Secretary of Labor, Complainant, v. Garney Construction, Inc., Respondent.	OSHRC Docket No. 02-2134

Appearances:

Joseph B. Luckett, Esquire
Office of the Solicitor
U. S. Department of Labor
Nashville, Tennessee
For Complainant

Robert C. Johnson, Esquire
Husch & Eppenberger, L.L.C.
Kansas City, Missouri
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Garney Construction, Inc., (Garney) is engaged in the construction and installation of water and sewer pipelines. On October 1, 2002, the Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite in Huntsville, Alabama. As a result of this inspection, respondent was issued a Citation and Notification of Penalty. Respondent filed a timely notice contesting the citation and proposed penalties. A hearing was held in Birmingham, Alabama, on March 11, 2003. For the reasons that follow, Citation No. 1, Item 2, is affirmed and a penalty of $1,625.00 is assessed; Citation No. 1, Item 3a, is affirmed and a penalty of $3,000.00 is assessed; and Citation No. 1, Items 1 and 3b are vacated.

Background

Complainant's compliance officer, Eric Harbin, conducted an inspection of Garney's jobsite on October 1, 2002, pursuant to two complaints and in accordance with OSHA's trenching emphasis program. Mr. Harbin met with respondent's project superintendent upon arrival at the jobsite. Work at this site began in August 2002. Total length of the pipeline was approximately 7,500 feet. On the day of the inspection, Garney was installing 42-inch diameter sewer pipe in an excavation 7 feet 11 inches deep, 14 feet wide at the top, and 68 inches wide at the bottom. The sides were benched with a height of 3 feet 11 inches from the bottom to the bench and 4 feet from the bench to the top

of the excavation. The width of the bench was 4 feet. During the inspection, five 20-foot pipes, or 100 feet of the length of the pipe in the trench, remained open and the soil at this location was Type B sandy clay, cohesive soil. The end of the last pipe installed was 6 feet from the end of the trench. An excavator with a 27-foot boom was located at the ground level at the edge of the trench nearest the last installed pipe. The 42-inch diameter pipe (46- to 48-inch OD) was laid in the center of the 68-inch wide trench, 10 inches to 12 inches from the side walls of the trench. There is no dispute that respondent's employees worked in this excavation on the day of the inspection. One employee was working in the trench 5 feet and 7 feet from the end wall and 1.5 feet from the excavator bucket while signaling the excavator operator.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The cited standards are clearly applicable. Respondent was engaged in construction activities and, specifically, in excavation work on the date of the inspection. Employees had access to the alleged violative conditions by undisputedly working in the 8-foot deep trench on that date.

Citation No. 1, Item 1
Alleged Serious Violation of 29 C.F.R. § 1926.651(c)(2)

The Secretary in Citation No. 1, Item 1, alleges that:

> A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees:
>
> > (a) On or about 10/1/2002, at the Huntsville, Alabama site - Employees working in an excavation had to climb on and/or over a 42 inch section of pipe to get to the ladder.

The standard at 29 C.F.R. § 1926.651(c)(2) provides that:

> (2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The Secretary alleges that respondent's employee in the trench had no safe means of egress from the excavation. A ladder was in place from the bench in the trench sidewall to the top of the excavation, a vertical distance of 4 feet. A slope of gravel extended from the bottom of the pipe near the employee to the top of the pipe. This gravel slope was in place on both sides of the pipe, and gravel was poured on the pipe. The most narrow point of these gravel slopes was 10 to 12 inches at the arch of the pipe 2 feet above the bottom of the trench.

Mr. James Morris, respondent's project superintendent, testified he observed employees in the excavation using the gravel as a ramp from the trench floor up to the bench, which was approximately 4 feet high, just above the top of the pipe. He saw these employees walk upright without slipping, while ascending the gravel slope, and saw employees use the ladder to exit the trench from the 4-foot wide bench. Here, Garney provided a sloped gravel ramp and ladder for employees to exit the trench. The Secretary produced insufficient evidence to prove that the means of egress provided by respondent was not safe. The Secretary, therefore, did not prove that Garney failed to comply with the terms of the cited standard. The alleged violation of 29 C.F.R. § 1926.501(c)(2) is vacated.

Citation No. 1, Item 2
Alleged Serious Violation of 29 C.F.R. § 1926.651(j)(2)

The Secretary in Citation No. 1, Item 2, alleges that:

> Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations:
>
> > (a) On or about 10/1/2002, at the Huntsville, Alabama site - Excavated soil and an excavator were at the edge of the excavation, exposing the employee working in the excavation to being struck by material and equipment falling or rolling into the excavation.

The standard at 29 C.F.R. § 1926.651(j)(2) provides:

> (2) 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.

Mr. James Morris, respondent's project superintendent, testified that Garney's excavator was positioned at the edge of the end of the trench. He stated that at that location the end wall was vertical and not benched. Excavated material was also at the edge of the trench at this location. An employee was at the end of the pipe in the trench, less than 6 feet from the end of the trench. The 100,000-pound excavator and excavated material were located at the edge of the trench a few feet above the head of this employee. During the inspection, clods of excavated soil were observed at the edge of the sides of the trench. Mr. Morris admitted this was not a good condition and that his excavator operator did not wipe off the clods at the trench side edge the way respondent normally does.

The cited standard specifically requires that equipment and excavated material be kept at least 2 feet from the edge of the excavation to protect employees in the excavation. The standard, as written, presumes the hazard, specifically, that equipment or material at the edge of an excavation could roll or fall into the trench and onto employees. Here the equipment and excavated materials

were at the edge of the trench above an employee who was working within 6 feet of the trench end, with easy access to the hazardous condition. Access to this condition constitutes employee exposure.

The cited standard allows an employer to protect its employees by the use of a retaining device sufficient to prevent materials or equipment from falling or rolling into the excavation. Respondent argues that the land sloped away from the trench, and it placed dirt under the excavator's tracks for stability. This unsupported argument lacks merit. Garney produced no evidence as to the degree of slope or that it considered this slope prior to commencing work or placing the employee in the trench. Neither the slope of the land nor the placement of dirt under the excavator tracks for stability constitutes a retaining device. Assuming, for the sake of argument, that these conditions qualify as retaining devices, respondent produced no evidence to show that these two conditions would be sufficient to prevent such materials or equipment from falling or rolling into the trench.

Respondent further argues that the benched sides of the trench constitute retaining devices. This argument also lacks merit. At the location where the employee was working, the trench wall was vertical. On the trench sides that were benched, clods of soil were found at the edge of the excavation where employees used the gravel as a ramp while exiting the trench. Materials at the edge of the benched sections could fall or roll into the excavation and onto employees.

The Secretary has shown that respondent failed to comply with the terms of the standard by locating its excavator and excavated materials at the edge of the trench without providing use of retaining devices sufficient to prevent the equipment or materials from falling or rolling into the excavation. She has further shown employee exposure to this violative condition. Respondent had actual knowledge through its project superintendent who was at this location during and before the inspection. His testimony clearly established that he was totally familiar with the conditions at issue. The violative condition could result in equipment or excavated material falling or rolling into the excavation or onto the employee in the trench. There is a substantial probability that death or serious physical harm could result from this condition. The violation of 29 C.F.R. § 1926.651(j)(2) is affirmed as a serious violation.

Citation No. 1, Item 3a
Alleged Serious Violation of 29 C.F.R. § 1926.652(b)(2)

The Secretary in Citation No. 1, Item 3a, alleges that:

> Maximum allowable slopes, and allowable configurations for sloping and benching systems, were not determined in accordance with the conditions and requirements set forth in appendices A and B:
>
> > (a) On or about 10/1/2002, at the Huntsville, Alabama site - Employees were laying pipe in an excavation 8 feet in depth and the benching system being used for type B soil, one half horizontal to one vertical, was not in accordance with Appendix B.

The standard at 29 C.F.R. § 1926.652(a)(1) provides:

> *Protection of employees in excavations.* (1) 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.

This excavation is not in solid rock. Both parties agree that the soil is Type B soil. The depth of the excavation is 7 feet 11 inches. An adequate protective system is, therefore, required. This system must be designed in accordance with paragraph (b) relating to sloping or benching systems or paragraph (c) relating to support, shield and other protective systems. Garney chose to protect its employees by designing and using a benching system in accordance with paragraph (b).

The standard at 29 C.F.R. § 1926.652(b)(2) provides:

> (b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows:
>
> > (2) *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 relates to *Soil Classification.* As noted above, the parties agree that the soil is Type B.

Appendix B contains specifications for sloping and benching of the face of excavations where, as here, the employer chooses to use this system to protect its employees. Appendix B specifies the maximum allowable slope for an excavation face in Type B soil is 1:1 (45 degrees) (See Table B-1 of Appendix B.)

As discussed above, the excavation was 7 feet 11 inches deep, 14 feet wide at the top, and 68 inches wide at the bottom. The sides were benched with a height of 3 feet 11 inches from the trench bottom to the bench and 4 feet from the bench to the top of the excavation. The width of the horizontal bench was 4 feet. The end face of the excavation was vertical.

To comply with the requirements and specifications of the cited standard, all faces of the excavation must be sloped or benched 1:1 or 45 degrees. The slope is measured from the toe of the slope or bench to the top of the excavation. Mr. Harbin's uncontroverted testimony established that using this method, the bench should have been 7 feet 11 inches wide, since the trench was 7 feet 11 inches deep. This would yield the 1:1 slope required by the standard for excavations in Type B soil. At best, Garney's slope was ½:1, since its bench was only 4 feet wide for the trench side walls in a 7-foot 11-inch deep excavation. The end face wall had no slope. Respondent's project superintendent, Mr. Morris, testified that the end wall was vertical. Respondent's argument that it was in substantial compliance with the standard is rejected.

Respondent's employee worked in the excavation less than 6 feet from the vertical end wall and next to the two benched side walls. He was clearly exposed to the improperly sloped or benched faces of the excavation. The cited standard presumes a hazard of cave-in or collapse of sides of excavations when improperly sloped. Respondent's project superintendent knew that the soil was Type B soil. He knew the depth of the trench and knew the width of the bench, as well as all other dimensions of this excavation. He knew that the end wall was vertical and knew that the excavator superimposed an additional load on that portion of the excavation. Garney, through Mr. Morris, had actual knowledge of the violative conditions. The hazard here is cave-in or collapse of the various walls of the excavation. Should a cave-in or collapse occur, there is a substantial probability that

death or serious physical harm could result. The violation of 29 C.F.R. § 1926.652(b)(2) is affirmed as a serious violation.

Citation No. 1, Item 3b
Alleged Serious Violation of 29 C.F.R. § 1926.651(k)(1)

The Secretary in Citation No. 1, Item 3b, alleges that:

> 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) On or about 10/1/2002, at the Huntsville, Alabama site - The competent person had not inspected the excavation prior to allowing employees to work in the excavation.

The standard at 29 C.F.R. § 1926.651(k)(1) provides:

> (k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

It is undisputed that employee exposure could be reasonably anticipated prior to the start of work on the day of the inspection. An employee was observed in this excavation during the inspection, and respondent's employees worked daily in the excavations. The standard is applicable and requires respondent's competent person, James Morris, to conduct an inspection, at least daily, in accordance with its terms.

The Secretary asserts that Garney failed to conduct the required daily inspection based primarily on the fact that its competent person, Mr. Morris, did not perform a manual test of the soil. Mr. Morris testified that he used his pocket penetrometer and determined the soil to be Type B soil when the project started. He performed a manual test of the soil two or three weeks before the inspection. He stated that the soil was consistent and never changed throughout the project. The

Secretary's compliance officer tested the soil on the date of the inspection and found it to be Type B soil.

The term "daily inspection" is not defined in the standard. The required elements and methodology of such inspections are not specified by the Secretary in the this standard or anywhere in Subpart B of 29 C.F.R. Part 1926.

The Secretary's argument that every daily inspection must include a visual test and a manual test is rejected. In her argument in this case, the Secretary has used the terms "inspection" and "test" interchangeably. She relies on Appendix A to Subpart P of Part 1926 - Soil Classification, (c) Requirements - (1) Classification of soil and rock deposits, which provides in part:

> (c) *Requirements*--(1) *Classification of soil and rock deposits.* Each soil and rock deposit shall be classified by a competent person as Stable Rock, Type A, Type B, or Type C in accordance with the definitions set forth in paragraph (b) of this appendix.
>
> (2) *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. Such analyses shall be conducted by a competent person using tests described in paragraph (d) below, or in other recognized methods of soil classification and testing such as those adopted by the America Society for Testing Materials, or the U. S. Department of Agriculture textural classification system.
>
> (3) *Visual and manual analyses*. The visual and manual analyses, such as those noted as being acceptable in paragraph (d) of this appendix, shall be designed and conducted to provide sufficient quantitative and qualitative information as may be necessary to identify properly the properties, factors, and conditions affecting the classification of the deposits.
>
> * * * *
>
> (5) *Reclassification.* If, after classifying a deposit, the properties, factors, or conditions affecting its classification change in any way, the changes shall be evaluated by a competent person. The deposit shall be reclassified as necessary to reflect the changed circumstances.

Paragraph (d) of Appendix A sets forth acceptable visual and manual tests and describes the purpose of both tests in part as follows:

> (1) *Visual tests.* Visual analysis is conducted to determine qualitative information regarding the excavation site in general, the soil adjacent to the excavation, the soil forming the sides of the open excavation, and the soil taken as samples from excavated material.

(2) *Manual tests.* Manual analysis of soil samples is conducted to determine qualitative as well as qualitative properties of soil and to provide more information in order to classify soil properly.

A careful reading of Appendix A leads to the conclusion that acceptable visual and manual tests are required to be performed by a competent person to initially classify soil and rock deposits. These visual and manual tests would also be required for any subsequent reclassification. A competent person must first determine whether any changes occur in properties, factors or conditions affecting the classification. If such changes occurred, he must then evaluate the changes and reclassify the soil as needed. Only at the time of evaluation must the competent person perform the acceptable visual and manual tests.

Daily inspections are required whether changes occur or do not occur. They are done to determine whether there is evidence of a situation that could result in a hazardous condition. As they relate to soil classification, such inspections are done to determine whether there have been any changes in the properties, factors or conditions affecting the classification. If upon initial inspection, a determination is made that such changes have occurred, the competent person must then perform the acceptable visual and manual tests specified by Appendix A to reclassify the soil as needed.

To require every daily inspection to include a manual test without first determining changes in soil conditions would impose duties and responsibilities on employers which are inconsistent with the requirements and specifications of Appendix A.

The purpose of daily inspections under 29 C.F.R. § 1926.651(k)(1) is to determine whether certain conditions have changed. The purpose of the acceptable manual tests under Appendix A to Subpart P, after soil is initially classified, is to fully evaluate the qualitative and quantitative properties of the soil and provide more information to reclassify soil after the initial determination that changes had occurred.

In promulgating the standards and appendices in Subpart P, the Secretary chose the words used to regulate and control the activities of employers engaged in excavation work. She is bound by those words and cannot now expand their meaning to impose additional requirements on those employers without sufficient notice.

While the Review Commission will generally defer to the Secretary's reasonable interpretation of a standard, I find the Secretary's interpretation as not reasonable insofar as it requires all daily inspections to include a manual test of soil, where, as here, there were no changes in the soil conditions found. Such an expansive interpretation of 29 C.F.R. § 1926.651(k)(1) is inconsistent with the requirements and specifications of Appendix A. This inconsistency will not withstand scrutiny.

The Secretary also argued that Mr. Morris was required to inspect for other hazards including accessibility of the ladder and the location of the excavator and spoil near the edge of the excavation. While evidence was produced at hearing relating to the location of such equipment and materials, no evidence was produced by the Secretary to prove that Mr. Morris did not inspect the site to determine whether these conditions existed or were hazardous. No reasonable inferences can be drawn from the existence of such conditions as to the adequacy of the daily inspections.

The Secretary did not prove that Garney failed to comply with the terms of the cited standard. The alleged violation of 29 C.F.R. § 1926.651(k)(1) is vacated.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Garney is an employer with approximately 200 employees. It has no history of violations affirmed within the last three years. Its superintendent was trained as a competent person.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). One employee was observed exposed to the hazard of cave in and falling materials and equipment for about 10 minutes

during the inspection. These conditions could result in serious injury and possibly death. Thus, the gravity of the violation is moderate.

Garney was cooperative and demonstrated good faith throughout the investigation. Based on these factors, the appropriate penalty for the violation of 19 C.F.R. § 1926.651(j)(2) is $1,625.00 and the appropriate penalty for the violation of 29 C.F.R. § 1926.652(b)(2) is $3,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing 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 upon the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.651(c)(2) is vacated;
2. Citation No. 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.651(j)(2) is affirmed and a penalty of $1,625.00 is assessed;
3. Citation No. 1, Item 3a, alleging a serious violation of 29 C.F.R. § 1926.652(b)(2) is affirmed and a penalty of $3,000.00 is assessed; and
4. Citation No. 1, Item 3b, alleging a serious violation of 29 C.F.R. § 1926.651(k)(1) is vacated.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: June 13, 2003