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. Gilco Contracting Co., Inc., Respondent.	OSHRC Docket No. **08-1641**

Appearances:

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

Brett Adair, Adair Law Firm, LLC, Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On August 13, 2008, Occupational Safety and Health Administration (OSHA) compliance officer Timothy Ford conducted an inspection of a worksite located at the intersection of Highway 43 North and Highway 171 in Northport, Alabama. A crew employed by Gilco Contracting, Inc., had dug an excavation in which two employees were working. Ford held an opening conference with Gilco's foreman, took photographs of the site, and took measurements of the excavation. As a result of Ford's inspection, the Secretary issued a citation to Gilco on September 30, 2008, alleging a repeat violation of § 1926.652(a)(1), for failing to provide an adequate protective system for employees working in an excavation more than 5 feet deep. The Secretary proposed a penalty of $21,000.00.

Gilco timely contested the citation. The case went to hearing on June 24, 2009, in Tuscaloosa, Alabama. Gilco disputes the Secretary's charge that employees in the excavation were not adequately protected. The Secretary established jurisdiction and coverage. The Secretary has filed a post-hearing brief.

For the reasons discussed more fully below, the undersigned affirms item 1 of the citation.

Background

On the morning of August 13, 2008, the area director for OSHA's Birmingham office directed compliance officer Timothy Ford to inspect an excavation located at the intersection of Highway 43 North and Highway 171. As Ford approached the site, driving on Highway 43, he observed two men in an excavation by the side of the road (Tr. 26). Ford turned into the parking lot of a convenience store and turned his vehicle around. By the time Ford again looked over at the excavation, one of the men had emerged from the excavation. Ford took photographs of the man remaining in the excavation (Exhs. C-1, C-2, and C-3). He then drove across the street, parked his vehicle at the worksite, and exited his vehicle (Tr. 27).

Ford walked over to the site and met with Gilco foreman Ricky Flannigan. Ford held an opening conference with Flannigan, whom he knew from a previous inspection of a Gilco site (Tr. 32). Ford determined Flannigan was the competent person on the site, and he was supervising two employees, Michael Kolter and Brendon Harris (Tr. 33).

Gilco's crew was at the site to uncover the new waterline Gilco had installed previously, its first re-excavation on this site. The crew needed to put a saddle valve on the new waterline to connect it to a house located southwest of the worksite (Tr. 226). Gilco had two trackhoes on the site. Flannigan operated one and Kolter operated the other to dig the excavation. Once they had uncovered the newly installed waterline (as well as an old waterline), Kolter and Harris entered the excavation to clean off the new waterline and install the saddle valve (Tr. 227-228). They were in the excavation for 15 to 30 minutes (Tr. 228). Gilco did not have a trench box on site (Tr. 39).

The excavation was approximately 25 feet wide. The northern, southern, and eastern walls of the excavation were properly sloped (Tr. 86-87). The western wall was vertical. After Kolter and Harris had both exited the excavation, but immediately prior to Ford's opening conference, Flannigan used the trackhoe he was operating to cut a swath off the top of the western wall (Tr. 33). Because the soil had been previously disturbed (when the old waterline was installed, and, more

recently, when the new waterline was installed), Ford determined it to be Type C soil. Flannigan agreed (Tr. 36).[1]

The floor of the excavation was not uniform in depth. The ground leveled out from the base of the vertical western wall for approximately 5 feet, then sloped down again. Ford extended his trench rod across this part of the excavation and dropped its attached plumb bob into the deepest part of the trench floor, approximately 5 feet from the vertical wall. The excavation was 8 feet deep in this area. Ford estimated the new waterline on which the employees had been working was approximately 2 feet beyond this deepest area or 7 feet from the west vertical wall (Exh. C-14; Tr. 40-45).

Approximately 20 minutes after Ford began his inspection, Paul "Buddy" Espey, Gilco's safety director, arrived at the site. Espey told Ford he did not see any problems with the excavation (Tr. 58). Using a tape measure, Espey took his own measurement of the excavation. Rather than measuring at the deepest part, Espey stood at the edge of the western wall and extended the tape measure until it touched the ground at the base of the wall. At this location, the depth was 5 feet, 2 inches (Tr. 177-178).[2]

The Secretary issued the instant citation to Gilco on September 30, 2008. The hearing was held on June 24, 2009. Some time during the spring of 2009, Espey and Kolter returned to the area of the excavation at issue and re-excavated it for a second time. The purpose of this re-excavation was to establish OSHA was wrong in its estimate of the distance between the west wall and where

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[1] Ford took one soil sample from the eastern wall of the excavation, and one from the western side. He sent the samples to the OSHA Technical Center in Salt Lake City, Utah. The Technical Center analyzed the composition of the soil and concluded it was Type B (Exhs. C-6, C-7). Since the excavation was dug in recently backfilled and pre-disturbed soil, it is considered Type C soil. A violation of § 1926.652(a)(1) exists if employees are exposed to a vertical wall of an excavation 5 feet or greater, regardless of whether it is Type B or Type C soil.

[2] There is a discrepancy between the testimony of Ford and the testimony of Espey and Kolter. Ford was working with a new camera during the inspection, and several of the photographs he took (Exhs. C-1 through C-5) are so blurry they are of limited probative value. Ford apparently misidentified Espey in another blurry photograph, Exhibit C-17, and stated Espey entered the excavation to take measurements with Ford's trench rod (Tr. 59, 76-77). Kolter identified the person holding the trench rod in Exh. C-17 as Flannigan (Tr. 235). Both Espey and Kolter denied Espey borrowed the trench rod, and Espey denied he entered the excavation (Tr. 172, 177, 234-235).

Prior to the hearing, OSHA inspected various Gilco worksites several times both before and after the inspection at issue. It is possible any of the three witnesses may have confused the events here. The undersigned determines Ford was mistaken in his identification of the man in Exh. C-17 as Espey, as well as in his recollection that Espey borrowed his trench rod and entered the excavation. These mistakes have no effect on the disposition of this case.

employees worked on the new waterline. They photographed and measured the new excavation. Gilco did not notify the Secretary of this action, and no representative of the Secretary was present at the re-excavation (Tr. 183-184).

Citation No. 1

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

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

The Secretary alleges Gilco committed a repeat violation of § 1926.652(a)(1), which 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Two of the elements of the Secretary's burden of proof are not at issue. Section 1926.652(a)(1) is an excavation standard, and it is undisputed it applies to the excavation Gilco dug at the cited worksite. Flannigan operated one of the trackhoes used to dig the excavation, and he was present and supervising Harris and Kolter at the time of the inspection. As foreman, his actual knowledge of any violative conditions is imputed to Gilco. "[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co., Inc*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The two remaining elements are at issue. Gilco denies the excavation violated the terms of § 1926.652(a)(1), and it denies its employees were exposed to the hazard of a cave-in. Gilco is incorrect on both counts.

Violation of the Terms of § 1926.652(a)(1)

At the hearing, a debate arose between the parties regarding the correct method for measuring the depth of an excavation: finding the deepest part, as Ford did using his trench rod and plumb bob (8 feet), or measuring from the top of the wall to its base, as Espey did using the tape measure (5 feet, 2 inches). In this instance, the point is moot. Regardless of whether Ford's measurement or Espey's measurement is used, the depth of the excavation still exceeds 5 feet.

Recognizing the deleterious effect the testimony of its own safety director has on its case, Gilco attempted to discredit Espey's measurement. Jerry Gillis is a consultant hired by Gilco "to look at the OSHA citation and give them advice as to the best way to defend" (Tr. 270). Gillis has worked as an outreach instructor for OSHA and is trained as a competent person (Exh. R-9; Tr. 268). He was not qualified as an expert at the hearing (Tr. 272).

Gillis testified the 5 foot, 2 inch, depth measurement taken by Espey was probably inaccurate. Espey took the measurement from the edge of the excavation where Flannigan had cut a swath after the employees exited the excavation. Gillis believes the swath "changes the configuration. . . . It takes away a couple of feet of the top of the excavation" (Tr. 277).

Gillis was not present at the site, and the conjecture is speculative. It is impossible to know exactly how much earth Flannigan removed, but the west wall would have been vertically higher before he removed an unknown amount of it. Gillis cited no mathematical formula supporting his theory. No evidence of the angle of the slope of the swath was adduced. Gillis failed to offer an alternate depth based on any calculations he made; he simply stated the depth was less than 5 feet, 2 inches. His testimony on this point cannot be afforded weight.

Gillis further strained credibility with other responses he made. Counsel for the Secretary asked if Espey's recorded depth measurement indicated the unprotected excavation was hazardous (Tr. 284-285):

> Q. Did I understand you to say that you didn't see any hazard to a vertical wall that's 5 feet, 2 inches?

Gillis: I said that I didn't call that wall 5 feet, 2 inches.

Q. If the wall was 5 feet, 2 inches, would you consider that a hazard?

Gillis: Normally, and this is from past experience, OSHA allows sometimes depending upon the soil and the conditions an inch or two without a problem on a five foot wall.

Q. You would agree with me that the regulations require protection for employees at anything 5 feet or above, correct?

Gillis: Almost. The competent person has the final say-so as to whether he considers it to be hazardous or not.

Q. Above 5 feet?

Gillis: Yes**.**

Gillis's interpretation of § 1926.652(a)(1) is contrary to the language of the standard and to Commission precedent. The standard presumes a hazard in any unprotected excavation that reaches 5 feet. Despite Gillis's assertion, the competent person cannot circumvent the requirements of the standard by deeming an excavation 5 feet or "an inch or two" over to be exempt from cave-in protection.

Espey, the safety director for the company, testified unequivocally, "I measured it at 5 feet, 2 [inches]" after the swath was removed (Tr. 177-178). The standard requires an adequate protective system for excavations 5 feet or more in depth. The Secretary has established the excavation at Gilco's worksite on August 13, 2008, violated the terms of § 1926.652(a)(1).

Employee Exposure

Gilco contends Kolter and Harris were not exposed to the hazards of a cave-in. Gilco bases this contention on a Standard Interpretation issued by the Secretary on December 2, 1991. Director Patricia K. Clark of the Directorate of Compliance Programs responded to an inquiry from an employer as to whether distance alone may be adequate to protect employees from the hazards of cave-ins. Clark replied (Exh. C-15, p. 1):

> [A]t the times your employee maintained a distance of at least two times the height of the vertical sidewall from the toe of the sidewall, the employee was not exposed to the hazards of cave-in. Therefore, no additional protective system was necessary.

> However, when distance alone is relied upon to protect employees from the hazards of cave-in, all employees entering the excavation must be instructed not to enter the danger zone and a warning system must be provided to prevent workers from entering the danger zone inadvertently. Roping off the area or adequately marking the area with cones, flags or other highly visible means are examples of acceptable warning systems.

After Gilco received the Secretary's citation, it appears it conceived the theory that Kolter and Harris at all times maintained a distance at least twice the height of the western wall from the toe of the wall. Ford had estimated the distance from the toe of the wall to the new waterline as approximately 7 feet.[3] In order to establish it complied with the Standard Interpretation, Gilco must show the new waterline was at least 10 feet, 4 inches (twice the length of the 5 foot, 2 inch, western wall) from the toe of the wall.

To establish this distance, Gilco re-excavated in the area of the cited worksite. In the cited excavation, the old waterline was visible in the western trench wall. By excavating both waterlines, Espey believed he could estimate the distance of the employees' exposure between them to prove the distance exceeded 10 feet, 4 inches. After Espey and Kolter uncovered the two waterlines, Espey measured them as 12 feet apart (Tr. 183). Gilco assumes the employees would have worked within just less than a couple of feet of the new line.

The evidence presented by Gilco regarding the second re-excavation cannot be fully credited. Espey could not remember the date they re-excavated. He and Kolter used photographs taken the day of the OSHA inspection to determine where to dig. They photographed the re-excavation (Exhs. R-5 & R-6; Tr. 185-187).

Re-excavations are especially problematic to prove dimensions of a previously back-filled trench. Gilco performed extensive work in the area of the waterline between the day of the inspection and the day of the re-excavation. At some point between those dates, Gilco installed a ditch flume by the side of the highway. The ditch flume carries water runoff away from the highway. It extends approximately 100 feet, and is 3 feet deep, and 4 feet across (Tr. 207, 209-210). Gilco presented no evidence corroborating Espey and Kolter's assertions that they excavated in the same

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[3] The undersigned did not rely upon the photographs to establish dimensions and perspective. Ford's estimate of 7 feet appears, however, to be consistent with Exhibits C-10, C-11, and C-12, when viewed with Gilco's evidence the excavator track measures 2½ feet (Tr. 176).

location as the cited excavation. Photographs often distort perspective, and using them to locate one horizontal dig line between the long parallel pipelines invites inaccuracy. The choice of beginning and ending points along the parallel lines could easily affect the horizontal measurement. Although not required, the Secretary was not afforded an opportunity to observe the re-excavation.

Even if Gilco could establish the new waterline was 12 feet from the toe of the west trench wall, the company would still fail in its contention that Kolter and Harris were not exposed to the hazards of a cave-in. The Standard Interpretation requires the employer to instruct employees entering the excavation to avoid the danger zone, and to provide a warning system (Tr. 65-66). Flannigan did not instruct either Kolter or Harris not to enter the danger zone. Gilco did not provide a warning system in the excavation; no ropes, flags, or cones marked the danger zone.

Simply asserting, as Gilco does, that its employees only worked within a 1 or 2 foot area around the new waterline as they dug with a shovel, cleaned the pipe, and installed the saddle valve, is insufficient to establish they were not exposed to the hazards of a cave-in. "The safety standard is implicated by the depth of a particular trench, without regard to an individual worker's precise location in it." *P. Gioioso & Sons, Inc. v. OSHRC,* 115 F. 3d 100, 109 (1st Cir. 1997).

The Secretary established Kolter and Harris were exposed to the hazards of a cave-in. The Secretary has proven Gilco violated § 1926.652(a)(1).

Repeat Classification

Ford conducted the instant inspection on August 13, 2008. The Secretary alleges the violation is a repeat, based upon a citation issued by the Secretary to Gilco on April 28, 2006 (Exh. C-18). A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.,* 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

Item 2 of citation no. 2 of an April 2006 citation charged a willful violation of § 1926.652(a)(1), the same standard at issue in this case. The parties settled the item as a repeat, and agreed to a penalty of $28,000.00. Judge Simko issued an order approving the settlement on May 18, 2007. It became a final order on June 29, 2007 (Exh. C-18).

"A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Co,*

17 BNA OSHC 1635, 1638 (No. 91-1597, 1996). Both violations were of the same standard and created the same hazard: death or serious injury by cave-in. In each case, Gilco failed to provide an adequate protective system for its employees in the excavation.

The Secretary has established the violation was properly classified as repeat.

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.

At the time of the inspection, Gilco employed approximately 140 employees (Tr. 297). The Secretary had cited Gilco previously for violating the same standard at issue here. The Secretary adduced no evidence of bad faith on Gilco's part. The company suffered financial reversals since the inspection.[4]

The gravity of the violation is high. Cave-ins are widely recognized as deadly hazards. Two employees were working in the unprotected excavation for at least 15 minutes. The excavation was dug in recently previously disturbed soil and was subject to the vibrations of two trackhoes. It was next to a highway. Gilco put Kolter and Harris at considerable risk. Also considered, however, is that the north, east, and south sides of the excavation were properly sloped and the excavation was relatively wide. It is determined the appropriate penalty for this violation is $15,000.00.

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.

[4] On June 29, 2009, this judge entered a limited protective order for certain transcript testimony. By its own terms that order has now expired and has no effect on the record.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the citation, alleging a repeat violation of § 1926.652(a)(1), is affirmed, and a penalty of $15,000.00 is assessed.

/s/
Nancy J. Spies
Judge

Date: November 9, 2009
Atlanta, Georgia