UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. HENSEL PHELPS CONSTRUCTION CO., Respondent.	DOCKET NO. 15-1638

Appearances:

Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Michael V. Abcarian, Fisher & Phillips, LLC, Dallas, Texas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On March 4, 2015, the Occupational Safety and Health Administration ("OSHA") inspected a Hensel Phelps Construction Company ("Respondent") jobsite located at 100 West Avenue, in Austin, Texas. (Stip. 1). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one willful violation of the Act with a proposed penalty of $70,000.00. (Stips. 104, 107). Respondent timely contested the Citation. (Stip. 105).

Stipulations

Pursuant to Commission Rule 61, 29 C.F.R. §2200.61, the parties fully stipulated to the facts of this case and each separately moved for a decision based upon the stipulated record. The parties' *Joint Stipulations of Fact and Procedure*, which contains one-hundred-thirty (130) stipulations, was filed on January 12, 2017. Each party's dispositive motion was filed on February 17, 2017.

Jurisdiction

Jurisdiction is conferred upon the Commission pursuant to Section 10(c) of the Act. Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5). (Stips. 109, 110). *See also Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Background

On March 4, 2015, the OSHA Area Office in Austin, Texas received a complaint concerning a construction jobsite for the new Austin Central Public Library ("library project"). (Stips. 11, 88). The complaint alleged that employees of CVI Development, LLC ("CVI") were working in hazardous conditions at the Seaholm Substation East Screen Wall. (Stip. 88). In response, OSHA Compliance Safety and Health Officer Greg Halter ("CSHO Halter") was dispatched to the worksite to conduct an inspection. (Stip. 102).

The inspection revealed that, on March 4, 2015, CVI employees Olivarel Nativadad,[1] Pedro Sanchez, and Karl Daniels (who was also the owner and President of CVI) were working next to an excavated wall, an area referred to as the Seaholm Substation East Screen Wall, which

[1] The Court notes that the parties' stipulations spell one of the exposed employees name differently at times. Stipulation No. 10 identifies one of the exposed employees as "Natividad Olivarez-Vasquez," while Stipulation No. 79 identifies, presumably the same person, as "Olivarel Nativadad."

measured approximately twelve feet, six inches (12' 6") in depth by one hundred fifty feet (150') in length. (Stips. 10, 37-39, 76, 78-80; Exs. 5-8). The parties' stipulations are sufficient to prove the *prima facie* elements necessary to establish the cited violation. *See* Discussion *infra*. Therefore, the sole remaining issue is whether Respondent, as the General Contractor on the jobsite, can be found liable for the Citation based upon CVI employees' exposure to the violative condition, under OSHA's "controlling employer" enforcement policy.

Respondent entered into a contract with the City of Austin to build the library back in 2010. (Stip. 11; Ex. 1). Respondent subcontracted with Haynes Eaglin Watters, LLC ("HEW") in 2014 to complete certain foundation and screen wall work on the Seaholm Substation East Screen Wall. (Stips. 4, 29; Ex. 2). HEW then subcontracted with CVI to complete all demolition, excavation and haul-off, backfill and drain, and site concrete (foundation & retaining walls) work as required for the Seaholm Substation East Screen Wall. (Stip. 35; Ex. 3).

Respondent had overall construction management authority on the library project. (Stip. 28). Respondent supervised the library work through various on-site management personnel, including superintendents, project engineers, and project manager(s). (Stips. 13-21, 24, 26). Many of Respondent's management personnel at this jobsite had extensive OSHA training, education, and experience (Stips. 22, 23, 25, 27).

In December 2014, Respondent submitted an Excavation Safety Plan to the City of Austin, which was prepared by HEW. (Stip. 43). All relevant construction documents (including the ROCIP Project Safety Manual, HP's Excavation Safety Plan and HP's Accident Prevention Plan) specified a requirement at the Seaholm Substation East Screen Wall to include an excavation slope of 1.5 (horizontal) to 1 (vertical), as well as 5 feet of level ground before

reaching the security fence surrounding the Seaholm Substation East Screen Wall work area. (Stip. 44).

In February 2015, after another subcontractor was brought in to resolve unforeseen underground structure and asbestos issues, CVI began to lay out footings for the Seaholm Substation East Screen Wall. (Stips. 45-56). CVI quickly determined that the wall footings were not going to fit the jobsite in accordance with construction drawings and requirements identified by Respondent's engineers. CVI notified HEW of this problem, who in turn notified Respondent. (Stip. 57). Respondent's management personnel visited and observed the Seaholm Substation East Screen Wall site to evaluate the issue. (Stip. 59). The City of Austin ultimately agreed that the planned Seaholm Substation East Screen Wall could be moved nine inches (9"), so as to be constructed immediately next to vertical excavation faces consisting of soil, and unknown fragments of brick, metal, wood and concrete. (Stip. 61, 62; Exs. 5, 6, 7, 8).

On the morning of March 4, 2015, CVI owner Karl Daniels sent his employees to work at another location on the library project (a different work area - unrelated to the Seaholm Substation East Screen Wall), while he awaited instructions from Respondent and/or HEW concerning the work to be performed at the Seaholm Substation East Screen Wall. (Stip. 63). A City of Austin Inspector observed the CVI employees working at the other area, and told CVI owner Karl Daniels that the only place CVI employees should be working at that time was at the utility pole location within the Seaholm Substation East Screen Wall. (Stips. 64-66). The City of Austin Inspector followed up these instructions in an email stating the same to various members of Respondent's project management team and HEW management personnel. (Stips. 67-70; Ex. 4).

The Court notes that in the email communications on this topic, CVI owner Karl Daniels expressed safety concerns about his employees working on the Seaholm Substation East Screen Wall that day. (Ex. 4). Mr. Daniels wrote to three HEW managers: "If the 'urgency' is due to the exposed electrical pole not being properly shored then CVI is concerned about working in said area. Please correct me if I am wrong, but CVI has been provided direction from Ash from Hensel Phelps [Respondent] to proceed with placing rebar for the walls discussed, however placing rebar in the mud and rain is unorthodox and very dangerous." (Stips. 32-34, 68; Ex. 4, p.1-2).

After sending the March 4th e-mail, the City of Austin Inspector returned to Mr. Daniels and told him that he had his notice about what CVI employees were expected to be doing and where—i.e., working only on the Seaholm Substation East Screen Wall, and at no other area of the library project until needed reinforcement and related work around the small transmission pole at the Seaholm Substation East Screen Wall had been fully addressed. (Stip. 69).

Lawrence Harding, Respondent's Area Superintendent, received the City of Austin Inspector's March 4th e-mail and forwarded it to Jay Herzing, Respondent's Project Superintendent; Tracey Robinson, Respondent's Engineer; Jesus Pena, Respondent's Engineer; Troy Saint, HEW Project Superintendent; Clotiel Haynes, HEW President; Eric McClure, HEW Project Superintendent; and HEW Project Superintendent Willie Ibarra, with the added message: "At this time CVI may not continue on any other work in regards to Seaholm substation until the AE [Austin Energy] and COA [City of Austin] concerns of reinforcing bar and concrete placement to the adjacent small transmission pole has been completed."
(Stips. 24, 26, 70).

As a result of these oral and email communications, Mr. Daniels pulled CVI employees from work at the other, unrelated location, and sent them to prepare the Seaholm Substation East Screen Wall area for rebar installation, which included, but was not limited to, digging the shear key, framing the pour area, tie-in of steel rebar, and pouring the footings. (Stips. 72, 73; Exs. 5, 6). Later that same day, still March 4, 2015, as CVI employees were installing rebar next to the unprotected twelve-foot vertical wall, it began raining intermittently. (Stip. 75). Respondent's Area Superintendent Lawrence Harding, Respondent's Project Superintendent Jay Herzing, HEW Project Superintendent Willie Ibarra, and the City of Austin Inspector were all present at the Seaholm Substation East Screen Wall while CVI employees were performing this work. (Stips. 24, 26, 76, 77, 81; Exs. 5, 6, 7). In other words, CVI employees were working next to the exposed face of a 12-foot high, excavated, vertical, wet, soil wall that was not properly sloped or otherwise protected from cave-in hazards, in full view of Respondent's management personnel. (Exs. 5, 6).

After OSHA's on-site inspection, Respondent hired three additional subcontractors to slope the wall to a 1.5 to 1 ratio; to install wire mesh around the large transmission pole; to "shot-crete" the wire mesh; and to remove dirt from atop the horizontal concrete structures. (Stips. 90, 91). Afterward, Respondent contracted with a registered professional engineer to issue a stamped letter approving CVI employees' return to the Seaholm Substation East Screen Wall to complete the required work. (Stip. 92).

Discussion

To prove a violation of an OSHA regulation, Complainant must establish by a preponderance of the evidence that: (1) the cited standard applied to the work; (2) the employer failed to comply with the requirements of the cited standard; (3) employees were exposed or

had access to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Citation 1, Item 1

Complainant alleged a willful violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. 1926.652(b) or 1926.652(c).
>
> At the Seaholm Substation East Screen Wall, 100 West Avenue, Austin, TX, 78701, on or about March 4th, 2015 and at times prior thereto, four (4) workers were installing rebar during intermittent rain in an unprotected excavation approximately twelve feet and six inches (12'6") deep by one hundred and fifty feet (150') long, exposing the workers to a cave-in hazard.

The cited 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 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.

29 C.F.R. § 1926.652(a)(1).

The parties stipulated to the facts necessary to establish all of the *prima facie* elements of the violation. The requirements of the cited regulation, 29 C.F.R. 1926.652(a)(1), applied to the work being performed by CVI employees at the Seaholm Substation East Screen Wall excavation site on March 4, 2015. (Stip. 111). The excavation at the Seaholm Substation East Screen Wall where CVI employees were working was not protected from the potential hazard of employees being caught in, or under, a cave-in by an adequate protective system pursuant to 29 CFR 1926.652(a)(1). (Stip. 112). The exposed wall consisted of Type C soil, was greater than

34 degrees (1.5 to 1 slope ratio), and did not include a protective system that met the requirements of 29 CFR 1926.652(c). (Stips. 82, 83, 112; Exs. 5, 6). The jobsite had been non-compliant for at least a few days prior to CSHO Halter's arrival on March 4, 2015. (Stip. 84). Respondent also knew that on March 4, 2015, the CVI employees were performing work on the Seaholm Substation East Screen Wall, including installation of rebar in areas next to the unprotected, twelve-foot high, vertical soil wall. (Stips. 77, 86, 87, 101). The *prima facie* elements of the violation alleged in Citation 1, Item 1 are established.

Therefore, as stated above, the sole remaining issue is whether Respondent, as the General Contractor for the library project, can be held liable for the violation as a "controlling employer." Complainant argues, based upon the parties' stipulated facts and Commission case law, that Respondent was properly cited for the violation as a "controlling employer" under OSHA's Multi-Employer Citation Policy. (Stip. 129; Ex. 9). Respondent argues, based upon the parties' stipulated facts and 5th Circuit case law, that OSHA's "controlling employer" policy has been invalidated and is unenforceable. (Stip. 123). The parties have agreed, however, that should Citation 1, Item 1 be affirmed in this case, it should be reclassified to an other-than-serious violation with a revised penalty amount of $12,471.00. (Stip. 127).

The Commission has held that "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), to protect not only its own employees, but those of other employers 'engaged in the common undertaking.'" *McDevitt Street Bovis*, 19 BNA OSHC 1108 (97-1918, 2000) (quoting *Anning-Johnson*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976)). "An employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Summit Contractors,*

Inc., 23 BNA OSHC 1196 (No. 05-0839, 2010) (quoting *McDevitt* at 1109).

The parties agree that a controlling employer is one who has general supervisory authority over the worksite, including the power to correct safety and health violations itself, or to require that others correct them. (Stip. 116). A general contractor normally has responsibility to assure that other worksite contractors fulfill their obligations with respect to employee safety matters that affect the entire construction site. (Stip. 118). A general construction contractor is normally well-situated to obtain abatement of safety hazards, either through its own resources or through its supervisory role with respect to work performed by subcontractors. (Stip. 119). Therefore, it is reasonable to expect that a general contractor will take reasonable action to assure compliance by subcontractors with required safety standards insofar as all employees on a construction site are affected. (Stip. 120).

In this case, Respondent had overall construction management authority on the library project. (Stip. 28). By virtue of its contract with the City of Austin, and as the jobsite general contractor, Respondent had authority through its officials and agents to stop construction work performed by subcontractors such as HEW and CVI when hazardous conditions were found, and to prevent them from continuing work due to safety concerns. (Stips. 94, 113). Respondent's onsite safety managers had actually exercised control over jobsite safety at the library project by stopping subcontractor work previously, and by removing subcontractor employees from this jobsite. (Stips. 99, 100).

It is undisputed that Respondent's Project Superintendent, Respondent's Area Superintendent, and Respondent's Safety Manager each walked portions of the library project on a daily basis, which occasionally included the Seaholm Substation East Screen Wall. (Stips. 85, 93, 95-98). Respondent's Area Superintendent Lawrence Harding and Respondent's Project

Superintendent Jay Herzing were actually present when CVI employees were performing work in the unprotected area of the excavation. (Stips. 24, 26, 76, 77, 81; Exs. 5, 6, 7). It is further undisputed that Respondent knew that on March 4, 2015, the work area at the Seaholm Substation East Screen Wall was not properly protected from cave-ins. (Stips. 77, 86, 87, 101, 114). Despite knowledge of CVI employees working in violative conditions, Respondent failed to adequately enforce CVI's compliance with safety and health requirements. (Stip. 115).

The stipulated record clearly establishes that Respondent had sufficient control and authority over this jobsite, including subcontractor CVI and its employees, to reasonably be expected to prevent and/or correct the violation in this case. Respondent's management employees present at the excavation could have easily prevented the CVI employees from working in the unprotected area along the vertical wall, and/or ordered them to come out of the unprotected area once Respondent's management employees observed them. Respondent did neither. Accordingly, Citation 1, Item 1 would be affirmed under applicable Commission case law. *Summit Contractors, Inc.*; *McDevitt Street Bovis*; *Anning-Johnson*, *supra*.

However, this violation occurred at a jobsite in Austin, Texas, which is in the geographical jurisdiction of the U.S. Court of Appeals for the 5th Circuit. In 1981, the Fifth Circuit clearly ruled that the OSH Act, and regulations implemented thereunder, serve to protect an employer's *own* employees from workplace hazards. *Melerine v. Avondale Shipyards, Inc*., 659 F.2d 706 (5th Cir. 1981). In a case involving a subcontractor employee's negligence action against higher level contractors, the Court unambiguously stated, "OSHA regulations protect only an employer's own employees." *Id.* at 711. On that basis, the Court concluded that the referenced OSHA regulations did not create or define any duty on behalf of a higher level contractor to the employees of a subcontractor. *Id.* at 712-13. The 5th Circuit expressly adopted

the rationale of a former Commission Chairman who wrote [*in pertinent part*] that status as an employer under the Act "does not necessarily mean that the [R]espondent is in violation of 29 U.S.C. §654(a)(2) for every failure to comply with a safety standard which occurs within its worksite. For example, an employer cannot be held in violation of that subsection if his employees are not affected by noncompliance with a standard…." *Id.* at 711. "In this circuit, therefore, the class protected by OSHA regulations comprises only employers' own employees." *Id*. at 712. *See also Southeast Contractors v. Dunlop*, 512 F.2d 675 (5th Cir. 1975) [A contractor is not responsible for the OSHA violative acts of his subcontractors or their employees].

"Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case – even though it may differ from the Commission's precedent." *Kerns Bros. Tree Service*, 18 BNA OSHC 2064 (No. 96-1719, 2000). And, as articulated by Respondent, "a holding by a court of appeals on a legal question is binding on the Review Commission in all cases arising within that circuit until and unless the court of appeals or the Supreme Court overturns that holding…" *Smith Steel Casting v. Donovan*, 725 F.2d 1032, 1035 (5th Cir. 1984).

In this case, it is undisputed that the employees working in the unprotected excavation, exposed to the hazardous condition, were not employed by Respondent. They were employed by subcontractor CVI. In addition, there is no evidence in the record that any of Respondent's own employees were exposed to the hazardous condition. Accordingly, applying 5th Circuit precedent, Respondent cannot be liable for a violation of the Act based solely upon a subcontractor's employees' exposure to the condition. Accordingly, Citation 1, Item 1 must be vacated.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is VACATED.

SO ORDERED.

/s/ ***Brian A. Duncan***

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

Date: April 28, 2017
Denver, Colorado