

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW

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.

K. M. Davis Contracting, Inc.,

Respondent.

OSHRC Docket No. 12-0643

Appearances: Rolesia Butler Dancy, Esq., U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For the Complainant

Andrew N. Gross, Esq., HB Training and Consulting
Lawrenceville, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

K. M. Davis Contracting Inc. (KMD) is an underground utility contractor in Marietta, Georgia. On August 17, 2011, a KMD laborer was observed holding a PVC pipe upright for the placement of a GPS device in an unprotected excavation along U. S. Highway 41 (Cobb Parkway) when the Occupational Safety and Health Administration (OSHA) initiated an inspection.

As a result of the OSHA inspection, KMD received a citation on January 18, 2012, alleging a willful violation of 29 C. F. R. § 1926.652(a)(1) for failing to shore or slope the walls of an excavation more than 5 feet in depth. The citation proposed a penalty of \$53,900.00. KMD timely contested the citation.

The hearing was held on June 14, 2012, in Atlanta, Georgia. At the hearing, the parties stipulated jurisdiction and coverage (Tr. 4). The parties filed post hearing briefs on August 31, 2012.

KMD denies the alleged violation and willful classification. KMD claims unpreventable employee misconduct because the laborer unexpectedly entered the excavation and the foreman was attempting to remove him when OSHA initiated the inspection.

As discussed more fully, KMD's violation of § 1926.652(a)(1) is affirmed as serious and a penalty of \$5,000.00 is assessed.

BACKGROUND

KMD is a family-owned business in Marietta, Georgia, engaged in installing underground utilities. KMD has been in business for 20 years. In August 2011, it employed approximately 35 employees (Tr. 191, 199).

The City of Marietta, Georgia, contracted KMD in 2011 to install 2,700 linear feet of replacement main water line and fire hydrants along Cobb Parkway (Tr. 66). The contract also required KMD to bury approximately twenty, 12-foot PVC pipes (risers) for the placement of GPS devices. The GPS device would locate pipe fittings on the main water line after the excavation was backfilled. The white PVC pipes were to be placed upright in the excavation with approximately 2 feet above the ground level (Tr. 112-113, 114, 158, 189).

On August 17, 2011, at the corner of Allgood Road and Cobb Parkway, the crew had dug an irregular shaped excavation approximately 9 feet deep. The walls of the excavation were vertical on three sides and the excavation also contained existing sewer and gas lines (Exhs. C-8, C-9; Tr. 33, 35-36, 38). To install the new main water line, the KMD crew used two sizes of trench boxes. The crew consisted of the foreman, an excavator operator (competent person), and two laborers (Tr. 61, 109, 150-151, 155).

By the afternoon, the crew had completed the installation of the main water line and the placement of one PVC pipe (Exh. C-5; Tr. 19, 70, 110). Another PVC pipe needed to be installed near the side of the excavation. To install this PVC pipe, the laborers exited the excavation and the trench boxes were removed. The foreman standing on the side of the excavation attempted to hold the PVC pipe upright with the head of a shovel while the excavator placed dirt around the pipe.¹ However, the pipe fell over in the excavation. When it fell, a laborer entered the excavation and began holding it upright (Exh. C-7; Tr. 29-30, 96, 122, 159).

¹ According to KMD, in wide trenches, the PVC pipes were installed with the employees holding the pipe inside a trench box until it was secured by backfill. For narrow trenches, or where the pipe was to be placed near the side, an employee standing on the side of the excavation would hold the pipe upright with their hands or by the head of a shovel (Tr. 113, 156).

As the OSHA compliance officer was driving along Cobb Parkway, he observed “somebody working in the excavation” (Tr. 12, 64). He parked his car and initiated the inspection. As he approached the excavation, the compliance officer observed the laborer holding the PVC pipe upright and the excavator moving a bucket of dirt in front of him (Exh. C-6; Tr. 17). The foreman was standing at the side of the excavation above the laborer. The other laborer was also standing on the side of the excavation, near the ladder (Tr. 15-16, 19, 21)

After introducing himself, the compliance officer observed the laborer ordered out of the excavation by the foreman and the excavator shut down (Tr. 23). According to the compliance officer, the foreman acknowledged that the excavation was “an illegal hole” (Tr. 22). He told the compliance officer that he knew it was necessary to use a trench box (Tr. 30). He had not put it back into the excavation because the job would take a short time – “five or ten minutes” (Tr. 42-43).

The compliance officer measured the excavation where he observed the laborer to be 9½ feet deep and 17 feet wide (Exhs. C-8, C-10; Tr. 34). The excavation was 7 feet deep where the ladder was located. The compliance officer observed cracks in the wall of the excavation near where the laborer was holding the pipe (Tr. 34, 48). He also noted that vibration from the nearby traffic and the location of existing utilities lines could affect its stability (Tr. 38). He classified the soil as Type C.

As a result of the OSHA inspection, KMD received a willful citation for violation of § 1926.652(a)(1) because of the lack of a cave-in protection system. KMD issued written safety citations to the laborer and foreman for their conduct on August 17, 2011 (Exh. R-5).

DISCUSSION

The Secretary of Labor has the burden of proving, by a preponderance of the evidence, an employer’s violation of a safety standard such as § 1926.652(a)(1). The Secretary must show: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employees access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

KMD claims the foreman was unaware the laborer had entered the excavation and was attempting to get him out as the OSHA compliance officer arrived on site. The laborer testified

that no one directed him into the excavation (Tr. 80). KMD argues that the noise level from the excavator and highway traffic was so high that communication was difficult. It maintains that the total time the laborer was in the excavation was less than fifteen seconds (Tr. 81, 91, 99, 161).

According to the Secretary, the foreman told the OSHA compliance officer that he instructed the laborer into the excavation because there was no other way to retrieve the fallen PVC pipe. The compliance officer estimated that the laborer was in the excavation for approximately 15 minutes and throughout that time, the foreman was standing on the side of the excavation watching the laborer hold the pipe and directing the work (Exh. C-5: Tr. 30, 69, 94-95, 101-102).

Alleged Violation of § 1926.652(a)(1)

The citation alleges that on “Cobb Parkway, Marietta, GA – The employee working in the excavation at a depth of 9 feet was not protected from potential wall collapses or cave-ins by the use of a protective system.”

Section 1926.652(a)(1) provides:

Each employee in an excavation shall be protected from cave-in 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.

There is no dispute the *Excavations* standards at Subpart P, § 1926.650 *et seq.*, applied to KMD’s excavation on Cobb Parkway on August 17, 2011. KMD does not dispute that the excavation was dug in Type C soil and exceeded 5 feet in depth. The excavation was in previously disturbed soil as evident by the existing sewer and gas lines (Exh. C-6; Tr. 38). It was 9 feet in depth and not in stable rock. The photographs establish that at the time the laborer entered the excavation to hold the PVC pipe, it lacked any cave-in protection system such as a trench box or other shoring and the walls were not slopped (Exh. C-4; Tr. 36).

Thus, the Secretary has met her burden of proof with regard to the application of the standard, KMD’s failure to comply with the terms of § 1926.652(a)(1), and the laborer’s exposure to a 9-foot deep, unprotected, excavation without shoring or sloping.

The issue in dispute to establish a violation of § 1926.652(a)(1) is whether KMD had the requisite knowledge of the violative condition.

KMD's Knowledge

KMD argues that the events on August 17 transpired too quickly to support either KMD's actual or constructive knowledge. The laborer entered the excavation on his own and exited immediately upon recognizing his mistake. According to KMD, he was only in the excavation a matter of seconds (KMD Brief, p. 9).

In order to establish an employer's knowledge of a violation, the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). A supervisor's actual or constructive knowledge of a hazardous condition may be imputed to the employer. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996). A condition which is plainly visible to a supervisor is sufficient knowledge chargeable to the employer. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994).

KMD's foreman was present at the excavation and supervised the laborer's work. He was standing on the side of the excavation immediately above the laborer holding the PVC pipe (Tr. 94-95). Although there is an issue as to whether the laborer was instructed to enter the excavation, there is no dispute that the foreman knew the laborer was in the excavation by the time OSHA arrived on site. The photographs taken by OSHA show the foreman looking into the excavation where the laborer was holding the pipe (Exhs. C-2, C-3). The foreman as a supervisor, who directed the work of the crew, was responsible for the laborer's safety (Exh. R-2). A supervisor's knowledge of the violative conditions and his own actions or inactions is imputed to his employer. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). The foreman's knowledge in this case is imputed to KMD.

KMD's argument that the laborer was in the excavation for only a brief time before exiting, is immaterial to a finding of a violation. The Review Commission has repeatedly held that although an employee's exposure to a hazardous condition may have been comparatively brief, such exposure is still sufficient to support the finding of a violation. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991) (brief exposures involved in passing or standing near an open edge constitutes access); *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2156 (No. 87-1238, 1989) (although the risk of falling was not great, the consequences of a fall

was significant, justifying a serious violation). A brief exposure to a hazardous condition does not negate a violation or its seriousness. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992).

KMD's claim that the laborer was in the excavation for 15 seconds is rejected as contrary to the evidence. A time of less than 15 minutes is deemed more appropriate based on the compliance officer's activity in first observing the laborer in the excavation, parking his car, gathering his equipment, walking to the excavation, and taking photographs (Exh. R-1). The laborer did not exit the excavation until after the foreman became aware of the OSHA compliance officer's presence. There is no showing that the foreman attempted to remove the laborer from the excavation prior to the compliance officer's presence. Although the area was noisy, the compliance officer did not hear or observe the foreman "yelling" or use hand signals to gain the attention of the laborer prior to exiting the excavation (Tr. 21-22). The photographs support the compliance officer's testimony. The compliance officer's estimate of less than 15 minutes from the time he first observed the laborer while driving on Cobb Parkway is accepted (Tr. 69). During the 15 minutes, the foreman remained on the side of the excavation and knew the laborer was in the unprotected excavation.

KMD's violation of § 1926.652(a)(1) is established unless it can show unpreventable employee misconduct.

Unpreventable Employee Misconduct

KMD asserts that the laborer who entered the excavation violated its work rules and was engaged in unpreventable employee misconduct. KMD claims the laborer entered the excavation on "his own volition" when he saw the PVC pipe fall and realized that he made a mistake when he exited the excavation (Tr. 6). KMD does not assert unpreventable misconduct on the part of the foreman.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

The Secretary does not dispute that KMD has adequate written safety policies and rules requiring a protective system before employees enter an excavation (Secretary's Brief, p. 14).

The company's *Safety and Health Manual* provides that "each employee in an excavation shall be protected from cave-ins by an adequate protective system" (Exh. R-2, p 2.4). KMD's rule was designed to prevent the cited condition.

With regard to KMD's communication of its safety rules, the record shows that the laborer received training and testing by KDM as part of its safety program (Exh. R-6; Tr. 86). He had worked for KMD for more than three years (Tr. 75). KMD offered evidence of regular weekly safety meetings where the laborer was present (Exh. R-7; Tr. 164).² On January 12, 2008, the laborer was given a test showing he understood the information regarding in part the need for a cave-in protection system (Exh. R-3; Tr. 77). The laborer even won a company safety award in 2010 for demonstrating "safety awareness and follows the company's safety policy" (Exh. R-4).

However, as noted by the Secretary, no tests, orientation packages or other records were shown for the other three employees at the excavation site. Also, the sign-in sheets for the safety meetings fail to provide any detail regarding the specific information discussed, the length of the meeting, or who provided the training (Tr. 173). The sign-in sheets state only "trench safety" or "trench box safety." Although the record shows that the employees received training on general safety matters and procedures, the evidence is insufficient to establish that the specific rule to avoid entering excavations without cave-in protection was communicated to the employees. *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999).

As to the reasonable steps to discover violations, KMD's safety officer purportedly visits each work crew weekly and conducts safety meetings. He checks work sites for safety and completes safety worksheets. Other company officers also inspect sites for safety with someone visiting every site at least once every workday (Tr. 192, 196-197).

The worksheets allegedly prepared by the safety officer during his site inspections were not made part of the record. Although foremen are part of KMD's monitoring program, the foreman in this case with twenty-one years of experience was the same person who permitted the laborer to remain in an unprotected excavation for 15 minutes in order to complete the task. The lack of good judgment by a supervisor such as a foreman raises an inference of a lax safety program. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982). KMD's

² Exhibit R-8, which also contains sign-in sheets, is not given weight because the meetings occurred after the OSHA inspection on August 17, 2011.

argument that the foreman was attempting to remove the laborer is rejected. The compliance officer heard and saw no evidence of such attempts (Tr. 21-22). His photographs and the amount of time the laborer was in the excavation support the compliance officer's testimony.

KMD's enforcement of safety rules is not supported by the record. KMD introduced recent discipline records involving violations of safety rules (Exh. R-9). Both the foreman and laborer received written safety citations as a result of the August 17, 2011, incident. The laborer was cited by KMD for entering a "ditch 10' without box." The foreman was cited for not stopping a "man from jumping into ditch to line up pipe on operator to fire hydrant" (Exh. R-5; Tr. 172).

Despite receiving the written citation, the foreman testified that he did not understand the write-up (Tr. 187). The company's safety manual provides that a written warning is supposed to be "followed by an explanation and/or training" (Exh. R-2, p. 16). There is no showing the foreman received such explanation and/or training. The foreman could not recall when he received the warning (Tr. 172). The laborer also could not recall when he received the warning. He did not lose any money as a result of the citation and it was the only safety warning he had ever received (Tr. 102). The other two employees on site did not receive any warnings although they were present and watched the unsafe conduct without apparent objection.

Where multiple employees participate in or witness an activity that violates a work rule, "the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *GEM Industry, Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996). There was one employee in the excavation and at least three employees outside the excavation including the foreman who were watching the laborer. All employees on site were purportedly aware of KMD's work rule against working in an unprotected excavation, yet none of them assured compliance with the rule. Prior to the OSHA inspection, it is noted that most of the written safety warnings involved hard hats, safety vests and glasses (Exh. R-9).

The excavator operator (competent person) testified that he has worked for KMD for more than ten years and has never been disciplined by KMD. He was not familiar with other employees receiving discipline. He was not disciplined for the August 19 activity although the excavator was operating while the laborer was in the excavation (Tr. 138-139). His claim that he did not see the laborer in the excavation is rejected. The photographs taken by OSHA show the

excavator's bucket filled with dirt directly in front of the laborer holding the PVC pipe or passing by him (Exhs. C-6, C-7; Tr. 93).

The foreman, who has worked for KMD for more than 20 years, also had no recollection of any prior discipline or of disciplining other employees. The foreman described a more informal system of verbal communications on how to perform tasks correctly (Tr. 187-188). There is no evidence of the foreman's safety training and instruction. KMD's monitoring results of the foreman's safety practices on other projects were not submitted into the record.

In the *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), the Review Commission noted that "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Id.* at 1017.

KMD's claim of unpreventable employee misconduct is not established.

Willful Classification

KMD's violation of § 1926.652(a)(1) was classified by OSHA as "willful." "It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). A willful violation is differentiated by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

The record shows that the KMD crew was overtaken by a quick sequence of unexpected events that were neither planned nor in compliance with KMD's written safety program. The experienced crew had used trench boxes earlier to perform its work in the excavation. At another KMD trench site approximately 150 yards from the excavation at issue, the OSHA compliance officer found no safety problems (Tr. 56-57). The events occurred too quickly for KMD to have the requisite heightened awareness to establish willfulness. The laborer entered the excavation on his own and was allowed to remain until OSHA initiated the inspection. The conduct by the foreman shows a lack of good judgment and an attempt to deal with the unexpected conduct of the laborer. But it fails to establish willfulness. There were a variety of

other options available to retrieve the fallen pipe instead of allowing the laborer to remain in an unprotected excavation. KMD claims that the excavator could have picked up the fallen PVC pipe and put it back in place within five minutes. The trench boxes could also have been reinserted which would have taken five minutes (Tr. 116, 118).

KMD's good faith effort to comply is evident from its consistent use of trench boxes at the site and that the same boxes were still on site, properly sized and ready for re-insertion in only five minutes. The foreman's apparent attempt to quickly finish the job is not sufficient to elevate KMD's conduct to willful. KMD has a good written safety program and attempts to regularly monitor each worksite. The same compliance officer was unable to find any safety problems at other KMD excavations.

KMD's violation of § 1926.652(a)(1) is reclassified as serious.

Penalty Assessment

Section 17(j) of the Act requires the Commission to give due consideration to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). The gravity of the violation is given primary consideration.

KMD employed approximately 35 employees at the time of the OSHA inspection (Tr. 48). KMD is not entitled to credit for history because of a serious citation within the past three years. It is entitled to credit for good faith because it has a good written safety program. The company safety training program and its communication to employees also appears adequate.

A penalty of \$5,000.00 is deemed reasonable for KMD's serious violation of § 1926.652(a)(1). The excavation was 9 feet in depth and dug in Type C soil. One employee was exposed to the unprotected excavation. His exposure was brief and resolved quickly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing decision, it is ORDERED that:

1. A willful violation of 29 C. F. R. § 1926.652(a)(1) is affirmed as serious and a penalty of \$5,000.00 is assessed.

/s/ _____ Ken S. Welsch
Ken S. Welsch
Judge

Date: December 11, 2012
Atlanta, Georgia