

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.

B. S. Carter Construction, Inc.,

Respondent.

OSHRC Docket No. **06-0343**

Appearances:

Dana L. Ferguson, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Richard Lively, Esquire, Law Office of Richard D. Lively, Prattville, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

B. S. Carter Construction, Inc. (Carter Construction) contracted to repair a leak in a 42-inch underground drain pipe located in the parking lot of a Winn-Dixie store in Prattville, Alabama. On August 19, 2005, two Carter Construction employees were in the excavation dug to repair the leak when the northwest corner of the excavation collapsed breaking the leg of one employee. As a result of an inspection by Occupational Safety and Health Administration (OSHA) compliance officer Steven Day, serious and willful citations were issued to Carter Construction on January 31, 2006. Carter Construction timely contested the citations.

The serious citation alleges Carter Construction violated 29 C.F.R. § 1926.21(b)(2) (Item 1) for failing to instruct its employees in the recognition and avoidance of unsafe excavation hazards and 29 C.F.R. § 1926.1053(b)(1) (Item 2) for failing to use a portable ladder to exit an excavation which extended at least 3 feet above the upper landing surface. The serious citation proposes total penalties of \$2,700.00.

The willful citation¹ alleges Carter Construction violated 29 C.F.R. § 1926.652(a)(1) for failing to provide cave-in protection to employees working in an excavation 17 feet in depth. The willful citation proposes a penalty of \$7,000.00.

The hearing was held in Montgomery, Alabama, on August 4, 2006. The record remained open until September 5, 2006, for Carter Construction to supplement the record with the trial deposition of owner Bobby Carter (Exh. R-2). The parties stipulated jurisdiction and coverage. Only, the Secretary filed a post hearing brief.

As discussed, the serious violations of § 1926.21(b)(2) and § 1926.1053(b)(1) are affirmed. The willful violation of § 1926.652(a)(1) is, also affirmed. Total penalties of \$7,000 are assessed.

The Accident

Carter Construction is engaged in trenching and excavation work. Its office is in Greenville, Alabama. Carter Construction employs nine employees and has been in business for more than forty years. The company is owned by Bobby Carter who inherited the business from his father approximately fifteen years ago (Tr. 38, 92-93).

On August 19, 2005, Carter Construction began work to repair a leak in a 42-inch underground drain pipe in a Winn-Dixie store parking lot in Prattville, Alabama (Tr. 88-89). Carter Construction had installed the original pipe twenty-five years earlier (Exh. R-2, p. 20). The crew repairing the leak consisted of foreman/excavator operator George Wainwright, backhoe operator Ricky Bazzell and laborer David Cook (Tr. 40-41, 48, 51). The crew started work at approximately 8:00 a.m. (Tr. 88).

By 11:00 a.m., Bazzell and Cook had entered the excavation twice to shovel dirt from around the drain pipe (Exhs. C-3, C-4; Tr. 51, 90). Although, there is no evidence owner Bobby Carter was present at the site when Bazzell and Cook were actually in the excavation, he was at the site twice, prior to the excavation's collapse in the northwest corner. (Exh. R-2, pp. 8, 27-28; Tr. 96). Carter had left the site less than 5 minutes before the collapse (Tr. 97).

¹The alleged violation of § 1926.652(a)(1) was cited as willful. In the complainant's prehearing statement dated July 27, 2006, she indicated she would move to amend the classification to serious at the hearing. Instead, at hearing complainant asked that the classification remain as willful. Complainant's request was Granted because the complainant did not actually amend the classification and respondent was unable to show prejudice (Tr. 7-8).

The excavation to repair the leak was 17 feet deep, 17 feet wide, and 25 feet long (Tr. 42). The excavation was not shored or sloped. There was no trench box in the excavation or on site (Exhs. C-3, C-4; Tr. 52, 74). The soil was described as loose clay. Because of the water in the bottom of the excavation and the existing drain pipe, indicating previously disturbed soil, the soil classification was Class C (Tr. 54). To access the bottom of the excavation, the employees used a portable ladder which extended 8 inches above the ground surface (Exhs. C-3, C-4, C-5; Tr. 76, 78).

The collapse occurred in the northwest corner and part of the west side at approximately 11:00 a.m. (Tr. 77, 90). When the sides collapsed, Bazzell and Cook were in the excavation. Bazzell's leg was broken. Cook was not injured (Tr. 41).

As a result of the collapse, OSHA compliance officer Day arrived on the site at 4:00 p.m., to conduct an inspection (Tr. 36). During the inspection, the wall of the excavation continued to slough off (Tr. 46). Day's inspection resulted in the serious and willful citations at issue.

In addition to the trial evidence and Carter Construction's admission as to the factual statements contained in the citations issued August 19, 2005, Carter Construction specifically made the following admissions of fact (Exh. JT-1; Tr. 25):

1. On August 19, 2005, Respondent was working at 701 East Main Street, Prattville, AL 36067 ("the worksite").
2. On August 19, 2005, Respondent's duties at the worksite included digging an excavation.
3. On August 19, 2005, before 11:00 a.m., as a result of Respondent's digging at the worksite, the excavation exceeded five in depth.
4. Before noon on August 19, 2005, Respondent did not have a trench box at the worksite.
5. Before noon on August 19, 2005, Respondent's employee Ricky Bazzell entered the excavation at the worksite that was more than five feet deep.
6. Mr. Bazzell was not protected by a trench box in the excavation when he entered the excavation before noon on August 19, 2005.
7. Mr. Bazzell was not protected by sloping when he entered the excavation at the worksite before noon on August 19, 2005.

8. Respondent's foreman George Wainwright was present at the worksite before noon on August 19, 2005.
9. Respondent's foreman George Wainwright knew that the excavation at the worksite was in excess of five feet deep before noon on August 19, 2005.
10. Respondent's foreman George Wainwright observed Mr. Bazzell in the excavation at the worksite before noon on August 19, 2005.
11. Respondent's foreman George Wainwright did not prevent Mr. Bazzell from entering the excavation, working more than five feet deep without protective systems, at the worksite on August 19, 2005.
12. Respondent's foreman George Wainwright did not remove Mr. Bazzell from the excavation at the worksite on August 19, 2005.
13. The ladder Mr. Bazzell used to enter the excavation at the worksite on August 19, 2005, did not extend three feet above the surface edge of the excavation.
14. Respondent did not train Mr. Bazzell in the recognition and avoidance of unsafe conditions at the worksite on August 19, 2005.

Procedural Rulings

Respondent's motion to continue the hearing because of Bobby Carter's personal emergency was Denied (Tr. 16). The basis for the motion was Carter needed to take care of his elderly parents and place one into a treatment facility (Tr. 10-12). The hearing had already been postponed once for the same reason. Carter Construction's motion at issue was not received by the court's office until 5:38 p.m., on August 3, 2006; the day prior to the start of the hearing on August 4, 2006 (Tr. 9, 14). The court as well as the Secretary's counsel and witnesses were already in Montgomery, Alabama, prepared to proceed (Tr. 15).

Commission Rule 40(d), 29 C.F.R. § 2200.40(d), provides that a postponement of hearing is not automatic upon filing of a motion to continue. Also, Commission Rule 62, 29 C.F.R. §2200.62, states that motion for postponement must be received at least seven days prior to the scheduled hearing. To avoid any prejudice to Carter Construction, the record was left open until

September 5, 2006 to allow Carter Construction time to supplement the record by a trial deposition of Bobby Carter (Tr. 102, 104).

In addition to denying the motion for continuance, the court deemed that Carter Construction had waived its defenses and admitted the violations at issue based on its responses to the Secretary's request for admission and its failure, without cause, to file the prehearing submission as required by the court's order dated April 20, 2006 (Exh. J-1; Tr. 17, 18, 23). The parties' prehearing submission identifying the issues, witnesses, and exhibits were to be filed at least three days prior to the hearing.

Carter Construction's assertion of an unpreventable employee misconduct defense was specifically Denied (Tr. 23). Such affirmative defense was not raised in its answer dated June 6, 2006, and no amendments to its answer were sought. Also, as stated, Carter Construction did not file a prehearing submission claiming the defense.

Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4), states "the failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable." Also, Commission Rule 101, 29 C.F.R. § 2200.101, provides that sanctions including striking any pleading or document against a party if the party fails to comply with a court's order.

Discussion

Based on the court's rulings and the admissions by Carter Construction, the parties agreed the sole issues remaining before the court involved the appropriateness of the classifications (serious or willful) of the violations and the reasonableness of the proposed penalties (Tr. 21, 24-25).

Citation No. I, Item 1 - Serious Violation of § 1926.21(b)(2)

Section 1926.21(b)(2) 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.

Carter Construction's violation of § 1926.21(b)(2) is established based on its admissions (Exh. J-1). Carter Construction admitted it did not train Bazzell in the recognition and avoidance

of the unsafe conditions existing at the excavation worksite on August 19, 2005. Based on his lack of training, Bazzell was exposed to the unsafe conditions when he entered the excavation, 17 feet in depth, on an inadequate ladder and the excavation lacked proper shoring or sloping.

Carter Construction's violation of § 1926.21(b)(2) was properly classified as a serious violation. In order to establish a violation is "serious" under § 17(k) of the Occupational Safety and Health Act (Act), the Secretary must show there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known of the violation.

Based on its admission and the record, Carter Construction through foreman Wainwright and owner Bobby Carter should have known of the lack of training provided to Bazzell. Bazzell had worked in the excavation industry off and on for several years (Tr. 64). However, there is no evidence that he received any training in recognizing the unsafe conditions associated with excavations. Also, Bazzell's lack of training resulted in a serious injury when he broke his leg when a portion of an unshored excavation wall collapsed (Tr. 41).

Citation No. 1, Item 2 - Serious Violation of § 1926.1053(b)(1)

_____Section 1926.1053(b)(1) provides:

When portable ladders are used for access to an upper landing surface, the ladder rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

Based on its admissions, Carter Construction used a portable ladder for employees to access the excavation which did not extend at least 3 feet above the upper landing surface (Exh. J-1). The ladder only extended 8 inches above the upper landing surface and was not secured at the top (Exhs. C-4, C-5; Tr. 76). By extending only 8 inches above the surface, employees had nothing to hold onto when exiting the excavation. Foreman Wainwright and owner Bobby Carter who were on site should have known the ladder was inadequate to enter or exit a 17-foot deep excavation.

The violation of § 1926.1053(b)(1) was properly classified as serious. The ladder only extended 8 inches above the landing. Employees Bazzell and Cook used the ladder to access the excavation, 17 feet deep. They exited twice from the excavation. From the upper landing surface to the top of the drain pipe was 13 feet (Tr. 59). A fall from a ladder at such height could result in a serious injury or death. Both owner Bobby Carter and foreman Wainwright were present at the excavation site and should have observed that the ladder was inadequate to allow safe access.

Citation No. 2, Item 1 -Willful Violation of § 1926.652(a)(1)

_____Section 1926.652(a)(1) 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.

There is no dispute the excavation which was more than 17 feet in depth was not shored or slopped and in Class C soil (Exhs. J-1, C-4, C-4, C-5; Tr. 42, 52, 86). Foreman Wainwright, who was directing the work at the time, was aware of the unsafe condition of the excavation based on his forty years of excavation experience (Tr. 92). He knew Bazzell and Cook were in the excavation. Owner Bobby Carter who was also on site knew the excavation was not shored or slopped.

A willful violation is “one committed with intentional knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-264, 1994). A willful classification requires a heightened awareness of the illegality of the conditions or a state of mind showing conscious disregard or plain indifference. A showing of “malicious intent” or “venal motive” is not necessary.

Carter Construction’s violation of § 1926.652(a)(1) was properly classified as willful. The record establishes that both owner Bobby Carter and foreman Wainwright were familiar with the OSHA requirements for excavations including soil classifications and the use of sloping and shoring (Exhs. R-1, R-2, p. 25, 30-32; Tr. 52-53). Carter Construction has been in the excavation business

for 30 years (Tr. 91-93). Wainwright, who has forty years of excavation experience, was designated the foreman in charge of the site and competent person for the job.

Also, it is noted that in 2002, this court found Carter Construction in serious violation of § 1926.652(a)(1) as a result of another excavation collapse during repair work on an underground drainage pipe which buried two employees who were fortunately rescued by the fire department. However, one employee broke his pelvis, leg, and suffered back injury. *B. S. Carter Construction Co., Inc.*, 19 BNA OSHC 2006 (No. 02-0088, 2002).

Despite this background and experience, Carter Construction decided to dig the excavation without providing cave-in protection. Carter Construction knew employees had to enter the excavation to determine the location of the leak and clear dirt from around the pipe. Although Bobby Carter and Wainwright discussed the use of a trench box, there was no trench box on site and Wainwright permitted the employees to enter the excavation twice without cave-in protection (Tr. 51, 90). Prior to the collapse, the employees had been in the excavation for fifteen minutes (Exh. R-1). Wainwright's knowledge as foreman and competent person on site is imputed to Carter Construction. Although there is no evidence that Bobby Carter knew the employees were in the excavation at the time of the collapse, he was on site at least twice. He knew of the excavation's condition and its lack of cave-in protection.

Based on Carter Construction's knowledge of the excavation at issue which lacked cave-in protection and the requirements of the OSHA excavation standards, its thirty years in the excavation business, and the prior finding by this court of the same violation of § 1926.652(a)(1) under very similar circumstances, the record establishes Carter Construction's plain indifference to the safety requirements for excavations and employee safety. Carter Construction's violation of § 1926.652(a)(1) is willful.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Carter Construction is a small employer with nine employees (Tr. 38). Three employees were on site when a portion of the excavation collapsed (Tr. 39). In addition to receiving credit as a small employer, Carter Construction is entitled to some credit for history because it had not received any serious citations in the preceding three years (Tr. 58). However, it is noted that in 2001, Carter Construction received serious citations after another excavation collapse which injured an employee (Tr. 94). Carter Construction is not entitled to credit for good faith because there is no evidence it maintained a safety program or provided safety training to employees.

A penalty of \$1,500.00 is reasonable for serious violation of § 1926.21(b)(2). Carter Construction did not provide training in recognizing and avoiding unsafe excavation conditions to an employee of four years. Bazzell displayed a lack of understanding of the hazards associated with excavations (Tr.68). As a result of the lack of training, Bazzell entered a 17 foot excavation which was not shored or slopped and broke a leg when a portion of the excavation collapsed.

A penalty of \$500.00 is reasonable for serious violation of § 1926.1053(b)(1). Two employees exited the excavation by use of a portable ladder which extended only 8 inches above the upper landing surface. Owner Bobby Carter and foreman Wainwright were present on site and should have known the portable ladder was inadequate.

A penalty of \$5,000.00 is reasonable for willful violation § 1926.652(a)(1). The excavation lacked any cave-in protection. Foreman Wainwright and owner Bobby Carter were on site and knew of the lack of shoring and slopping. Foreman Wainwright knew the employees were working in the excavation. Also, Carter Construction had received an earlier citation as a result of an injury to an employee from another excavation collapse, under similar circumstances.

**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 ORDERED that:

1. Citation No. 1, Item 1, alleged serious violation of § 1926.21(b)(2), is affirmed and a penalty of \$1,500.00 is assessed.
 2. Citation No. 1, Item 2, alleged serious violation of § 1926.1053(b)(1), is affirmed and a penalty of \$500.00 is assessed.
 3. Citation No. 2, Item 1, alleged willful violation of § 1926.652(a)(1), is affirmed and a penalty of \$5,000.00 is assessed.
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/S/ Ken S. Welsch

**KEN S. WELSCH
Judge**