



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

Secretary of Labor,

Complainant

v.

Saiia Construction, LLC,

Respondent.

OSHRC Docket No. **04-0709** (EZ)

Appearances:

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

Kathleen G. Henderson, Esquire
King & Ballou
Nashville, Tennessee
For Respondent

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

DECISION AND ORDER

Saiia Construction, LLC (Saiia) is engaged in construction and was installing concrete pipe in an excavation in Birmingham, Alabama, on November 21, 2003. The Occupational Safety and Health Administration (OSHA) conducted an investigation of the Respondent's jobsite on November 25, 2003. This investigation concerned working conditions relating to an accident at that worksite on November 21, 2003. As a result of this investigation, the Respondent was issued a citation. The Respondent timely filed a notice contesting the citation and proposed penalty. A hearing was held, pursuant to EZ trial procedures, in Birmingham, Alabama, on September 30 and October 1, 2004. Prior to the hearing, the Secretary withdrew her allegation of a violation of 29 C.F.R. § 1926.651(e). Remaining at issue is the alleged violation of Section 5(a)(1) of the Act and the proposed penalty of \$7,000.00. For the reasons that follow, the alleged violation of Section 5(a)(1) is vacated and no penalty is assessed.

Citation No. 1, Item 1, issued on April 15, 2004, in pertinent part, alleges a violation of Section 5(a)(1) of the Act as follows:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazard of being struck by the load attached to the bucket of the Komatsu Hydraulic Excavator, PC300LC-6:

At Overton Road - Southend - On or about 11/21/03, employees were exposed to the hazard of being struck by the 48"X8' concrete pipe attached to the bucket of the Komatsu Hydraulic Excavator, PC300LC-6. The concrete pipe was being lifted from the excavation.

Among other methods, one feasible and acceptable method to correct this hazard is to ensure through training, that employees adhere to the instructions outlined in the Operations and Maintenance Manual for the Komatsu PC300LC-6, Section 7.2 and Section 7.6.

The Secretary has the burden of proving, by a preponderance of evidence, a violation of Section 5(a)(1) of the Act.

To establish a violation of section 5(a)(1) of the Act, the Secretary must prove that an activity or condition in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or "serious physical harm," and that a feasible and effective means of abatement existed by which the employer could eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872, 1995-97 CCH OSHD ¶ 31,207, p. 43,724 (No. 92-2596, 1996). As part of her burden to prove these elements, the Secretary must define the alleged recognized hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices which are within the employer's control. *Inland Steel Co.*, 12 BNA OSHC 1968, 1970, 1986-87 CCH OSHD ¶ 27,647, p. 35,997 (No. 79-3286, 1986); *Pelron Corp.*, 12 BNA OSHC 1833, 1835, 1986-87 CCH OSHD ¶ 27,605, p. 35,871 (No. 82-388, 1986).

Beverly Enterprises, Inc., 19 BNA OSHC 1161, at 1168, 2000 CCH OSHD ¶ 32,227, p. 48,958 (No. 91-3144 et al., 2000).

To prove a violation of Section 5(a)(1), the Secretary must prove employee exposure and employer knowledge. Under Section 5(a)(1), the Secretary must show knowledge of the hazard and

knowledge that the alleged hazardous condition exists at the jobsite. See *Getty Oil Co. v. OSHRC*, 530 F.2d 1143 (5th Cir. 1976); *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

Here, the Secretary proved knowledge of the hazard, that is, that the Respondent and its industry recognized the hazard of an employee working in a trench, being struck by a concrete pipe, while that pipe was being lifted from the trench. The Secretary, however, failed to prove that the Respondent had the requisite knowledge that the hazardous condition existed at this jobsite. Specifically, the evidence presented at the hearing did not prove that the Respondent knew or with the exercise of reasonable diligence could have known of the presence of the violative conditions; that is, that the Respondent's employee was in the trench, exposed to the pipe being lifted, and not inside the previously laid pipe. The Secretary, therefore, did not present sufficient evidence to prove a violation of Section 5(a)(1) of the Act.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law (Tr. 559-564), are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

- (1) Citation No. 1, Item 1, which alleged a violation of 29 C.F.R. § 1926.651(e), was withdrawn prior to the hearing and no penalty is assessed ;
- (2) Citation No. 1, Item 1, which in the alternative alleged a violation of Section 5(a)(1) of the Act, is vacated. No penalty is assessed.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: November 1, 2004