



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

WEST VALLEY CONSTRUCTION CO., INC.,
a/k/a WVC COMPANY, INC.,

Respondent.

OSHRC DOCKET NO. 06-1499

APPEARANCES:

For the Complainant:

Evan H. Nordby, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:

Carl H. Plumb, Plumb Safety Consulting, Yakima, Washington

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, West Valley Construction Co., Inc. (WVC), was engaged in construction at the Naval Air Station Whidbey, in Oak Harbor Washington. Respondent WVC admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act (Tr. 25).

On August 3, 2006, the Occupational Safety and Health Administration (OSHA) initiated an inspection of WVC's Whidbey worksite. As a result of its inspection, OSHA issued a citation alleging violations of the OSHA construction standards. By filing a timely notice of contest WVC brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Seattle, Washington on March 21, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

FACTS

On August 3, 2006, OSHA Compliance Officers Kalah Goodman and Nicole Flessner stopped at an open and unprotected trench after observing WVC employees working in, and then exiting the trench (Tr. 30-31, 42; Exh. C-7 through C-12). Their superintendent, Mitch Cunningham, stood on the edge of the trench while his employees went into the trench to check the subgrade of the hole (Tr. 165-67, 190). According to Cunningham, the employees were only in the hole for a minute or so (Tr. 167).

The trench had vertical walls, and was approximately six feet wide at both the top and the bottom (Tr. 35-36, 40). It was approximately 10 to 15 feet long and ran from west to east (Tr. 35-36; Exh. C-25). The west end of the trench, where the employees were observed working, was six feet deep (Tr. 35, 37-38, 119-20, 185, 198, 221-22, 224). A valve for a water main was located at the west end of the excavation; a shovel leaned against the trench wall next to the valve (Tr. 45-46, C-13, C-14, C-15, C-24). The east end of the trench was approximately four feet deep with a sloped side (Tr. 35-36). The trench had been excavated in previously disturbed soil, and was damp from water released from the main (Tr. 40-41, 77, 109-10). The soil was classified as Type C (Tr. 40-41, 170).

Alleged Violation of §1926.652(a)(1)

Repeat Citation 2, item 1 alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section:

- a) At the jobsite, where employees worked within a trench excavation of Type C soil measuring 6 feet in depth without the use of a protective system.

West Valley Construction Company, Inc. was previously cited for a violation of this occupational safety and health standard or its equivalent standard (29 CFR 1926.652(a)(1)) which was contained in OSHA Inspection Number 307529057, Citation Number 1, Item 1, issued on 04-12-05, with respect to a worksite located at 6300 E. Hampden, Denver, Co 80222.

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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, by a preponderance of the evidence, (a) the applicability of the cited standard, (b) the employer's noncompli-

ance with the standard's terms, (c) employee access to the violative condition, 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 condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994).

The standard is applicable in that the cited trench was six feet deep, one foot deeper than the five foot depth that triggers the standard, and was excavated in unstable soil. Employees were allowed to enter the trench under the supervision of a WVC superintendent although no protective system was in place. The knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991).

Respondent's sole defense to the citation rests on the superintendent's testimony that, to the best of his recollection, his employees were in portions of the trench that were only four to five feet deep when the OSHA inspectors walked up to the excavation (Tr. 191).

The testimony of Respondent's superintendent cannot be credited. Cunningham never measured the trench, as the OSHA inspectors did. The shovel with which the employees were working was in the six foot portion of the trench, as was the valve they were working around. The OSHA inspectors photographed one of the employees being pulled up out of the west end of the trench, where the six foot measurement was taken. Cunningham failed to object to OSHA's measurements at the time of the inspection, and agreed to slope the excavation should any further entries be required (Tr. 232-34).

In any event, there can be no question that employees were in the "zone of danger," posed by the unshored portions of the cited trench, *i.e.*, the area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent. *RGM Construction Co.*, 17 BNA OSHC 1229, 1234, 1995 CCH OSHD ¶30,754 (No. 91-2107, 1995). Had the six foot portions of the trench caved in while the employees were working at the west end of the cited trench, they could have been exposed to the sloughing soil. Employee exposure to the cited hazard was established.

The violation will be affirmed.

Repeat

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). The entry into the record of a prior citation issued to respondent alleging a violation of the same standard, combined with respondent's concession that the prior citation was not contested and had become a final order prior to the

date of the inspection giving rise to the present citation, is sufficient to complete the Secretary's prima facie case. *Stone Container Corp.*, 14 BNA OSHC 1757, 1990 CCH OSHD ¶29,064 (No. 88-310, 1990).

WVC was cited for an alleged violation of this standard in April, 2005 (Tr. 137-40; Exh. C-3). The citation was issued as a “repeat”, and reclassified as a “serious” violation. The reclassified citation was not contested and became a final order on May 5, 2005 (Tr. 141-44; Exh. C-3, C-4). The present violation will be affirmed as a “repeat” violation.

Penalty

A penalty of \$6,000.00 was proposed for this item. In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The gravity of the violation is determined by (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

Respondent is a small employer, with 50 employees or less (Tr. 135). Two employees were exposed to the cited hazard for a short period (Tr. 167, 181). Had the trench been less than five feet deep rather than six feet, no protective measures would have been required (Tr. 77). The muddy conditions, and the vibrations from a roadway next to the trench may have increased the likelihood of sloughing occurring (Tr. 49).

The gravity of the violation is low. The exposure of the employees was brief and the trench was relatively shallow. Ordinarily the low gravity of this violation would merit a minor penalty. However, given that this is a repeat violation, committed while Cunningham was observing, a penalty of \$2,000.00 is appropriate.

Alleged Violation of §1926.21(b)(2)

Serious Citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury:

- a) At the jobsite, employees were working within a trench excavation, 6' deep, that was not equipped with a means of egress or protective system, had the spoils pile and Track Hoe located at the edge of the trench excavation and muddy conditions surrounding the water

main valve. Employees had not been instructed in the recognition of hazards associated with trenching excavation operations.

The cited standard provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Facts

After the inspection, Goodman spoke with Manny Kouskoutis, WVC's vice president of operations (Tr. 48, 214). Kouskoutis told Goodman that, with the exception of the foreman, Cunningham, the employees had not received training specific to trenching and excavation (Tr. 48). At the hearing, however, Cunningham testified that he trained his crew in trench hazards.

Cunningham received formal trench safety training twice, and had been certified as a "competent person" for purposes of the OSHA regulations on four or five occasions (Tr. 154-55). Cunningham provided employees with their initial safety orientation at the Whidby site and conducted weekly safety meetings, during which he addressed trench safety, including shield installation and proper egress (Tr. 153, 156-57, 160, 177; Exh. R-2). According to Cunningham, Kouskoutis had only been on the job site twice, and would have been unaware of the training Cunningham provided (Tr. 159-60).

Discussion

In order to establish a violation of the cited standard, the Secretary must demonstrate that the employer failed to "instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Secretary of Labor v. Fabi*, 370 F.3d 29, 35-36 (D.C. Cir. 2004). Goodman believed that the presence of employees in an improperly shored trench demonstrated those employees had not been trained. However, the Commission has found an employer's failure to enforce compliance with work rules on the job does not establish a failure to train. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000). Cunningham testified that he instructed his crew in trench safety, including shield installation and proper egress. His testimony is not rebutted by Kouskoutis' statement, as Cunningham was in a better position to know what training had been provided. The Secretary has not carried her burden of proof on this item, and it is vacated.

Alleged Violation of §1926.651(c)(2)

Serious Citation 1, item 2 alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

- a) At the job site, where the employees worked within a trench excavation with a depth ranging from 4-6 feet. A safe means of egress such as, a ladder, was not provided.

The cited standard provides:

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

Facts

One WVC employee was observed walking up the sloped east end of the trench; the other was pulled out of the west end of the trench by one of the two other WVC employees standing on the edge of the excavation (Tr. 36). Cunningham testified that WVC provided safe access, in the form of a ramp out of the hole (Tr. 171). Goodman did not believe the ramp provided a safe means of egress because the soil was loose, portions of the slope were rocky, and the employee walking out appeared to be exerting himself, swinging his torso, as he ascended the slope (Tr. 50, 54, 57-58). Had he fallen he could have suffered sprains or bruises (Tr. 51, 79). Goodman further testified that, because WVC failed to provide a safe means of egress, the second employee resorted to an “unconventional” means of egress, *i.e.*, taking a hand and clambering up the side of the trench, which could have triggered a cave-in (Tr. 51-52).

The Secretary’s video shows an employee walking up the slope without having to hold onto anything (Tr. 54; Exh. C-6). He was able to avoid the rocky portion of the slope (Tr. 86).

Discussion

In an earlier case, *C.J. Hughes Construction, Inc.*, 17 BNA OSHC 1753, 1996 CCH OSHD ¶31129 (No. 93-3177, 1996), the Commission held that if an employee could walk out of the trench using the ramp provided, the ramp was acceptable. CO Goodman agreed that OSHA guidelines say only that employees should be able to walk upright on a ramp when they exit a trench (Tr. 107).

The record clearly establishes that a safe means of egress was provided. As for the employee pulled from the west side of the trench, the cited standard requires only that a safe means of egress, such as a ramp, be provided. That an employee choose not to use the means of egress provided may pose a hazard, but not one addressed by this standard. This citation must be vacated.

Alleged Violation of §1926.651(j)(2)

Serious Citation 1, item 3 alleges:

29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations:

- a) At the jobsite, where the spoils pile, located beneath the track hoe bucket, and track hoe were located at the edge of the trench excavation.

The cited standard provides:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary.

Facts

On the east side of the trench, a mound of excavated soil was located between the tracks of the track hoe and the track hoe's bucket, which rested, in part, upon the soil (Tr. 59, 67; Exh. C-20, C-21). Goodman testified that, unlike the other edges of the excavation, the edge in front of the track hoe was not clean (Tr. 61-62). Goodman believed that the material located at the top of the ramp could roll back into the excavation (Tr. 66). She also testified that, should the east side of the trench collapse, the track hoe could fall into the excavation (Tr. 90). Goodman admitted that it was unlikely the sloped east side of the trench would collapse, and that the small amount of spoils there would not result in any increased instability of that slope (Tr. 93).

Cunningham testified that the track hoe had been used that day to pull less than a bucket of mud from in front of the water main's valve (Tr. 166, 184, 198). The spoils pile for the trench itself was located north of the track hoe approximately four feet on the other side of a curb (Tr. 172-73).

The track hoe was positioned approximately 10-15 feet from the top of the sloped east side, its tracks perpendicular to the excavated trench (Tr. 65, 86, 174). Cunningham testified that because the trackhoe is 11'6" long, it was physically impossible for it to slide into the cited trench (Tr. 174).

Discussion

Certain standards promulgated by the Secretary contain requirements or prohibitions that by their terms need only be observed when employees are exposed to a hazard described generally in the standard. *See; Armour Food Co.*, 14 BNA OSHC 1817, 1987-90 CCH OSHD ¶29,088 (No. 86-247, 1990) [proof of a violation of §1910.132(a) requires a showing that a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazard warranting the use of

personal protective equipment]; *Pratt & Whitney Aircraft v. Donovan and OSAHRC*, 715 F.2d 57 (2d Cir. 1983) [to show violation of §1910.94(d)(7)(iii) the Secretary must show “significant” fire, explosion or chemical reaction hazards]; *Rockwell International Corporation*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶24,979 (No. 12470, 1980) [§1910.212(a)(3)(ii), Secretary must establish that unguarded points of operation actually expose employees to injury].

The cited standard requires that employees be protected from excavated or other materials or equipment *that could pose a hazard by falling or rolling into excavations*. Neither the small mound of dirt at the top of the ramp, nor the track hoe 10-15 feet away was shown to pose any hazard to employees in the trench. The east side of the trench was less than five feet in depth and was sloped. Goodman admitted there was little chance of the slope giving way. It was simply impossible for the trackhoe to fall or roll into the trench. The only condition identified, *i.e.*, the possibility of small amounts of loose soil sliding back down the slope, cannot reasonably be deemed hazardous. This violation is vacated.

Alleged Violation of §1926.651(k)(1)

Serious Citation 1, item 4 alleges:

29 CFR 1926.651(k)(1): An inspection of the excavations, the adjacent areas, and protective systems was not conducted by the competent person prior to the start of work and as needed throughout the shift:

- a) At the jobsite, where employees worked within a trench excavation, 6' deep, that was not equipped with a ladder or protective system, had the spoils pile located beneath the track hoe bucket and track hoe located at the edge of the trench excavation and muddy conditions surrounding the water main valve.

The cited standard provides:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Discussion

During her inspection of the Whidby site, Goodman asked Cunningham whether he had performed an inspection of the cited trench that day; Cunningham told her he had not (Tr. 68). It is undisputed that conditions in the trench changed during the day, as water was released and then dug out of the trench, resulting in the trench reaching six feet in depth (Tr. 69). Goodman acknowledged that Cunningham was, undoubtedly, aware of conditions in the trench; the citation was based on his failure to address the changes

(Tr. 76). Based on Goodman’s testimony, Complainant suggests, in her post hearing brief, that the citation be amended to allege, in the alternative, violation of §1926.651(k)(2), which provides:

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

Discussion

The amendment Complainant seeks adds allegations not known to Respondent at the hearing and as such is prejudicial. Such motion is denied. However, the motion is unnecessary. The one violation that has been affirmed, failure to shore a trench in excess of 5 feet was clearly visible to Cunningham. To look and not to see is not to look. The violation is affirmed.

Penalty

This violation is “serious” in that it involves the same hazards described in the repeat violation. A penalty of \$1,000.00 is assessed.

ORDER

1. Repeat Citation 2, item 1, alleging violation of §1926.652(a)(1) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
2. Serious citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.
3. Serious citation 1, item 2, alleging violation of §1926.651(c)(2) is VACATED.
4. Serious citation 1, item 3, alleging violation of §1926.651(j)(2) is VACATED.
5. Serious citation 1, item 4, alleging violation of §1926.651(k)(1) is AFFIRMED and a penalty of \$1,000.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: June 14, 2007