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. RCS Contractors, Inc., Respondent.	OSHRC Docket No. **06-0849**

Appearances:

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

Eric R. Miller, Esq., Gordon, Arata, McCollam, Duplantis & Eagan, LLP, Baton Rouge, Louisiana
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

RCS Contractors, Inc. (RCS), is a small construction contractor which installs underground drainage systems and utilities for commercial projects (Tr. 131). On April 12, 2006, RCS began removing an older pipeline and installing two new parallel storm drain pipelines, running next to an expanded Airline Highway in Baton Rouge, Louisiana. That afternoon, Ruth Michelli, a compliance officer with the Occupational Safety and Health Administration (OSHA), waited in heavy traffic at the turning lane where Bluebonnet Boulevard crosses Airline Highway. She observed what appeared to her to be violations of the construction standards enforced by OSHA. From her automobile she took photographs of the excavation worksite. She then related her observations to her OSHA office (Tr. 18, 19, 63). OSHA assigned compliance officer Billy F. Wright to inspect the worksite. As a result of the OSHA inspection, the Secretary issued RCS a two-item serious citation on May 1, 2006.

For item 1, the Secretary asserts RCS violated § 1926.652(a)(1) by failing to protect employees working in an excavation from the potential hazard of a cave-in. For item 2, she asserts RCS violated § 1926.100(a) by failing to ensure employees used protective helmets to protect against overhead hazards. RCS counters that the excavation was not as deep as 5 feet but, even if it were,

the trench walls were properly sloped for Type B soil. It contends head protection was not needed because employees inside the excavation were never in a zone of danger from overhead hazards. In addition, RCS asserts the defense of employee misconduct for item 2.

On September 29, 2006, the undersigned held a hearing in this matter in Baton Rouge, Louisiana, under simplified proceedings. The parties filed post-hearing briefs, and the case is ready for decision.

For the reasons discussed below, the Secretary failed to prove RCS violated the standard cited in item 1. She established a violation for item 2.

Facts

The old 30-inch concrete pipeline that RCS contracted to remove ran inside a "ditch" or "culvert" off from the shoulder area along Airline Highway. Earlier RCS stockpiled materials, but August 12, 2006, was the crew's first day excavating on the project. On that date RCS removed from the culvert area 40 feet of the old concrete storm pipe. It would install dual 42-inch "round equivalent" reinforced concrete arch pipelines. Each section of the newly installed arch-shaped pipe measured approximately 30 inches high and 52 inches wide. RCS laid the two storm pipelines side-by-side, 18 inches apart (Tr. 41, 209-212). A 14-inch asbestos waterline, which RCS would also remove, ran along the north side of the excavation. The water line was 3 feet farther into the north trench wall, 1 to 2 feet below the level of the old 30-inch line (Tr.145, 196). A PVC irrigation/sprinkler line, which ran between the banks of the excavation not far from the culvert's surface, was easily removed (Exh. C-4; Tr. 149, 216). As the pipe laying proceeded from Bluebonnet Boulevard toward a driveway of a hotel along the highway, the culvert became higher and the excavation would have become deeper.

RCS foreman G. Wayne Tullier supervised the project. Describing himself as "supervisor, superintendent, foreman and, generally, I – I have to do everything," Tullier also operated the large trackhoe to excavate the area and to lay the pipe (Tr. 131). With the trackhoe Tullier dug out dirt from the base of the ditch and threw it behind to make a work platform for the trackhoe. From the platform Tullier pulled out the old storm pipeline, expanded the bed for both new pipelines, loaded up dirt into trucks, dumped in the limestone bedding, and carried over the new pipe to the trench. Three employees guided each new pipe section into the excavation. When they finished the

preparation work, Tullier pushed the pipe sections together with the trackhoe (Exhs. C-1, C-7 - C-9; Tr. 214).

Michelli observed the RCS crew at 3:30 p.m., and the employees were in the process of positioning the pipe and laying what would be the last course of new pipe for the day (Tr. 174). Tullier had exited the trackhoe and watched the installation process from the bank. Wright arrived at the worksite some thirty minutes after Michelli's call to OSHA. By that time, Tullier and the crew had finished for the day. Tullier left the worksite, and the others were in the truck preparing to leave. The crew telephoned foreman Tullier, who returned to the site and participated in the OSHA inspection. Wright identified himself to Tullier and explained what prompted the inspection (Tr. 18, 27). The excavation remained open and was not to be backfilled for 5 days (Tr. 150). Wright photographed the excavation, measured its depth at one side, and interviewed employees.

Discussion

The excavation standards of Subpart P address protection from cave-ins. The standards provide for alternative procedures and types of protective methods which can be used. In order to establish a violation of the standard, the Secretary bears the burden to prove: (a) the standard applies to the condition cited; (b) the terms of the standard were not met; (c) employees had access to the violative conditions; and (d) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171 (No. 990257, 2000).

It is not disputed that the cited standards apply to the excavation activities of RCS. Employees were exposed to or had access to conditions inside the excavation. Remaining to be determined are whether RCS violated the terms of the standard and whether RCS had knowledge of the violative conditions.

Item 1: Alleged Serious Violation of § 1926.652(a)(1)

The Secretary contends RCS violated § 1926.652(a)(1) by failing to provide adequate cave-in protection for employees working in the excavation. The standard requires:

> 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.

Whether RCS violated the terms of § 1926.652(a)(1) depends on the type of soil into which the excavation was dug and on the depth and slope of the excavation.

Soil Type

Soils are classified as Type A (generally the most stable types of clay), Type B (angular gravel, silt, silt or sandy or clay loam, some previously disturbed or fissured soils, or those subject to vibrations), or Type C (the least stable gravel, sand, loamy sand, water soaked soils, or some previously disturbed soils) (Subpart P, App. A). The more unstable the soil, the further back the employer must slope the walls of the excavation. RCS's excavation was in "previously disturbed" soil. Not only had an earlier storm drain pipeline been installed in the soil, but the 30-inch pipe sections were pulled out of the bed before the excavation was dug to accommodate two pipelines. The soil was also previously disturbed by installation of a 14-inch asbestos water line running along and underneath the old storm line for 146 feet. Other utilities were previously placed in the excavation field. Neither party seriously disputes the soil was Type B.

Excavation Over 5 Feet -- Cave-In Protection Required

Other than when dug in solid rock, the standard requires excavations 5 feet and deeper to have cave-in protection. RCS bears the burden of proving the excavation was less than 5 feet in depth and that its inspection did not indicate the potential for cave-ins. *A.E.Y. Enterps.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006). Both parties took measurements. The Secretary contends Wright properly measured the depth of the trench wall to be 6½ feet. Although RCS disputes the Secretary's measurement and claims the excavation was less than 5 feet,[1] its own project engineer and general manager Christopher Alonso measured the depth in the middle of the excavation to be 5 feet, 2 inches (Tr. 231). The excavation was shown to be 5 feet or greater in depth, and cave-in protection was required.

[1] RCS relies on a one-page profile illustrating a section of the highway expansion. The profile shows the ditch but not where the pipe will be placed. Neither Tullier nor Alonso used this page, which is not a blueprint. Neither was sure of its relation to the actual site, other than to provide an estimate of how much dirt would be hauled away. It is determined that R-1 is less reliable than actual measurements (Tr. 155, 223).

Dimensions of the Excavation

Shortly after the inspection, RCS's Alonso measured the depth and lower width of the excavation. Alonso measured 5 feet, 2 inches from the point between the new pipelines where the crew ended its work up to a 2 by 4 he placed across the top of the excavation to facilitate the measurement. Wright's 6 foot, 6 inch measurement was taken against the north side of the trench wall beyond the end of the last pipe (Exh. C- 3; Tr. 22, 39, 231).

No one measured the top width. Tullier estimated he dug the top width "approximately between 22, 24, 26, somewhere in that area . . . I was actually digging about 24-, 26-foot wide at the top" (Tr. 164).

Alonso measured the bottom width in several locations to be between 16 to 18 feet (Tr. 231). Tullier testified the excavation had different bottom widths at two different times. The first bottom width was only wide enough to accommodate two 52-inch wide pipes, plus 18 inches from each bank and 18 inches between the pipes (or 13 feet, 4 inches) (Tr. 212). According to Tullier this was the width at all times employees were in the excavation. He described how he later widened the north trench wall and removed part of the slope to dig out the old water line (Tr. 145-146):

> It was - the bottom of the – the toe of that slope was removed when I excavated that 14-inch asbestos water line that was down there that had to be removed, so it was – the bank come down and, about three foot into that bank, there was a water line in there and, after I installed the pipe, I reached and grabbed the water line and pulled it out and backfilled that with stone and, then, dug on down. I did it – I laid about two joints and, then, I would dig the pipe out and, then, I'd go about two more and I'd dig the pipe out.

Tullier testified it was this latter, wider, steeper configuration Wright observed and photographed. Roughly corresponding to Alonso's bottom measurement, Tullier's new width equaled two 52-inch wide pipes, plus 18 inches from the south bank to the pipe, 18 inches between the pipes, and 5 feet between the pipe and the north bank (or16 foot, 8 inch) (Tr. 212).

Conflicting Calculations of the Slope

Sloping the sides of an excavation is one means of approved cave-in protection, and the one RCS contends it utilized. The maximum allowable slope for Type B soil is 1-foot horizontal distance for each 1 foot of vertical distance (or 1:1, or a slope of 45°). As long as the trench walls were in fact

sloped, with the bottom width of 13 feet, 4 inches, the excavation could meet the 1:1 sloping requirements for Type B soil. This is true whether the depth was 5 feet, 2 inches (as Alonso measured) or 6 feet, 6 inches (as Wright measured). If employees were in the excavation when the bottom width was 16 feet, 8 inches, the opposite is true. The top width in that configuration would not have been sufficiently wide to accommodate a 1:1 slope.[2]

The Secretary argues that regardless of the dimensions, the excavation was not sloped. Wright observed the walls and photographed them. He testified the north side of the trench was "practically straight up and down. There is no sloping, no benching" (Tr. 37). The Secretary bolsters Wright's observations with the photographs and with Tullier's admissions. Wright recalled Tullier's initial statement to him that "[the area] wasn't a trench, it was a ditch. It was a 7-foot ditch, not a trench, and that all [Tullier] did was knock the sides off of it and how could he be responsible for employees in a ditch" (Tr.21). As Wright measured the trench wall, he said to Tullier, who stood beside him, "it's 6½ foot." In response, Wright testified Tullier replied, "Well, I already told you it was a . . . 7-foot ditch" (41). Although Tullier denies the comment, Wright recorded the statements which were placed in the file and provided to RCS. The statement comports with Tullier's quick-tempered demeanor. It is concluded that Tullier made the "7-foot ditch" comment to Wright, but it is not certain what Tullier considered "the ditch."

However, if Tullier's version of his method and sequence for laying the pipe and removing the water line is correct, employees were not exposed to the conditions Wright observed at the north side of the excavation.

[2] A shorthand calculation for determining whether the slope of an excavation can correspond to the 1:1 ratio for Type B soil is to multiply its depth by 2 (two sides of an excavation sloped at 1:1) and to add the bottom width. The top width should be at least equal to or greater than that number. In the absence of measurements, the top width is considered to be Tullier's widest estimate of 26 feet. If the bottom width is 13 feet, 4 inches, and its depth is 5 feet, 2 inches, the top width should be equal to or exceed 23 feet. With a depth of 6 feet, 6 inches, the top width should equal at least 26 feet, 4 inches. If the bottom width was actually 16 feet, 8 inches when employees worked in it (based on Alonso's and Tullier's 16 to 18 foot measurement), at 5 feet, 2 inches deep, the top width should be 27 feet. If it is actually 6 feet, 6 inches deep, the top width should be 29 feet, 8 inches.

Totality of the Evidence

The Secretary characterizes as "far fetched" Tullier's assertion he dug out the water line *after* employees laid the storm pipelines (Secretary's brief p. 6). She particularly notes Tullier would have had to accomplish too much work within the short time frame between Michelli's observations and Wright's investigation. No one disputes the lower water line was removed. In fact, removing the line which was another 2 feet down accounts for the difference between Alonso's depth measurement in the middle and Wright's at the north trench wall. The dispute is whether, contrary to Tullier's testimony, he excavated out the water line before the limestone bedding and two new storm lines were laid. Excavating out all the old pipes at one time appears to be the common-sense method. The photographs show the newly installed storm pipes bear no ill effects from having the water line dug out right next to them. It might seem likely that using a 4-foot bucket to dig out a pipe less than 4 feet from the new pipes would leave some signs of the activity, even if Tullier added additional limestone bedding (Tr. 197). The record raises the questions but does not satisfactorily answer them.

The undersigned carefully weighed the relevant testimony and the exhibits.[3] Tullier's testimony was particularly reviewed. Tullier agrees he was angry about the inspection and considered Wright's allegations of safety problems to be a personal affront to him (Tr. 217). Tullier's testimony was confusing, and it is unclear whether some of the confusion was intentional. The problem may have arisen, however, because water lines, old and new storm lines, and irrigation lines were not clearly distinguished. In the final analysis, the record does not provide sufficient evidence, minus the speculation, to establish Tullier and the crew performed the work in a manner different than Tullier described. With Tullier's 25 years of experience operating the trackhoe, it may be possible that sequencing the work in the manner claimed was somehow advantageous.

Wright appeared to rely heavily on the photographs for his testimony. For example, he misinterpreted items shown in the photographs as metal, rather than cardboard pieces. The facts may have appeared to Wright to be straight forward, making it unnecessary to take additional measurements or to get a fuller understanding of the work operation. Michelli was prevented from

[3] To correct an oversight at the hearing and without objection, Exhibits C-9 (a photograph) and R- 3 (RCS safety policy) are hereby admitted into evidence.

testifying for medical reasons. While the issue is not without doubt, the Secretary bears the burden of proof that the excavation walls were not sloped in accordance with Type B soil. She must prove when and where employees were exposed (or had access) to the violative condition. It is determined the Secretary failed to meet her burden. Item 1 is vacated.

Item 2: Alleged Violation of § 1926.100(a)

The Secretary asserts RCS violated § 1926.100(a) when employees worked inside the excavation without hard hats or other head protection. RCS argues employees did not need head protection during that time because neither the pipe nor bucket or boom of the trackhoe passed directly overhead and placed employees in the zone of danger. The standard provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

Tullier described how he brings the pipe over to be set, holding the pipe with a cable secured to a bracket on the trackhoe on one end and the pipe on the other (Tr. 214):

> I have a cable that sticks down through that hole [in the pipe] and hangs off of my trackhoe and, . . . when you pick that pipe up, you bring it over the ditch. When you get it down in and start moving it, the men in the hole that you see holding the pipe by the side, they'll guide it straight for me and they'll stab it in. I'll set it down and, then, I take that cable, roll it like that and it pushes it on. The only thing they do is put the filter []cloth, the bands and the ram neck.

Tullier lowers the pipe to the men in the excavation until it drops down. Photograph Exhibit C-1 shows the pipe at the worker's neck or shoulder level as they push and guide the pipe into position. While the pipe is suspended, the crew leans, pushes and holds it into place. The crew stretches the black filter cloth underneath where the pipe section will sit. The crew applies the tar-like "ram neck" onto the top section of the new pipe and onto the bottom section of the previously set pipe (Tr. 185, 216). To do this the crew bends down to work around the upper and the lower pipes (Exh. C- 1, C-7-C-9 ; Tr. 205, 216).

Tullier describes how one of his crew, Brown, injured his head when his hard hat fell off. "[W]hen he reached in there to get it, he hit the back of his head on the top of the pipe, right on that lip where all the jagged concrete is from when they broke the form off of it, and he cut the back of

his head" (Tr.206). Although intended to show hard hats cause problems, the event illustrates the need for head protection while working bent down around these large pipes.

RCS's understanding of overhead hazards is too narrow. The standard requires protection from "possible danger" from impact or from falling or flying objects. The trackhoe bucket which suspends the pipe is 48 inches wide, only 4 inches less than the pipe it suspends. Because employees must guide, hold, and push the 52-inch wide pipe, someone may well come under the bucket. Further, the bucket was digging out the excavation shortly before it would swing the pipe into the excavation. Dirt and stones which cling to the bucket may drop or be thrown into the excavation. Employees were subjected to hazards requiring hard hat protection. RCS violated the terms of the standard. Anticipated head injuries range from the minor cuts described by Tullier to severe and debilitating head wounds. A violation would be classified as serious.

Knowledge

Did RCS know or should it have known of the violative conduct? According to Tullier, the crew quickly follows his express verbal instructions. He does not put up with "humbug" (Tr. 165, 192). Tullier was the supervisor of the employees and was responsible for directing them and ensuring that they worked safely. None of the three employees in the excavation, including the leadman Darren Camp, wore a hard hat. Tullier testified he did not expect them to do so (Tr. 208):

> I mean, it's my common practice, when it comes to the hard hat issue, my hill men generally wear their hard hats. My road flaggers and stuff, people like that do, but the men that are working in the hole that's stooping and bending and leaning, I have them have theirs readily available. They – I don't strictly enforce them keeping it on their head because it causes more problems than not.

When a supervisor's own violative conduct constitutes the violation, the foreseeability of the action must be considered. Yet, when the supervisor directs his subordinates to perform activities which violate a standard, a different criteria applies. *See W. G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir., 2006). The Secretary establishes a prima facie showing of knowledge by proving that a supervisory employee was responsible for the violation. *Aquateck Systems, Inc.,* 21 BNA OSHC 1400 (No. 03-1351, 2006). The Secretary made this showing. Nor can RCS rebut the showing of knowledge since it did not take reasonable measures to prevent the violation. Its workrule governing personal protective equipment gives too much discretion to the supervisor and states

(Exh. R-3): "required personal protective clothing and/or equipment shall be worn at all times *as deemed necessary by your immediate supervisor*" (emphasis added).

The Secretary has established the elements of a violation, and it will be affirmed unless RCS proves a defense of employee misconduct.

Employee Misconduct

RCS contends Tullier warned the employees to wear hard hats, and their failure to wear them in the excavation constituted employee misconduct. As discussed above, RCS did not have a specific workrule requiring employees to wear hard hats under the cited conditions. The vague workrule about following directions of the immediate supervisor would not avail when the supervisor did not believe in requiring head protection (Exh. R-3; Tr. 203-205). Nor is the vagueness of the rule cured by a bare notation that Tullier addressed "hard hat" during three weekly safety meeting over a year's time (Exh. R-2). The employer lacked a safety rule aimed at preventing the violation. The employee misconduct defense fails. The violation of § 1926.100(a) is affirmed

Penalty

In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of past violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). Gravity is the principal factor to be considered. RCS had 30 to 35 employees and is a small employer. The gravity of the violation is moderate. The excavation was wide, but the three men worked in tight spaces with 18 inches between the pipes and the banks and between the pipes. Tullier and the crew worked very fast (Tr. 218), increasing the likelihood that debris from the bucket could fall or workers could hurt their heads on the sharp edges of pipe. The recommended penalty of $225.00 is appropriate and is assessed.

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, an alleged violation of § 1926.652(a)(1) is vacated.

2. Citation No. 1, item 2, a serious violation of § 1926.100(a) is affirmed with a penalty in the amount of $225.00

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

November 13, 2006