey rod completely perpendicular to the trench floor. Harbin stood a couple of feet away from Robinson to photograph the measurements and to gain visual perspective. Noting that measuring an excavation is “not a perfect science,” Harbin looked to the right and left of the rod to find the imaginary line where the two sides met (Tr. 40-41, 205). Harbin’s field notes (supported by the photograph) show a recorded depth of “9’, 8”” (Exhs. C-7, C-8, C-9; Tr. 46). As Robinson held the rod, Harbin called out “it looks like about 9 feet.” Robinson looked down at the rod from where he was standing and believed that he stated his agreement “or something to that effect” (Tr. 362). The same process occurred for the top width measurement. Robinson recalled Harbin saying, “It looks like about 15 foot” (Tr. 361-362). Neither Robinson nor Johnson, who stood by, disputed the measurements.

The credibility of the Secretary’s measurements is bolstered by the contemporaneous diary notes of superintendent Robinson for the date of the inspection (Exh. C-14, 00013; Tr. 239): “Laid 112 ft of 30' [reinforced concrete pipe.] Set MH 8+[9]2 in **10 ft. cut. Warned Juan about slopes 3 times and LV [Johnson]**” (emphasis added). Robinson explained that his diary notes reflected that the crew cut an *average* trench depth of “10 ft.” between the manholes (Exh. C-15; Tr. 241-242). This does not change the corroborative nature of the evidence. The measurements made at the time

of the inspection, which are considered reliable, are more dependable than calculating the dimensions based on site plans and estimated adjustments to the topography, as the parties alternatively suggest. Finally, the fact that Johnson worked around the “thin” gravel which spilled out at the end of the previously set pipe, did not affect the accuracy of the depth measurement (Tr. 196-197). He would step a reasonable distance back from the bell in order to perform his assigned tasks at the area measured.

The Slope

The Secretary contends that the excavation was sloped too steeply for either Type B or Type C soil. Saiia counters that the degree to which the excavation was sloped more than complied with the requirements for Type B soil and (if the measurements were rightly understood) even for Type C soil.

The sides of the excavation formed a basic “V.”⁵ For Type B soil, the 9-foot trench having a 3-foot bottom width, should have the top width of 21 feet. For Type C soil, the top width should have been 30 feet (Tr. 58-59).⁶ The 15-foot width was too narrow to comply with the sloping requirements for either Type B or Type C soil.

Knowledge

The Secretary must establish that Saiia knew, or with the exercise of reasonable diligence, could have known that the excavation was improperly sloped. The Secretary meets this burden by showing either actual or constructive knowledge of the violative conditions. The knowledge of Superintendent Robinson may constitute constructive knowledge, if his knowledge is properly imputable to the company. *E.g., Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307,

⁵ The sidewalls were not perfectly smooth. The parties agree that one of the sidewalls had a “nearly vertical” portion which extended from the area where Johnson worked back towards the end of the pipe where Javier Gonzalez worked. The area angled down towards Gonzalez’s knees. However, neither of the sidewalls were in any manner “benched” as that term is defined in the standards (Exhs. C-7, R-5; Tr. 166). Saiia is incorrect that calculation of the slope must begin at the point where the vertical area ends. The slope is measured from the toe of the excavation, which is how an employee would experience a potential cave-in.

⁶ Type B soils must be sloped at 1 foot of horizontal distance for each 1 foot of vertical distance (a ratio is 1:1, or 45°); and Type C soil must be sloped at a ratio of 1½:1 (or 34°). A shorthand calculation for determining whether an excavation meets the requirements for Type B soil is to multiply the depth by 2 (two sides of the excavation sloped at 1:1) and to add the 3-foot bottom width, or in this case 21 feet. For Type C soil the depth is multiplied by 3 (two sides sloped at 1½:1) plus the 3-foot bottom width, or 30 feet (Tr. 58-59).

1993); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (supervisor's knowledge of his own actions or inactions may be imputed to his employer).

With brief exceptions, Robinson was at the excavation site most of the day. He recalls having been back at the site for some 10 minutes when Harbin approached the excavation. Contrary to Saiia's contention, Robinson was aware of the conditions in the excavation. He earlier tried to get the slope widened as the pipeline proceeded. When Harbin arrived and stated his impression that the excavation was too narrow, Harbin recalled that Robinson commented that the excavation was about "5 feet narrow" (Tr. 26). Even if as may be possible, Robinson made the specific comment after measuring, this does not defeat knowledge. Saiia's counsel examined Robinson on the point (Tr. 307-309):

Q. Before the third pipe was brought over to the excavation, did you observe the slope of the excavation in the area where the third pipe was going to be installed?

A. Just visually, yes.

Q. Can you tell us what your impressions were at that point in time as to what the slope of the excavation was in the area where that third pipe was going to be installed at that point in time?

A. My impression was it was not sloped back to what I was wanting.

Q. And, what was it that you had wanted?

A. A two-to-one.

Q. Okay, what was your impression as to what the slope was in that area?
* * *

A. I thought that it was actually sloped back, but it was not on a two-to-one.

Q. Okay, but what did you think it was sloped back at? I need to establish what was the slope you thought it was?
* * *

A. I knew it wasn't a one-and-a-half-to-one, but I figured it was at least a one-to-one or better.

Q. So, you thought that the last pipe laid before . . . was at a one-to one or better?

A. I thought it was or better.

* * *

Q. . . . And, now, I hear you saying that you thought the area . . . was sloped at a one-to one; is that correct?

A. At least a one-to-one. I knew it was a little narrow, but I did not think that was extremely narrow.

Robinson was having a hard time getting his excavator and pipelayer to slope the excavation as directed. That morning Robinson repeatedly instructed Henderson and Johnson to widen the excavation, the last time being 30 minutes before Harbin arrived at the site. Harbin recalled Robinson's description of the conversation (Tr. 90-91):

He alleged that he and Mr. Johnson had talked about the slope not being – or the width of the excavation not being wide enough across the top, and they talked about how there was – Mr. Robinson and Mr. Johnson had talked about how there had been a turn in the direction that the pipe was going which made it difficult on the side of the excavation where the spoil pile was to slope it at a steeper angle than what it was because there was an underground utility line of some sort – gas, I think it was– and they didn't know the exact location of where that line was, so no changes had been made when I initiated the inspection.

Harbin confirmed the conversation with Johnson (Tr. 34, 51, 91, 438, 460).

Robinson apparently did not feel comfortable going beyond verbal warnings. He did not pursue further disciplinary action when three verbal warnings failed to secure compliance with his instructions. When asked about that difficulty, Robinson replied, “[Henderson] was just an older operator that was set in his ways, and I just had to stay on him to make sure he kept it sloped back”(Tr. 258). Robinson may have been conscientious, but it became predictable that Johnson and Henderson would continue to ignore his directions on the size of the slope. It is concluded that Robinson's knowledge of the violative conditions is properly imputed to Saiia, and the violation is affirmed. Death or a severe injury is the probable result of a cave-in of this excavation. The Secretary has established a serious violation of § 1926.652(a)(1).

Item 2b – 29 C.F.R. § 1926.651(k)(2)

The Secretary asserts at item 2b that Saiia’s competent person recognized (or should have known) of the hazardous condition of the trench but failed to remove the employees in violation of § 1926.651(k)(2). The standard provides:

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.

It is insufficient to argue that whenever a competent person is aware an excavation is too narrow to comply with § 1926.652(a) that the company violates § 1926.651(k)(2) as well. More must be shown. Saiia points out that the soil was basically cohesive sandy clay; and there was no evidence of seepage, cracking, heaving, water accumulation, fissures, sloughing, or instability.

Harbin considered that Saiia violated the standard because Robinson repeatedly warned Henderson and Johnson to widen the excavation as the work continued that morning. Robinson understood the hazard of sloping the excavation too narrowly. Here, the 9 foot deep, 15-foot wide excavation presented a hazard made worse by the fact that the portion of the trench where Johnson worked was almost vertical. An upper area of the excavation was dug in previously disturbed soil, with a pipe shown in the sidewall. Two employees worked in the excavation as they guided the third pipe into place. One worked at the bell setting the laser and arranging the area for the next pipe at the location OSHA measured. Heavy equipment operated nearby, creating ground vibrations, which were a destabilizing force (Tr. 209-210). The probability, and thus the hazard, of a cave-in was high. Although the competent person had warned to widen the slope, he allowed work to continue without reasonable assurances that the excavation would be properly sloped.

For this standard, proof of knowledge is inherent in proof of the violation, and it has been met. For the reasons previously discussed, the knowledge of Robinson is imputed to Saiia. Failure to remove employees from the hazard subjected them to serious injury or death if a cave-in occurred. The Secretary has established a serious violation of § 1926.651(k)(2).

Penalty

The Commission must give “due consideration” to the size of the employer’s business, the gravity of the violation, the employer’s good faith, and history of past violations in determining an

